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Silencing of activism in Australian law

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Abstract

Environmental destruction and climate change are driving new waves of environmental activism. In response, governments in several Australian states have enacted legislation designed to penalise and silence political protest. This article analyses Tasmania's anti-protest laws and considers how the United Nations and scholars have reacted to them. We argue that protest suppression laws such as these reflect a neoliberal rationality which conceptualises society in market terms. This mode of thinking perceives protest as market interference rather than civic participation. Accordingly, anti-protest laws seek to secure the rights and interests of corporations to unimpeded market access.

Keywords

Protest, dissent, environmental activism, climate change action, Environmental NGOs

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In this article, we look at recent developments in anti-protest law with a focus on laws introduced in the state of Tasmania, in Australia, in 2016. Tasmania's anti-protest laws are only the most recent in a long series of government actions which undermine political participation and have the capacity to silence Australian activists. However, while protest suppression should always be of concern, these laws are of particular interest now. Government inaction on environmental destruction and climate change is driving a wave of community action against fossil fuel industries and the businesses that support and invest in them. At the same time, in Australia, the right to protest is facing a level of statutory suppression not previously seen in peacetime.

This article begins by describing how state and federal governments are undermining environmental protest in Australia. We outline funding cuts to environmental organisations and consider criminal and civil laws as well as changed policing practices. With this context in place, we unpack key sections of Tasmania's anti-protest laws and describe how United Nations (UN) special rapporteurs on human rights have responded to the legislation. Finally, we ask what is driving governments to silence environmental advocacy? We argue that neoliberalism as a political rationality is one important part of this process. Drawing on political scientist Wendy Brown, we argue that neoliberalism conceptualises every aspect of life in market terms and promotes corporate rights over non-market values.¹ From this

¹ Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, 2015).

perspective, protest infringing the 'right' of corporations to unimpeded market participation can justifiably be criminalised, rendered legally impossible and/or publicly attacked.

Undermining environmental protest

To understand the impact of anti-protest legislation in Tasmania, we must look more broadly at trends in the relationship between Australian governments and environmental advocacy.

Australia has no human rights legislation which could protect a right to protest. On the contrary, laws which potentially limit protest include: public order offences; offences criminalising obstruction and violence; terrorism offences; civil litigation; legislative restrictions on protests at large events (such as APEC, World Youth Day, the Olympics).

Activists also face widening restrictions on freedom of assembly: the enclosure of apparently public spaces such as shopping malls; increased surveillance in almost every aspect of life including public and private spaces; and public discourse that privileges individual rights but renders the concept of democratic collective action undesirable. Australian protesters increasingly encounter surveillance from security agencies.² They may also face paramilitary policing strategies which erode the capacity to protest.³ Paramilitary policing involves a shift from the 'negotiated management' of protest policing through liaison and permits to 'strategic containment' through exclusion zones, surveillance and information control strategies.⁴ At the same time, corporations are increasingly being granted rights and powers that extend their hegemony over public space and the natural world.

In the last few years we have witnessed more overt executive attempts to remove, restrict and/or silence Australian environmental action. Examples include federal Liberal Senator Richard Colbeck's 2014 attempt to ban environmental boycotts;⁵ gag clauses being written into the contracts of community legal centres;⁶ the defunding of voluntary environment, sustainability and heritage organisations and Environmental Defenders' Offices nationally;⁷ and attempts to weaken standing for environmental groups challenging development (*Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487).⁸

² Clive Hamilton, 'Is spying on anti-coal activists just the tip of the iceberg?' *The Conversation* (online), 4 June 2014 <https://theconversation.com/is-spying-on-anti-coal-activists-just-the-tip-of-the-iceberg-27570>.

³ Jude McCulloch, 'Paramilitary Surveillance: S11, Globalisation, Terrorists and Counter-Terrorists' (2001) 13(1) *Current Issues in Criminal Justice* 23.

⁴ Patrick Gillham, Bob Edwards and John Noakes, 'Strategic Incapacitation and the Policing of Occupy Wall Street Protests in New York City, 2011' (2013) 23(1) *Policing and Society* 81, 82-83.

