SUBMISSION OF THE NEW SOUTH WALES BAR ASSOCIATION ON THE INCLOSED LANDS, CRIMES AND LAW ENFORCEMENT LEGISLATION AMENDMENT (INTERFERENCE) BILL 2016

1. The New South Wales Bar Association has reviewed the legislative amendments proposed in the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016* (**Bill**).

2. The Association considers that the Bill must not be enacted in its present form because, in summary:

1) the Second Reading speech emphasised that the Bill is directed to "*unsafe protest activities causing severe disruption to lawful business activity*", in particular at mine sites, but the proposed amendments in the Bill involve the expansion of police powers and criminalisation of activity in any type of public assembly or demonstration;

2) the new section proposed to replace section 200 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (**LEPRA**) removes an existing limitation on police powers when police are dealing with public assemblies, processions and demonstrations. The present section 200 is an important check on police power to ensure some balance and as an acknowledgment of the public interest in allowing concerned citizens to participate in peaceful assemblies and demonstrations. The new section 200 as proposed in Schedule 3 of the Bill would involve an unjustifiably broad conferral of discretionary power on police officers to prevent or disrupt peaceful assembly and protests; and

3) the proposed new criminal offence in Schedule 1 of the Bill ("*Aggravated unlawful entry on inclosed lands*") is expressed in words that are too wide and are uncertain in meaning. In particular, there is a very wide range of potential conduct by which a person might be considered to act in a way that "*interferes with, or attempts to interfere with*" the conduct of a business or undertaking when that person is on inclosed lands without consent. If, despite the laws presently available in respect of trespass and criminal damage, the creation of an additional offence in relation to businesses is considered necessary, it should be restricted to instances of proven severe disruption to a business or undertaking, or a serious and immediate risk of significant physical harm to a person.

Background

1. The *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016* (**Bill**) was introduced in the Legislative Assembly on Tuesday, 8 March 2016. A copy of the Bill is Attachment 1.

2. The member with carriage of the Bill, the Minister for Industry, Resources and Energy (the Hon. Anthony Roberts) gave the Second Reading speech that afternoon. A copy of the Second Reading speech is Attachment 2.

3. Debate was then adjourned for five clear days and it is understood that the government proposes to seek the enactment of the provisions as soon as possible thereafter.

4. This letter will briefly address each of the three Schedules in the Bill.

Schedule 1 - Amendment of *Inclosed Lands Protection Act 1901*

5. Schedule 1 of the Bill proposes the creation of a new criminal offence ("*Aggravated unlawful entry on inclosed lands*") in a new section 4B to be inserted in the *Inclosed Lands Protection Act 1901* (**ILP Act**).

6. It is relevant to note that many areas of land and all buildings in New South Wales are "*inclosed lands*", since the definition in section 3(1) of the ILP Act includes any public or private land inclosed or surrounded by a fence or wall or natural feature, and any building or structure, and any land used in connection with schools, hospitals and other prescribed premises.

7. The new offence in section 4B is committed if the person commits an offence under section 4 of the ILP Act (that is, entering into or remaining in, without lawful excuse, inclosed lands without the consent of the owner) in relation to inclosed lands on which any business or undertaking is conducted and, while on those lands, the person (a) interferes with, or attempts or intends to interfere with, the conduct of the business or undertaking; or (b) does anything that gives rise to a serious risk to the safety of the person or any other person on those lands. The maximum penalty for the proposed new offence is 50 penalty units (currently, $5,500), which is 10 times the maximum penalty for an offence against section 4.

8. The new offence is expressed in words that are very wide and uncertain in meaning. In particular, there is a wide range of potential conduct by which a person might be considered to act in a way that "*interferes with, or attempts to interfere with*" the conduct of a business or undertaking when that person is on inclosed lands without consent. By way of analogy, a decision in the Supreme Court of Western Australia in 2011 held that an offence of interfering with fishing gear was committed if the fishing gear was "*handled, used or in any way dealt with, rather than being left alone*" (*Blechynden v Bogumil* [2011] WASC 4 at [27]). Interference with the conduct of a "business or undertaking" could likewise include any use of or contact with the tangible property of the business, as well as any disruption (apparently, however insubstantial it might be) to the processes and activities of the business.

9. Further, the broad meaning of the terms used in proposed section 4B does not appear to reflect the more limited purpose of the government as indicated in the Second Reading speech, namely to protect against real threats to personal safety and severe disruption to lawful business activity.

10. There are existing laws presently available in respect of trespass, unlawful assembly (including section 545C of the *Crimes Act 1900*) and criminal damage (including sections 194 - 202 of the *Crimes Act 1900*). If, despite the continuing availability of those laws, the creation of an additional offence is considered necessary, it should be restricted to instances of proven severe disruption or actual

damage to a business or undertaking; or circumstances in which there is a serious and immediate risk of significant physical harm to a person.

