THE UNIVERSITY OF QUEENSLAND
AUSTRALIA

PUBLIC PROTEST AND CONTINUITY OF ESSENTIAL ENERGY SUPPLY

PREVENTION, PROPORTIONALITY, POLICING, AND PROSECUTION

A DISCUSSION PAPER PREPARED BY THE INTERNATIONAL MINERALS AND ENERGY LAW PROGRAM

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PART 1: PRELIMINARY

COMMENTS BY DIRECTOR

This Discussion Paper highlights key concepts and issues discussed at a Workshop convened on 1 December 2015 in Brisbane by the International Minerals and Energy Law Program (IMELP), focused on public protest and the continuity of essential energy supply.

The Workshop was convened to identify and explore the key issues and challenges facing "both sides of the protest fence" when radical forms of protest (involving instrumental law breaking) are directed at the resources and energy sector, its critical assets and its key supply chains. This is a highly charged and contentious space for industry, governments and police, as well as for civil society and protest groups. Academic opinion is also divided on key issues. The recent experiences in the United Kingdom of policy and policing overreach that have been very publicly and painfully exposed after the "outing" of committed green anarchist "Mark Stone" as undercover police officer Mark Kennedy offer a timely and cautionary tale for how these issues are considered, discussed and debated in Australia.

The one day invitation-only Workshop, attended by industry, the Commonwealth government, police, civil society groups and academe stimulated a rich set of ideas, and forged new partnerships. The Workshop was designed to focus on the key themes of prevention, proportionality, policing, and prosecution. This Discussion Paper is a tangible outcome from the Workshop that sought to build links with industry, police, civil society groups, other legal academics and inter-disciplinary colleagues. Rather than be a transcript of the discussions,

this Discussion Paper is intended to capture the key themes from the Workshop, highlight the complexity of the issues, to reflect a range of perspectives and to contribute to public policy in this area.

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INTERNATIONAL MINERALS AND ENERGY LAW PROGRAM

The International Minerals and Energy Law Program (IMELP) was established in 2013 to fill the research gap in the areas of minerals and energy law, to contribute to the intellectual depth of the debate and policy development on issues affecting these sectors, and to promote the sectors' importance to the national economy.

As a leading research Centre, the purpose of IMELP is to demonstrate continued excellence in research, including interdisciplinary research, the development of young researchers through a vigorous and active research higher degree program, and cooperative research with national and international institutions in both the Northern and Southern Hemispheres.

The Centre engages in a number of ways, including consultancies, education, and collaborative research projects with numerous stakeholders, including governments, relevant industries, the legal profession and other research institutions.

The minerals and energy sectors are fundamental to the Australian economy, while their legal regulation has become a vital and dynamic area of law and legal practice across the world.

The purpose of the **International Minerals and Energy Law Program** is threefold:

1. to be a leading research Centre that meets the present and future needs of all stakeholders in the minerals, petroleum and energy industry through the provision of high-quality and accessible research and teaching;
2. to support The University of Queensland's research activities within the minerals and energy sectors through the contribution of legal expertise, scholarship and research in relevant projects; and
3. to collaborate in research, scholarship and teaching with international mineral, petroleum and energy law centres.

Underpinning these purposes are our three core areas of activity: research, teaching and engagement.

Research	Teaching	Engagement
Theoretical	Specialist Masters' program	Legal Profession
Applied	Undergraduate teaching	Industry
Interdisciplinary	Executive Education	Government

Collaborative (local, national and international)

Research Institutions (within UQ, national and international)

WORKSHOP CONTEXT

Environmental activism and environmentally-motivated protest are multi-faceted, sophisticated and diverse – they are no "one thing" and come with rich and complex cultural, social, political and scientific histories [1, 2]. Internationally, environmental activism is driven by diverse environmental and socio-political goals underpinned by diverse philosophies that have shifted and evolved over time [3, 4]. In its broadest sense, environmental activism includes legal and illegal events, above and underground organisations, single events and long-term campaigns, as well as small and large scale protest. The spectrum of environmentally-motivated activism expanded internationally in the last decades of the twentieth century to include more radical forms of protest [1, 3, 5]. This occurred in response to 'the perception that mainstream environmentalism was too slow and ineffective in achieving the fundamental change in political and policy spheres activists believed was necessary to (a) protect their individual or collective interests, or (b) more broadly save a planet viewed to be "in crisis" and at imminent risk [1]. Globally, the resources and energy sector and their associated business headquarters, sites and transport corridors have been, and continue to be, the targets of ongoing campaigns by environmentally-motivated activists and campaign groups [1].

