Environmental Protest and Civil Disobedience in Australia

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In Germany, disruptive protest demanding climate change mitigation policies has provoked popular and constitutional discussion. Commentators have questioned whether acts of illegality committed as civil disobedience should be treated distinctly from 'ordinary' criminality and punished more leniently. In other parts of the world, however, legislative activity has singled out the illegality involved in civil disobedience to the opposite end. Legislatures have introduced laws that radically increase penalties for existing offences involved in disruptive protest and blockades, conferred new powers on police, and created new offences for previously legal forms of protest.[1]

In this post I explore an Australian legislative trend of the last decade that specifically targets environmental civil disobedience by imposing additional criminal penalties upon its exercise. The Australian case study is a cautionary tale of what can follow a failure to recognise democratic value in civil disobedience and treat it with constitutional nuance. Unlike in Germany, Australian climate and environmental activists do not employ constitutional arguments to frame their demands. Civil disobedience is also established in the Australian political tradition, and was the origin story of the world's first Green political party. In recent years, however, state legislatures have become active against protestors in the old growth forest, animal and climate protection movements. Court treatment of that legislation, while divergent and at an early stage of development, has tended to reduce constitutional analysis to questions of legality and the need to disincentive criminal conduct. I suggest some reasons why courts have adopted this approach, which resembles Jürgen Habermas' description of 'authoritarian legalism', notwithstanding Australia's political history.[2] The Australian example demonstrates the role that courts and constitutions can play in prescribing avenues for political and social change even in cases where they are textually 'minimalist' or practice parliamentary deference. It warns against collapsing the practice of democracy and the meaning of the constitutional mechanisms that protect it to the meaning given by a parliament at a particular time.

Recent Trend of Legislative Backlash

Forestry Blockades

The island state of Tasmania is home to some of the world's oldest and tallest forests. It has been a site of intense conflict between conservationists and state and industry actors seeking to extract economic value from its rich natural resources.[3] Protests have been influential, deciding elections and successfully blockading projects so that they became unviable. Protests have leveraged federal politics to secure Commonwealth intervention and protection of forests.

In 2014 a conservative state government was elected on a promise to "tear up" a deal between industry and environmental movements and open up protected forests not covered by heritage listing.[4] It enacted legislation to ensure that protestors would not

[1] See, eg, Nick Crockett, 'The Rise of Critical Infrastructure Protest Legislation and its Implications for Radical Climate Activism' (2022) 33(2) Colorado Environmental Law Journal 407; Public Order Act 2023 (UK).

[2] Jürgen Habermas, 'Civil Disobedience: Litmus Test for the Democratic Constitutional State' (1985) 30 Berkeley Journal of Sociology 95. Habermas argued that the state should treat civil disobedience more leniently than 'ordinary' criminality. Where judges and prosecutors fail to do so, this effectively reduces the question of what is 'legitimate' to what is 'legal', resulting in what he termed 'authoritarian legalism'.

[3] Thomas Anthony O'Brien, '"Let this Forest For Ever Rest": Tracking Protest and Identity in Australia's Forests' (2019) 50(3) Australian Geographer 365.

"damage business premises" or "obstruct the carrying out of business activities" on logging sites.[5] The legislation prohibited participation in a "demonstration, parade, event or a collective activity" on "business premises" without the consent of the "business occupier". Provisions empowered police officers to arrest protestors without warrant and remove them from areas designated as business premises, which could include public places and roads. This legislation was successfully challenged for breaching a constitutionally implied freedom of political communication, which I explore below.[6]

The Tasmanian government has passed subsequent legislation — most recently in 2022 with bipartisan support[7] — attempting to respond to the Court's objections while still increasing penalties for protest on logging sites. The most recent bill increases criminal penalties and treats protest on business premises as aggravated trespass, an offence previously reserved for situations such as trespass involving a firearm.[8] MPs have been transparent that additional penalties introduced against organisations are targeted at the Bob Brown Foundation, a civil society organisation at the centre of the Tasmanian forestry movement. In 2022 the Victorian state government passed similar legislation increasing criminal penalties for protest on logging sites.[9]

'Ag-Gag' Legislation

Animal activists engage in civil disobedience when they trespass into animal agricultural facilities to document and distribute footage of animal treatment. This serves a similar purpose to disruptive environmental protests, which I explore below. Mainstream politics assigns a particular value to animals as property and as a resource for extracting wealth and enabling consumption. But other values are also assigned to animals that sit in tension with that treatment. By recording and distributing footage of commercial animal agricultural facilities, animal activists seek to highlight contradictions between those ways of assigning value.