Schedule 2 - Amendment of the *Crimes Act 1900*

11. Schedule 2 of the Bill contains specific and limited proposed amendments to section 201 of the *Crimes Act 1900* ("*Interfering with a mine*"). Section 201 currently provides:

> **201 Interfering with a mine**
> A person who intentionally or recklessly:
> (a) causes water to run into a mine or any subterranean channel connected to it,
> (b) destroys, damages or obstructs any shaft, passage, pit, airway, waterway or drain of, or associated with, a mine,
> (c) destroys, damages or renders useless any equipment, building, road or bridge belonging to a mine, or
> (d) hinders the working of equipment belonging to a mine,
> is liable to imprisonment for 7 years.

12. The main amendment that is proposed to this serious offence is to extend the definition of "*mine*" to include any place at which gas or other petroleum is extracted, or areas in which physical exploration for minerals or gas occurs, or former mine areas that are being decommissioned or made safe.

13. The Association does not raise any objection to or concern about the amendments proposed in Schedule 2 of the Bill.

14. However, the existence and ongoing availability of the specific offence in section 201 of the *Crimes Act 1900* (as amended) is a good reason to consider that it is not necessary to create other generally expressed criminal offences or to extend police powers generally in order to protect against unsafe or damaging protests at mine sites. The amendments in Schedules 1 and 3 of the Bill are **not** limited to mine sites and those amendments cannot and should not be justified by reference to an asserted deficiency in the criminal laws applying to unsafe or damaging protests at mine sites.

Schedule 3 - Amendment of the *Law Enforcement (Powers and Responsibilities) Act 2002*

15. Schedule 3 of the Bill proposes significant amendments to the provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (**LEPRA**) in two areas. The first is the proposed insertion of sections 45A - 45C (in a new Division 7 in Part 4 of the LEPRA), which would confer on police additional powers of search and seizure without a warrant. The second area of proposed amendment is the replacement of existing section 200 of the LEPRA ("*Limitation on exercise of police powers under this Part*") so as to loosen or remove those important limitations.

16. As to proposed sections 45A-45C:

1) The identification in section 45A of the things to which the new Division applies are "*anything that is intended to be used to lock-on or secure a person*" to any plant, equipment or structure for the purpose of interfering with the conduct of a

business or undertaking and that is "*likely to be used in a manner that will give rise to a serious risk to the safety of any person*". The provision seems to be unworkable and may prove to be unenforceable. The criminal law should not operate by reference to vague descriptions of physical items that fall within the ambit of a provision only by the existence of someone's intention to use them in the future for a purpose, particularly when that purpose and the likely use of the items are each themselves assessments based on broad and uncertain criteria.

2) Proposed section 45B confers a power without warrant to stop, search and detain a person or vehicle "*if the police officer suspects on reasonable grounds*" that the person has or vehicle contains anything to which the Division applies; and the thing may be seized and (by proposed section 45C) forfeited to the Crown. Particularly having regard to the fact that the reasonable suspicion of the police officer must be a suspicion formed by reference to the matters referred to in section 45A, section 45B provides an unclear but potentially very intrusive power of search and seizure without a warrant. For example, a person and their vehicle might be stopped, detained and searched because a police officer suspects that the vehicle contains rope or wire and a padlock that may be used in an unsafe way.

3) The forfeiture of things seized under section 45B also permits the Local Area Commander of Police to destroy or dispose of the thing. Section 45B(4) provides that "*a court does not have jurisdiction*" to order delivery of the thing (to a person from whom it was lawfully seized) under Part 17 (which otherwise provides for the recovery of property in police custody, including by application to a court).

4) The proposed additional powers of search and seizure without warrant appear to be an excessive and disproportionate response to the perceived problem.

17. As to proposed replacement section 200 of the LEPRA, the provision unduly confines the limitation on police powers when police are dealing with processions, public assemblies and peaceful protests.

18. At present, the police have the powers set out in Part 14 (sections 197-199) of the LEPRA to give directions to a person or to a group of people in a public place, by which the police can direct the conduct of people so as to (among other things) remove obstructions to other people or traffic or deal with situations that the police believe harasses or causes fear in other persons. Failing to comply with a direction without reasonable excuse is an offence (section 199) and exposes a person to a liability to pay a penalty.

19. Section 200 of the LEPR Act currently provides:

> **200 Limitation on exercise of police powers**
> (cf *Summary Offences Act 1988*, s 28G)
> This Part does not authorise a police officer to give directions in relation to:
> (a) an industrial dispute, or
> (b) an apparently genuine demonstration or protest, or
> (c) a procession, or
> (d) an organised assembly.