The ability to peacefully assemble and protest is a legally protected human right in Australia. At the national level, Australia is a signatory to many key human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) [6]. This is intended to afford protections relating to freedom of speech, assembly and association [6]. That said, public protest involving criminal damage, assaults, trespass, intentional misleading of share markets and obstruction may expose protesters and groups to a range of criminal and civil liabilities. Instrumental law breaking that includes serious forms of criminality with potential serious consequences to protesters, responders and the wider community include: sabotage; targeted and serious vandalism; property destruction; locks-ons to plant and equipment to hinder or shut down business operations; and occupations of key parts of the civil infrastructure that are aimed at shutting down exploration or operations. Research identifies that 'proportionately responding to these more radical forms of protest in advanced liberal democracies is a "wicked problem" that has vexed policymakers, police and industry for decades' [1]. When radical protest is focused on disrupting lawful business operations including those with a role in delivering essential services (such as energy production), questions brought to the fore include: what are (or should be) limits on the democratic right to protest?; how is public order maintained?; how should (or shouldn't) protest be policed?; the limits of "political will"; and the adequacy of legal and policy frameworks. In this respect activists, policymakers, police, police oversight bodies, the businesses targeted as well as industry groups and their advisors can hold irreconcilably different views [1]. It is truly a contested terrain.

Yet the law, as often implemented by police, is weighted against the protester. Or that is how protesters perceive the situation. There is a range of offences to which a protester can find himself/herself subjected to in

a public place (obstruction, intimidation, failing to obey the lawful direction of a police officer, traffic violations and assault). While interim injunctions have freely been granted to employers in the industrial relations protest sphere [7], responding to environmentally-motivated protest by the use of injunctions remains contentious [1].

Police powers to prevent crime and uphold public order arguably outweigh the rights of citizens, but today police actions in the streets (particularly against dissenters) are subject to the ubiquitous accountability through use of cameras and social media. Of course police obeying the law have no fear of the most rigid accountability.

IMELP's interest in radical environmental protest is the application of the laws about public protest, and the effect of that protest on the resources and energy sector. One example is the moral fervour of climate change activists and their targeting of coal projects. Does the legitimate end – highlighting climate effects of major fossil fuels – justify the means of protest that is, based on the current state of the criminal code, unlawful. This is a highly contested political and policy space and one where there remains a lack of consensus on a clear way forward. In addition, this complexity and lack of clarity as to how to address the balancing of legitimate "ends" with effective and proportionate "means" leads to policy gaps, gridlock and uncertainty for police, protesters and infrastructure owners and operators. It is in this complex context that the Workshop brought together senior industry experts, police and leading experts and scholars in law, civil rights, policing, criminology, history, policy and crisis management.

PART 2: LEGAL PERSPECTIVES AND PUBLIC PROTEST

CONTEXT

Both internationally and within Australia, contemporary environmental activism falls along a continuum that broadly ranges from (a) legal forms of advocacy, protest and dissent to (b) protest that is "noisy and annoying" and "pushes the legal envelope" through to (c) criminal and/or dangerous forms of protest and finally to (d) very serious criminality directed at critical infrastructure that can be considered potentially prejudicial to economic and national security. Around the globe, contemporary environmental activism focused on fossil fuels, coal seam gas, fracking and climate change (among other environmental causes) has captured the public imagination and coalesced disparate individuals, groups and communities around a range of economic, social, health and political causes. Motivations underpinning environmentally-motivated protest are as diverse as ethical investing, landholders' rights, population health, protection of world heritage sites, climate change and a trenchant critique of capitalism. Predictably, both inside and outside Australia, new allegiances have formed and innovative forms of protest continue to emerge [1, 8, 9]. Energy infrastructures and their associated supply chains (in particular those supporting energy production from fossil fuels) are often vulnerable to more radical forms of protest [1]. Considered as a sectoral group, these energy infrastructures and their networks and supply chains support national security, economic prosperity and social and community well-being [1]. The US Department of Homeland Security has identified the energy sector as "uniquely critical" on the basis it

provides an enabling function that supports of all other types of critical infrastructure [10]. The rationale is that without a secure and stable energy supply, national security is threatened through the implications of the cascading impact from loss of electricity and power supply on other critical infrastructure services (for example, water and communications) and therefore the health, welfare and economy of nation states [10]. As one Workshop participant said 'bad things can happen when the lights go out'. Without built-in redundancies in the management of energy supply for city water supplies, for instance, a power failure lasting more than a few days can put millions of lives at risk.