Visual footage of animal mistreatment is distinct in its capacity to communicate and persuade.[10] It taps into certain social values and emotions — concern for animal welfare, and aversion to cruelty and violence — that sit in tension with the way that other social and economic structures assign value to animals. The power of visual footage to persuade, and of visual evidence of abuse obtained undercover to cause change, reflects in the reality of political practice: footage obtained by activists has exposed breaches of law,[11] prompted investigations of businesses for animal mistreatment,[12] driven legislative change and improved standards,[13] affected consumer choices, and led to the closure of abattoirs unwilling or unable to comply with regulatory standards.[14] Material obtained through trespass has also exposed breaches of welfare codes that regulators have been unable to expose because of a lack of resources and the warning that operators receive prior to inspection of premises. In Germany, for instance, activists have availed themselves of the defence of necessity because the act of trespass ultimately exposed other violations of law.[15]

'Ag-gag' legislation targets undercover investigations and whistleblowing in animal agriculture.[16] Originating in the United States in the early 1990s, 'ag-

[4] Lenore Taylor, 'Why reignite Tasmania's forest wars — to produce logs no one will buy?' Guardian Australia online, 24 March 2017.
[5] Workplaces (Protection from Protestors) Act 2014 (Tas).
[6] Brown v Tasmania (2017) 261 CLR 328.
[7] Police Offences Amendment (Workplace Protection) Act 2022 (Tas).
[8] 'Fact Sheet', Police Offences Amendment (Workplace Protection) Bill 2022 .
[9] Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022 (Vic).
[10] Darren Lilleker, Anastasia Veneti and Daniel Jackson, 'Images matter: the power of the visual in political communication' The Conversation, 20 September 2019 .
[11] Laura Kane, 'Chilliwack dairy farm pleads guilty to animal abuse' The Canadian Press, 16 December 2016 .
[12] David King, 'Undercover footage of violence at dairy farm prompts RSPCA investigation' The Guardian, 26 February 2019 .
[13] Premier of Victoria, 'Government Crack Down on Live Baiting', State Government of Victoria (Web Page), 11 June 2015 .
[14] Lauren Day, 'Pig abattoir ceases operations amid investigation into 'serious and disturbing' allegations' ABC News online, 26 February 2023 .
[15] Decision of OLG Naumburg, 22 February 2018, 2 Rv 157/17.

gag' legislation can impose greater penalties on activists that trespass to obtain footage, restrict the distribution of footage obtained during that trespass, or penalise misrepresenting membership of an animal rights organisation when pursuing employment with an agricultural facility. A 'second wave' of ag-gag legislation has emerged over the past two decades, spreading from the United States to Australia and Canada.[17]

In 2007 the New South Wales government passed the Surveillance Devices Act, which included a prohibition on disseminating material that had been recorded on private premises without consent.[18] It did not provide for an exemption for material in the public interest, unlike legislation in other Australian states.[19] This meant that, while the legislation was not designed to work as 'ag-gag' legislation, it can be applied in this way. Subsequent laws introduced in New South Wales,[20] Queensland[21] and South Australia[22] have introduced aggravated penalties for trespass onto farms to interfere with a business, damage property or release livestock. In 2022 Farm Transparency Ltd, an animal protection charity, brought a constitutional challenge to provisions of the New South Wales Surveillance Devices Act that prohibit dissemination of footage. This was narrowly upheld by the Australian High Court for reasons I explore below.[23]

Disruptive Climate Protests

Disruptive protests are a social movement tactic that seeks to shape political agendas. They work by influencing the broader political and social environment in which institutionalised political processes operate. In some historical cases movements have relied on disruptive protests to expose a lack of social licence for a particular activity. In others they have sought to ensure a topic remains on the political agenda because of the disruption that a violation of the law attracts. The willingness of activists to expose themselves to criminal sanctions can itself be a form of persuasion, communicating the seriousness of the activists' convictions. To understand the function of disruptive protest, it is important to distinguish between mainstream political activity within institutions — which seeks popularity and public support, affirmed at elections — and activity targeted at the broader political ecosystem and norms that influence the rules and opportunities for action within mainstream institutions. Disruptive protest may be unpopular at the time, because it is confrontative, conflictual and cultivates what Martin Luther King Jr described as 'creative tension'.[24] Social movements have used it successfully throughout history,[25] however, even if that success was not apparent at the time.[26] That success reflects that conflict, tension, discomfort and emotions such as anger and moral shame are often the motors of social and political change. It can extend the Overton window for acceptable arguments within mainstream politics,[27] alter how the more 'moderate', mainstream flank of a movement appears, and expose contradictions in values in mainstream politics.[28]