⁵ Lisa Cox, 'Environment Groups Reject Push to Ban Boycotts as an Attack on Free Speech', *The Sydney Morning Herald* (online), 3 April 2014 <http://www.smh.com.au/federal-politics/political-news/environment-groups-reject-push-to-ban-boycotts-as-an-attack-on-free-speech-20140403-zqqan.html>.

⁶ Anna Patty, 'State Funds Come with Proviso Not to Protest' *The Sydney Morning Herald* (online), 24 May 2013 <http://www.smh.com.au/nsw/state-funds-come-with-proviso-not-to-protest-20130523-2k3wb.html>.

⁷ Graham Readfearn, 'Budget axe of small grant fund will hurt conservation groups across Australia', *The Guardian* (online), 15 May 2014 <https://www.theguardian.com/environment/planet-oz/2014/may/15/budget-axe-of-small-grant-fund-will-hurt-conservation-groups-across-australia>.

⁸ Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth).

Despite this rather hostile context, environmental organisations have never been more professionally organised nor more willing to use legal avenues for redress.⁹ This point was made in October 2016 by Federal Labor MP Tony Burke: 'I find it odd that we've gone from complaining that environmentalists are blockading and protesting to complaining that they're turning up to a courtroom.'¹⁰

The Tasmanian laws

Tasmania's Liberal government¹¹ passed the *Workplaces (Protection from Protesters) Act 2014* (Tas) (the Act) in late 2014. A government announcement had called the Bill an advance for workers' rights, while regretting the Legislative Council's removal of a three-month mandatory imprisonment penalty it had initially included:

Tasmania will now have the strongest legislation in the country to protect the rights of workers to lawfully earn a living, while ensuring the right to free speech and legitimate protest have been protected. ... No longer will Tasmania tolerate the extremists; you may have your say but you may not stop workers from earning a living.¹²

While logging has long been a source of conflict in Tasmania, the government's attempt to appeal to 'workers' rights' rather than corporate protection is cynical. However, perhaps the most shocking part of the Act is its definition of protest activity as any activity that 'promot[es] awareness of or support for – an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue' taking place on business premises or access points to business premises.¹³ The targeting of political expression is overt.

Section 6 of the Act creates numerous offences, including: entry or remaining on business premises; doing acts on business premises; and preventing, hindering or obstructing business occupiers. The term 'business premises' is defined very broadly in s 5 of the legislation and includes all areas related to mining and exploration, forestry, 'manufacturing, building or construction.' New s 7 offences of causing or threatening damage or risk to the safety of business have penalties of up to \$250 000 or five years imprisonment.

Protesters who do not leave a premises when directed to do so by police or who return within four days face penalties of up to \$10 000 under s 8. All members of a group to whom a police direction is addressed are taken to have been directed if they 'ought reasonably to be expected to have heard the direction' under s 11(8). All offences created by this Act are

⁹ Clive Hamilton, 'Hamilton: A New Brand of Environmental Radicalism', *Crikey* (online), 22 February 2011 <https://www.crikey.com.au/2011/02/22/hamilton-we-need-a-new-brand-of-environmental-radicalism/>.

¹⁰ Jared Owens, 'Tony Burke Rejects Coalition Move to Block Green Group Legal Activism', *The Australian* (online), 26 October 2016 <http://www.theaustralian.com.au/business/mining-energy/tony-burke-rejects-coalition-move-to-block-green-group-legal-activism/news-story/7cbc67e6558c57a3123865202bef5602>.

¹¹ In Australia, the Liberal party is the major conservative political party.

¹² Ben Hagemann, "'Radical' Protesters Face Fines and Jail Time in Tasmania", *Australian Mining*, 18 November 2014.

¹³ *Workplaces (Protection from Protesters) Act 2014* (Tas) s 4.

indictable.¹⁴ It creates sizeable fines for bodies corporate and entitlements to compensation for loss and the cost of removing protesters.