Different forms of protest evoke different legal, political, policy and policing responses [1]. The laws governing protest in Australia were described by one participant as 'a tangled mess of rights and responsibilities drawn from common law and legislation.' Adding to the complexity that arises from this is that the boundaries between distinctly different forms of protest are blurred. Similarly, the points at which protest shifts from "legal and peaceful" to "criminal, dangerous and even prejudicial to security" are not always clearly evident to policymakers, police and industry responders on the ground. As one Workshop participant pointed out, not only are these boundaries blurred but so too is the boundary between 'what is acceptable about protest and its potential or actual impact on individuals and potentially whole communities'. The example discussed at the Workshop was the situation where a simple "trespass" onto an industrial energy production or supply site by a protester could see the business need to consider suddenly cutting power on a transmission line to save a single protester with the known and detrimental flow-on impact of cutting off electricity supply to multiple customers using life support systems at home.

LEGAL FRAMEWORKS AND POLICY LEADERSHIP

The discussions identified that some Australian States (notably Victoria and Western Australia) have laws specifically criminalising protest that seeks to disrupt, or does disrupt, key parts of the civil infrastructure and/or parts of its supply chain. However, one participant observed that at both a State and Territory level as well as at a national level there remains a 'piecemeal and ineffective approach' with little political or policy will to tackle the issue holistically or nationally. According to one participant, this reflects that different governments over time across the jurisdictions have not articulated clear policy positions that can be adequately reflected in legislative frameworks – 'they don't know what they want' and 'they don't know how to consistently describe the threat that the community faces from radical forms of protest aimed at disrupting energy production or supply'. This is despite decades of political and policy attention in Australia focused on critical infrastructure and a contemporary policy goal in Australia of critical infrastructure resilience in the face of all hazards [11, 12]. It is this policy goal that necessarily links critical infrastructure policy with the threat to energy infrastructure and the essential services they support from serious criminality associated with radical forms of protest [1]. Yet as one participant described, the supporting legal frameworks and weak penalties applied by the lower courts in Australia in particular are inadequate, and 'do not reflect the risk protesters, responders and the community faces' from what could otherwise be considered minor criminality (such as trespass). As one participant observed, by their very nature critical energy assets have 'an immediacy of need for the whole community' and the law should (but does not) reflect this. Another participant described the

legal frameworks relevant to radical forms of environmentally-motivated protest as having been 'a political, legal and policy hot potato in Australia for decades'.

The progress of the Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (WA) through the Parliament was briefly discussed, with participants noting that when finalised, its application in practice will be crucial. A key discussion at the Workshop then shifted to whether there could (or should) be special (and nationally consistent) laws aimed at protecting essential energy infrastructures (or indeed other critical infrastructures) from the more serious criminality associated with radical forms of protest (environmentally-motivated or otherwise).

If these and related issues are to be considered, a number of key questions for policymakers would arise:

- why are current legal frameworks which do encompass trespass, public nuisance and property damage viewed as insufficient and/or unworkable?
- are the issues related to "soft penalties" or a lack of specific laws for damaging critical infrastructure?
- how could (or should) such laws be structured?
- what would be the objectives of any legislation?
- how could (or should) laws be scaled so that penalties reflected different "criticality" factors?
- what (if anything) justifies the derogation of human rights to protect protesters and the public?
- how could balance and proportionality be achieved? - would a state or national bill of rights help?
- what (if any) is the balance to be stuck between time specific legislation and general legislation?
- how could the criticality of infrastructures or specific assets be consistently articulated?
- is it better for the law to contain some "grey" areas to allow some discretion and flexibility for police and other authority figures?
- what is the "political will" to pursue special legislation?
- how could new laws be communicated to various publics both those affected by them and others?
- should protesters be required to pay (a) for property damage they cause, (b) costs associated with response outside of normal industry and emergency response operations and/or (c) for the downstream costs should electricity production or supply be cut? or does this create "a can of worms" or set a precedent for any culprit of any form of harm/damage to be liable for the cost of that damage?
- should protesters be prosecuted for deliberately putting themselves in danger by trespassing on dangerous industrial sites? what role (if any) should industry play in private prosecutions or civil actions against individuals or groups engaged in protest?
- do laws that criminalize damaging Commonwealth property offer a starting point?