Across the world, disruptive protest has become a popular tactic for flanks of the climate movement.[29] Since the disruptive climate protest movement became active in Australia, state legislatures have increasingly moved against it. In 2019 the Queensland Parliament passed legislation introducing jail terms for using

[16] Center for Constitutional Rights and Defending Rights and Dissent, 'Ag-Gag Across America: Corporate-Backed Attacks on Activists and Whistleblowers', 2017 .
[17] See, eg, Security from Trespass and Protecting Food Safety Act 2020 (Ontario).
[18] Surveillances Devices Act 2007 (NSW) s 11.
[19] See, eg, Surveillance Devices Act 1999 (Vic) s 11.
[20] Right to Farm Act 2019 (NSW).
[21] Agriculture and Other Legislation Amendment Bill 2019 (Qld).
[22] Summary Offences (Trespass on Primary Protection Premises) Amendment Act 2020 (SA).
[23] Farm Transparency v New South Wales [2022] HCA 23.
[24] Martin Luth King King Jr, 'Letter from Birmingham City Jail' in Hugo Adam Bedau (ed), Civil Disobedience in Focus (Routledge, 1991) 68.
[25] Damien Gayle, 'Disruptive protest helps rather than hinders activists' cause, experts say' The Guardian, 7 July 2023 .
[26] Michael Harriot, 'MLK is revered today but the real King would make white people uncomfortable' The Guardian, 17 January 2022 .
[27] Heather Alberro, 'Climate change: radical activists benefit social movements — history shows why' The Conversation, 24 May 2022

certain lock on devices such as 'dragon's dens' and tripod suspension devices that are difficult for police to remove without causing injury.[30] In 2022 the New South Wales Parliament passed legislation that made disrupting, blocking or causing the closure of prescribed railway stations, ports or infrastructure an offence.[31] An exemption was carved out for industrial action. It also introduced an offence of disrupting or obstructing Sydney Harbour Bridge, except as part of an industrial action.[32] In December 2022 protestor Deanna 'Violet' Coco was sentenced under the legislation to 15 months in prison with a non-parole period of eight months for blocking a lane on Sydney Harbour Bridge for 28 minutes.[33] Her sentence was later overturned on the basis that police had misled the Court during the initial sentencing by claiming Coco had blocked an ambulance.[34] Helen Kvelde and Domonique Jacobs, activists from the Knitting Nannas, brought a constitutional challenge to the New South Wales legislation in May.[35] The New South Wales Supreme Court has yet to deliver its decision.

South Australia followed New South Wales in May 2023 by increasing the maximum penalty for intentional or reckless obstruction of a public place to a three month custodial sentence or $50,000 fine.[36] New South Wales Premier Chris Minns has also recently proposed that governments work with social media platform Meta to prevent the broadcast of protests involving civil disobedience.[37]

Constitutional Treatment of Legislation Targeting Civil Disobedience

The Australian Constitution infamously contains limited express rights. In 1992 the Australian High Court found that a freedom of political communication was implied in certain constitutional provisions that require that Parliament be "directly chosen by the people".[38] This was found to apply to legislation affecting the physical conduct of protest.[39] But to decide whether legislation targeting civil disobedience is a proportionate burden on that freedom involves complex questions about what 'choice' means. To protect the capacity of people to 'choose' involves protecting the conditions in which choices form. Those conditions are 'pre-institutional' and interference with them can be difficult to identify and analyse. They encompass influences on how political parties select and prioritise certain policies over others in electoral platforms and how pressure on party and parliamentary agendas is exercised. Work on civil disobedience, and on social movements more generally, also looks at strategic engagements with this broader political ecosystem in which the agendas for electoral choice form.[40] There is considerable overlap between the conditions that the implied freedom should protect from legislative interference, and what civil disobedience seeks to achieve in agitating for certain parliamentary or election priorities.