Protected industrial activity is excluded, along with 'a procession, march, or event' that passes a business or access to a business 'at a reasonable speed, once on any day.'¹⁵ The Resources Minister stated without apparent irony: 'This Bill is not seeking to undermine or remove people's right to voice their dissent or undertake protest action.'¹⁶

Unfortunately, Tasmania is not the only Australian state to pass or propose anti-protest laws in recent years. In 2015, the Western Australian government introduced a bill (which has now lapsed)¹⁷ which created new offences for physically preventing a lawful activity and possessing a 'thing' with the intention of preventing a lawful activity.¹⁸ Each of these offences attracted penalties of two months' imprisonment and a fine of \$12 000. Similarly, legislation in NSW provides police officers with a broad range of new powers to shut down protests that block traffic and search and detain activists. The laws also create new offences for 'interfering' with a mine site and carry penalties of up to seven years in jail or a fine of \$5000.¹⁹ As described by the NSW Council for Civil Liberties, the primary purpose of these laws is to 'confer expanded powers on police and to severely enhance penalties for protesters'.²⁰

In 2014, the UN Office for the High Commissioner on Human Rights urged Tasmania to withdraw the legislation.²¹ They found its focus on environmentalists 'shocking'.²² The UN Rapporteurs pointedly drew attention to Australia's co-sponsorship of UN Human Rights Council resolution 25/38 recognising the democratic contributions of peaceful protest. David Kaye, Special Rapporteur on freedom of opinion and expression, noted: 'The law itself and the penalties imposed are disproportionate and unnecessary in balancing the rights to free expression and peaceful assembly and the government's interests in preserving economic or business interests.'²³ Kaye went on to suggest that the 'bill would have the chilling effect of silencing dissenters and outlawing speech protected by international human rights law.'²⁴ In agreeing, Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and association, argued:

In democratic societies, demonstrations and protests are key to raising awareness about human rights, political, social concerns, including regarding environmental,

¹⁴ *Workplaces (Protection from Protesters) Act 2014* (Tas) s 16.

¹⁵ *Workplaces (Protection from Protesters) Act 2014* (Tas) s 6.

¹⁶ Tasmania, *Parliamentary Debates*, House of Assembly, 26 June 2014, 5 (Andrew Harriss, Minister for Resources), 2–3.

¹⁷ Jacob Kagi, 'WA protest laws on backburner until after state election', *ABC News* (online), 7 September 2016 www.abc.net.au/news/2016-09-07/wa-protest-laws-on-back-burner-till-after-election/7824184.

¹⁸ *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (WA).

¹⁹ *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW).

²⁰ NSW Council for Civil Liberties, 'Anti-Protest Bill' Explained', 6 June 2016

www.nswccl.org.au/_anti_protest_bill_explained.

²¹ UN High Commissioner for Human Rights, *UN Experts Urge Tasmania to Drop Its Anti-Protest Bill* (2014) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

labour or economic issues, and of holding not just governments, but also corporations accountable. The Bill, if adopted, would impede that very function.²⁵

These objections notwithstanding, the Liberal party proceeded with the Bill, indicated its support for Commonwealth measures directed at environmental organisations²⁶ and announced its intention to become the only Australian state to permit corporations to sue for defamation.²⁷ A Liberal party document stated: 'The Liberals believe that the best way to stop unlawful market attacks by Green groups is not to try and appease them; it's to toughen the law to deter them.'²⁸ In reality, the Act creates categories of illegal protest that did not previously exist, quite specifically converting nonviolent protest into a crime. As Aidan Ricketts has observed:

Lawful protest in the common law tradition means no more than the residual activities not yet rendered unlawful. Every new curtailment of the right to protest simply reduces residual rights further, and so what remains of lawful protest becomes further emaciated.²⁹

Finally, in October 2016 Michel Forst, UN Special Rapporteur on the situation of human rights defenders, visited Australia. He praised Australia's engagement in the development of human rights law and expressed his expectation that he would 'encounter only laudable implementation of the State's obligations under international human rights laws.' However, Forst expressed astonishment and surprise at the vilification of human rights defenders by public officials and the media. He criticised the rising pressure being placed on civil society in Australia by government failure to implement human rights protections, in direct contradiction to Australia's expressed commitments to human rights at the international level.³⁰ Forst added his voice to that of other UN experts who have repeatedly expressed repeated concern that Australian protest suppression laws infringe our international human rights obligations, in particular by contravening the rights to freedom of expression and peaceful assembly. To date Forst's findings have been ignored by the Tasmanian government. The Commonwealth Attorney-General argued that Forst had 'not presented a balanced view of the situation of human rights defenders in Australia.'³¹

A challenge before the High Court regarding the validity of the laws, brought by former Leader of the Australian Greens Party, Bob Brown and registered nurse Jessica Hoyt, was

²⁵ Ibid.