20. Section 200, which has been in its present form since the enactment of LEPRA in 2002, is an important check on police power to ensure some balance and as an acknowledgment of the high public interest in allowing concerned or interested citizens to participate in peaceful assembly, processions and genuine demonstrations and protests. Events of that sort have for centuries properly been regarded as an essential part of the social, political and cultural life of any civilized society.

21. The proposed amendments to section 200 would preserve the exclusion of industrial disputes, but would make substantial changes to increase police powers to give directions to persons in other types of public assembly. In particular, the Bill proposes the following amendments:

> (2) Except as provided by subsection (3) or (4), this Part does not authorise a police officer to give a direction in relation to:
> (a) an apparently genuine demonstration or protest, or
> (b) a procession, or
> (c) an organised assembly.
>
> (3) A police officer is not precluded from giving a direction in relation to any such demonstration, protest, procession or assembly if the police officer believes on reasonable grounds that the direction is necessary to deal with a serious risk to the safety of the person to whom the direction is given or to any other person.
>
> (4) A police officer is not precluded from giving a direction in relation to any such demonstration, protest, procession or assembly that is obstructing traffic if:
> (a) the demonstration, protest, procession or assembly is not an authorised public assembly for the purposes of Part 4 of the Summary Offences Act 1988 or the demonstration, protest, procession or assembly is not being held substantially in accordance with any such authorisation, and
> (b) the police officer in charge at the scene has authorised the giving of directions under this Part in relation to the demonstration, protest, procession or assembly.

22. The effect of proposed subsections (3) and (4) is to reinstate police power to give directions to individuals or groups that participate in processions, assemblies or protests if a police officer considers either that the direction is "*necessary to deal with a serious risk to the safety*" of persons, **or** if the procession, assembly or protest is "*obstructing traffic*" and is not an "*authorised public assembly*" (that is, authorised under the procedure in Part 4 of the *Summary Offences Act 1988* for prior notice to, and approval of the public assembly by, the Commissioner of Police or the Supreme Court).

23. In either case, the Bill sets the threshold too low for the activation of police powers in respect of a procession, assembly or demonstration.

24. A direction should be able to be given by a police officer to an individual or group in a public assembly, procession, demonstration or protest on safety grounds only in circumstances in which there is a serious and immediate risk of significant physical harm to a person.

25. The threshold for police action in proposed subsection 200(4) is also too low.

26. There is an extensive range of community groups, religious organisations, returned services groups and charities that participate in processions and assemblies in Sydney and throughout New South Wales. Not all of them wish to, or decide to, go through the process of approval as an authorised public assembly, and for some assemblies or demonstrations time would not permit that procedure to be followed in any event. (Of course, the fact that a public assembly is not authorised under the *Summary Offences Act 1988* does not make the assembly or participation in it unlawful.) Recent examples of peaceful demonstrators voicing political and social concerns in the CBD include protesters against the expansion of coal seam gas exploration and extraction; demonstrations about the treatment of animals in greyhound and horse racing; and protests by advocates of greater gun control. Every one of those processions, assemblies, demonstrations and protests would be reasonably capable of being considered to 'obstruct traffic'.

27. Further, the Bill requires only that the "demonstration, protest, procession or assembly" is obstructing traffic, but the direction may be given "in relation to" it, which appears to allow a direction to any participant or other person (whether or not those individuals are doing the obstructing) so long as the direction is in relation to the assembly or protest. Such a law would be a retrograde step that would undermine the notion of individual responsibility for the commission of criminal offences.

28. Accordingly, if the amendments are passed and should a police officer choose to do so when a public demonstration, procession, assembly or protest (inevitably) obstructs traffic, a direction can be given to the people involved to move on, or disperse. That direction must be complied with in order to avoid the commission of an offence and liability to a penalty. That is not an acceptable 'balance' in a modern democracy.

29. Further, there must be a real doubt about the constitutional validity of proposed section 200 in its application to individuals or groups that are exercising their implied constitutional freedom of communication about government and political matters. It may be that a Court would consider the law not appropriate and adapted to the achievement of the reasonable regulation of the participants in a public assembly (of the requisite type) on the basis that it permits a police officer to disperse the assembly or otherwise give directions to participants merely because the assembly (but not necessarily the relevant individual given the direction) is "*obstructing traffic*".

30. The new section 200 proposed in Schedule 3 of the Bill would involve an unjustifiably broad conferral of discretionary power on police officers to prevent or disrupt peaceful assembly, processions and demonstrations. It should not be supported and section 200 of the LEPRA should be retained in its present form.