Two relatively recent decisions of the Australian High Court provide some early indications of the Court grappling with how to understand civil disobedience and treat legislation seeking to deter its exercise by increasing criminal penalties. Although the approach of justices has diverged, some judgments have tended to quickly dismiss the value of protest that involves illegal activity. While unarticulated, that dismissal reflects certain premises regarding the nature of political communication and how it influences both 'choice' and the options available for voters to 'choose'.

Brown v Tasmania

The 2017 decision of Brown v Tasmania considered the 2014 Tasmanian legislation that targeted forestry blockades. Two activists, Bob Brown and Jessica Hoyt, were arrested and charged under the legislation while trespassing on "business premises". A majority of the Court agreed with their argument that the provisions of the legislation breached the implied freedom of political communication, but the reasons of

[28] Brent Simpson, Robb Willer, Matthew Feinberg, 'Radical flanks of social movements can increase support for moderate factions' (2022) 1(3) PNAS Nexus 110.
[29] Carnegie Endowment for International Peace, 'Climate Protests: Tracking Growing Unrest', 12 January 2023 .
[30] Summary Offences and Other Legislation Amendment Bill 2019 (Qld).
[31] Roads and Crimes Legislation Amendment Bill 2022 (NSW).
[32] Roads Act 1993 (NSW) s 144G.

the majority judgment centred on the breadth of the provisions. Kiefel CJ, Bell and Keane JJ noted the difficulty for police officers in determining the boundaries of "business premises". This increased the risk that police may interfere with protests outside but near those premises that did not involve trespass or illegality. Justice Gageler's judgment, which also found the legislation unconstitutional, noted the number of protests that have taken place on the site of areas that were subsequently granted protection by the government. Gageler J emphasised the "communicative power of on-site protests" that "lies in the generation of images capable of attracting the attention of the public and of the politicians to the particular area of the environment" under threat. Edelman J dissented, concluding that the legislation was valid because it only targeted conduct that was "already unlawful". If there was "no legal freedom to communicate about government or political matters", then the Constitution could not protect that activity. For the Court to assess whether the Constitution protected a freedom in that context would be an "anathema" in a society "founded on the rule of law".

Farm Transparency v New South Wales

Judgments in the 2022 Farm Transparency v New South Wales decision, which narrowly upheld the 2007 New South Wales 'ag-gag' legislation, exposed premises relevant to the treatment of civil disobedience more starkly. In 2015 New South Wales police raided the Adelaide home of Chris Delforce, the director of Farm Transparency, and charged him for, amongst other things, the possession of footage of pigs being gassed as a method of slaughter that he obtained on private commercial premises.[41] While some charges were later dropped, Farm Transparency and Delforce challenged section 11 and 12 of the Act which prohibit publishing and possessing material obtained while secretly recording activity on private property. Kiefel CJ and Keane J, with Justices Edelman and Steward in separate judgments, found the restriction on publishing was a proportionate burden on the implied freedom. Chief Justice Kiefel and Justice Keane's judgment found that the restriction was necessary to disincentivise illegal trespass, which in turn protected "privacy", "property" and "dignity". Justice Edelman agreed but concluded that the restriction on publishing wouldn't apply to third parties or journalists who publish without knowledge of the unlawful way the footage was obtained. As in Brown, Justice Edelman's judgment concluded that the freedom could not protect what was already illegal. Justice Gageler, dissenting, concluded that disincentivising trespass was an insufficient justification for restricting communication on "matters of political and governmental concern", particularly where that prohibition was blanket. As in Brown, Gageler J emphasised the persuasive visual imagery as a form of communication.

A Position on Civil Disobedience?

These judgments do not present an express position on civil disobedience — illegal activity for the purpose of political engagement. With the exception of Justice Gageler's judgments, however, they reflect certain relevant premises. The first of these seems to be a view of political communication as information, whose function in shaping voters' choices at elections can exist independently of the medium that carries it and how it is communicated. This premise is not unique to the Australian context, and reflects to a certain extent in First Amendment doctrine on 'content-neutrality' and 'time, place and manner' restrictions. The reality of political practice, as well as extensive scholarship in the social sciences, demonstrates the instability of that distinction. In recognising the importance of visual imagery, Justice Gageler's judgments reflect a less mechanistic understanding of how political communi-