²⁶ Tasmanian Liberals, 'Rebuilding the Forest Industry--Cracking Down on Illegal Protestors--Building a Tasmania We Can All Be Proud Of' (nd) <https://www.tas.liberal.org.au/sites/default/files/policy/Rebuilding%20the%20Forest%20Industry%20-%20cracking%20down%20on%20protestors.pdf>.

²⁷ Felicity Millner, *Tasmanian Protest Laws Will Have Chilling Effect* (2015) Environmental Justice Australia <https://envirojustice.org.au/blog/tasmanian-protest-laws-will-have-chilling-effect>.

²⁸ Tasmanian Liberals, above n 26 (emphasis added).

²⁹ Aidan Ricketts, 'Freedom from Political Communication: The rhetoric behind anti-protest laws' (2015) 40(4) *Alternative Law Journal* 234, 236.

³⁰ Michel Forst, 'End of Mission Statement', 18 October 2016 http://apo.org.au/files/related-content-files/2016-10-18_australia_sr-hrd-statement-final-3.pdf.

³¹ Michael Koziol, 'Fear, Censorship and Retaliation': United Nations Rapporteur Slams Australia's Human Rights Record', *The Sydney Morning Herald* (online), 18 October 2016 www.smh.com.au/federal-politics/political-news/fear-censorship-and-retaliation-united-nations-rapporteur-slams-australias-human-rights-record-20161018-gs4tt3.html.

heard by the full bench on 3 May 2017.³² The challenge contends that the legislation ‘impermissibly burdens the implied freedom of communication on government and political matters’ in the *Australian Constitution*.³³ Peter Gutwein, formerly Tasmanian forestry minister and now Tasmanian treasurer, has expressed confidence that the legislation will stand up to a constitutional challenge.³⁴ However, given how little the court has engaged with political protest,³⁵ the outcome is far from certain. A decision from the High Court was still pending at the time of writing.

Neoliberal rationality

What is driving the silencing of protest in Australia? Australia has seen protest suppression in the past, perhaps most famously when former Queensland Premier Joh Bjelke-Petersen announced a State of Emergency during the South African Rugby Tour in 1971,³⁶ and instituted a subsequent ban on street marches in Queensland from 1977–79. However, the current rise of Australian protest suppression legislation has already spread beyond one state, and takes place in a context of Commonwealth government action to suppress protest as explained above.

While no single cause can be isolated, we focus on neoliberalism as a political rationality,³⁷ which extends market logic into all aspects of human and social life. Neoliberalism mobilises the ideas and institutions of democratic liberalism for economic ends so that ensuring the conditions for the success of business becomes the primary function of the state. It enlarges the scope of economics into all aspects of human life and treats market value as the sole criterion for evaluating human action and value.³⁸ Wendy Brown explains:

Whether through social media ‘followers,’ ‘likes,’ and ‘retweets,’ through rankings and ratings for every activity and domain, or through more directly monetized practices, the pursuit of education, training, leisure, reproduction, consumption, and more are increasingly configured as strategic decisions and practices related to enhancing the self’s future value.³⁹

We argue that in the past, protest suppression was often driven by a law and order agenda. In the neoliberal present, however, protest has been reconceptualised as an impediment to

³² Michael Safi, ‘Bob Brown Launches Challenge to Law Targeting “Disruptive” Protesters’, *The Guardian* (online), 10 March 2016 <https://www.theguardian.com/australia-news/2016/mar/10/bob-brown-launches-challenge-to-law-targeting-disruptive-protesters>.

³³ AAP, ‘Tas Govt Unfazed by Bob Brown Legal Case’, *news.com.au* (online) 10 March 2016 <http://www.news.com.au/national/breaking-news/tas-govt-unfazed-by-bob-brown-legal-case/news-story/cdd71c0742647eaa22af3d5ad26b7318>; Thom Mitchell, ‘Bob Brown Is Taking “Shocking” Anti-Protest Laws to the High Court’, *New Matilda* (online), 10 March 2016 <https://newmatilda.com/2016/03/10/bob-brown-challenges-tasmanian-anti-protest-laws-in-high-court/>.

³⁴ Rosemary Bolger, ‘Tasmanian Protest Laws: Second Plaintiff Joins High Court Challenge’ *ABC News* (online) 7 July 2016 www.abc.net.au/news/2016-07-07/tasmanian-workplace-protest-laws-heading-for-legal-challenge/7578800.

³⁵ The only significant case is *Levy v Victoria* (1997) 189 CLR 579.

³⁶ Larry Writer, *Pitched Battle: In the Frontline of the 1971 Springbok Tour of Australia* (Scribe, 2016) 246–51.

³⁷ Brown, above n 2, 9.

³⁸ *Ibid* 164.

³⁹ *Ibid* 34.

market forces and not merely a threat to law and order. Under neoliberalism, protest cannot be conceptualised as political engagement, the exercise of civic rights, or a contribution to the common good. These things have no market value, and under neoliberal rationality, this means they have no worth. Indeed, 'the common good' cannot readily be understood within a rationality which individualises as it economises. As a result, the right to protest, never a vibrant concept under the common law, has been increasingly emptied of substantive content, and the idea of citizens as actively engaged in the political process (beyond exercising the right to vote) has been eroded.⁴⁰

At the same time, neoliberalism has rendered the 'right' of business to unfettered market activity in the pursuit of profit almost self-evident. Put another way, businesses seeking to maximise profit are clearly economic actors, and thus, for neoliberal rationality, rights-bearers. That business has a right to protect economic activity from protesters becomes obvious within this frame. Yet neoliberal rationality is unable to conceptualise citizens as having rights to protect present and future life on earth from the actions of business. As the Tasmanian and NSW examples show, governments are willing to adopt extreme measures to safeguard conditions for business, even in the face of significant social and environmental criticism. This advancement of corporate interests is then seen as the protection of corporate rights, rather than as evidence of government subservience to market imperatives. As Lindsay Fitzclarence has suggested, instead of a right to protest, we now have an ever-widening arc of 'neoliberalism's meta-narrative of freedom and compliance: maximum freedom of opportunity to have access to and engage in an extended marketplace' and strident attempts by the state to 'suppress legitimate protest in the service of powerful interests.'⁴¹

The connections between protest suppression laws and industry interests are overt. The titular objective of protecting workers in the Act notwithstanding, the Tasmanian Resources Minister stated: 'the central objective of the Government is to ensure wealth creating businesses can develop and grow free from disruptive protest action that prevents them from operating on [a] normal commercial basis.'⁴² A similar logic is evident in the NSW anti-protest laws which appear to have been legislated in response to widely publicised protests over coal seam gas extraction such as the Bentley Blockade. Drawing on Brown, anti-protest laws are an example of the state being activated 'not to undertake economic functions or to intervene in economic effects, but rather to facilitate economic competition and growth and to economize the social, or as Foucault puts it, to "regulate society by the market."⁴³

Conclusion

Protest is now routinely reported as having economic costs to business which can be quantified and objected to. Activists are depicted as extremists interfering with business-as-usual for no recognisable (that is, economic) reason. These accounts of protest and protesters draw upon a recognisably neoliberal rationality in which all aspects of human life

⁴⁰ Ibid 99.

⁴¹ Lindsay Fitzclarence, 'New Generation Police Tactics' (2012) 121 *Arena Magazine* 5, 7.

⁴² Tasmania, *Parliamentary Debates*, House of Assembly, 26 June 2014, 5 (Andrew Harriss, Minister for Resources) 3-4.

⁴³ Brown, above n 2, 62.

are redrawn as forming part of the market, and consequently assessed according to market metrics.

The last few decades have seen a rolling wave of protester suppression in which the recent Tasmanian and NSW anti-protest laws are only the most recent moves. We would argue that these laws reveal governments whose ability to govern through consensus is threatened. They are therefore resorting to more overt forms of coercion. Rather than anti-protest laws being an example of governmental strength, they may instead be a signal of weakness and precarity. Movements fighting for a healthy environment are organised across national borders and increasingly uniting groups that may previously have failed to recognise their common interests. They have the power to disrupt (if not prevent) major fossil fuel projects.

It is time to imagine how the future will judge the inaction of governments and industry on climate and habitat destruction. In that context, how will future generations assess laws that attempt to intimidate a generation of activists into silence?

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