[33] Azadeh Dastyari, 'The Road to Repression: Environmental Activism and the Right to Protest in the State of New South Wales', Verfassungsblog, 20 December 2022 .
[34] Michael McGowan, 'NSW police drop claim that protest involving Deanna 'Violet' Coco blocked ambulance' The Guardian Australia online, 7 March 2023 .
[35] Ben Doherty, 'Knitting Nannas tell court NSW protest laws have left them 'frightened' to take climate action' The Guardian Australia online, 10 May 2023 .
[36] Summary Offences (Obstruction of Public Places) Amendment Act 2023 (SA).

cation shapes voter choice. Relatedly, some of the judgments too readily dismiss the value of activity that is unlawful in shaping Australia's political system. This tendency — reflected in Justice Edelman's judgment in both cases, and Chief Justice Kiefel and Justice Keane's judgment in Farm Transparency — sees the additional burden as less relevant because the law already restricts the activity. This tendency is at odds with practices of civil disobedience, where accepting criminal penalties is itself a form of communication that communicates the strength of the activist's convictions. Altering the penalty, or the ends to which material obtained unlawfully can be used, will affect the likelihood of that communication taking place — and this is the legislature's intent.

These premises are not treated in great depth in *Brown* and *Farm Transparency* and the Court's position on civil disobedience so far — likely to become more important as the climate crisis escalates societal and political conflicts — is not entirely settled. Brown and Farm Transparency may instead tend to validate Justice Gageler's concerns that adopting a test of structured proportionality to analyse whether the implied freedom had been breached, reduces analysis to "some pre-determined all-encompassing algorithm" that takes attention away from the fundamental purpose for which the freedom exists. When combined with other doctrinal oddities of the implied freedom — the Court will only analyse legislative but not executive acts[42] — it can produce the strained outcomes associated with an algorithm. A clear example is Chief Justice Kiefel and Justice Keane's conclusion that the legislation in Farm Transparency protected dignity and privacy, even though the particular facts involved surveillance of commercial activity on commercial premises. Other constitutional systems, including Germany, distinguish between protecting the privacy and dignity of natural persons and other legal persons.[43] This kind of close attention to context is particularly important in cases involving civil disobedience, which as my earlier discussion explored, often involve trespass against private property rights. Debate and contest about what is, and should be, property goes to the heart of most environmental conflicts.

The Climate Emergency and Contentious Politics

Parliaments and legislatures across the world are failing to meet the challenges of the climate emergency. And while the reasons for that failure are complex, one explanation is the 'institutionalised' quality of parliamentary politics itself. Party politics pursues popularity, its focus is local and short-term, and the design of legislatures is oriented toward compromise between interests and the maintenance of the status quo. The climate emergency requires us to act fast, it will not compromise or negotiate on terms, and the consequences will not wait for the bundle of norms and expectations that govern institutionalised politics to catch up. In the short term, any policy response required to keep global heating within safe bounds will involve a loss of entitlement to extract wealth from the environment — especially for actors and constituencies with a greater degree of representation and influence in parliamentary politics.[44] Mainstream politics is disincentivised from leading uncomfortable conversations unless it has no choice. If parliamentary politics steps up to the challenge of the climate emergency, it will be because it is forced to do so either by a 'politics of discomfort', or because the scale of disaster that unfolds from its current trajectory creates that

[37] Tasmin Rose and Josh Taylor, 'NSW push to stop climate protestors livestreaming on Facebook labelled 'profoundly anti-democratic' The Guardian Australia online, 22 June 2023 .
[38] Australian Capital Television v Commonwealth (1992) 177 CLR 106.
[39] Levy v Victoria (1997) 189 CLR 579.
[40] Jim Jasper, Kevin Moran, Marisa Tramontano, 'Strategy' in Donatella della Porta and Mario Diani (eds) The Oxford Handbook of Social Movements (OUP, 2014) 399-409.
[41] Paul Gregoire, 'Exposing Agricultural Brutality: An Interview with Chris Delforce' Sydney Criminal Lawyers (Web Page) 22 November 2017
[42] Janina Boughey and Anne Carter, 'Constitutional Freedoms and Statutory Executive Powers' (2022) 45(3) Melbourne University Law Review 903-949.
[43] See, eg, German Federal Constitutional Court decision of the First Senate 13 June 2007, 1 BvR 1550/03.
[44] Matto Mildenberger. Carbon Captured: How Business and Labor Control Climate Politics (MIT Press, 2020).

discomfort. To this end, the climate emergency requires that constitutional lawyers reflect carefully on the premises regarding democratic change that we bring to constitutional interpretation.

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