One participant pointed out that reconciling the dual goals of (a) 'securing peoples' security' and (b) 'respecting human rights' and the 'right to freedom of assembly' are not incompatible. However, what the discussion highlighted is that in Australia, while there are mechanisms to pursue nationally consistent legislative frameworks (including mechanisms to meaningfully engage with civil society groups), over time

political and policy attention on protest including that directed towards critical infrastructures has waxed and waned (and is and has been different state to state, territory to territory). As another participant described, 'it seems that the causes being championed by protesters have moderated the way policymakers have considered the serious criminality that is at times associated with protest and the very real potential harms that can flow from disrupting critical energy infrastructures'. A further point raised is that concomitant with this "softening" of attitude of courts towards protests on topics whose time has come, so to speak (for example climate change), the ostensible legitimacy such protest seems to have tends to affect the eventual penalty. The Workshop heard that this is leaving protesters with symbolic punishment (a "rap on the knuckles"), fuelling a perception amongst certain groups (particularly industry) of a gap between (a) results in the courtroom and (b) the reality of the potential consequences of the protest action - that is the risk to critical infrastructure and the continuity of essential energy supply. One participant observed that 'individual states "reinventing the wheel" has proven to be flawed' noting the example of Tasmania's controversial anti-protest laws. Further, the participant noted that 'by writing brand new laws, the Tasmanian Parliament provided the Tasmanian police with laws so complex they have, so far, proven unusable'. In fact since the Workshop, charges against the first five people charged under the laws had to be dropped [13].

The Workshop also heard that a number of other factors can underpin how the lower courts consider such cases including: 'courts are reportedly unwilling to hold testimony provided by a police officer in higher regard than that of an accused'; and 'convictions can be more difficult to secure without digital imagery and audio recordings of the protest'. The latter being more difficult in regional towns when there are existing community tensions and divisions about the locations and operations of energy infrastructures. Conversely, 'what is wrong with that?' asked civil liberties representatives.

Discussion at the Workshop then shifted to the question of how the adequacy (or otherwise) of contemporary legal frameworks could be assessed. Here the policy "home" for issues relating to serious environmentally-motivated criminality is unclear. What was identified is a lack of clarity on policy "ownership" in State and Territory as well as in Commonwealth jurisdictions. This is a contentious policy space that cuts across agencies with responsibility for environmental stewardship, law, security, infrastructure policy, workplace health and safety, and regulatory responsibilities (for example energy supply, transportation).

In late 2013 the Attorney-General, Senator the Honourable George Brandis QC, asked the Australian Law Reform Commission (ALRC) 'to review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges' [14]. Finalised in March 2016, it could provide the much needed trigger to progress a structured national political and policy discussion about the legal frameworks that apply to radical forms of protest.

In its final report the ALRC discusses the all-important issue of proportionality at paragraph 2.55 in the following terms [15].

> Important rights often clash with each other, so that some must necessarily give

> way, at least partly, to others. Freedom of movement, for example, does not give a person unlimited access to another person's private property, and convicted murderers must generally lose their liberty, in part to protect the lives and liberties of others. Individual rights and freedoms will also sometimes clash with a broader public interest—such as public health or safety, or national security.

On the other hand, as Civil Liberties Australia Director and rights advocate Richard Griggs has written, 'what is the value of free speech (and the right to assemble and protest) if it needs to be done in a way that is pre-approved and sanctioned by government?' [16].

POSSIBLE AREAS FOR RESEARCH AND POLICY ATTENTION

Looking forward, industry participants at the Workshop, strongly supported by civil society groups and academic researchers, would welcome meaningful engagement with policymakers on the core issues identified in this session of the Workshop. This includes research and policy attention on questions such as:

- why are existing legislative frameworks considered by some stakeholder groups to be inadequate?
- police work within legal parameters where discretion is central to public order policing, so how do police decide which laws to enforce (or not) and how does this influence prosecutorial outcomes?
- how can the risk posed to individuals, communities, industry and the economy from radical forms of protest be better articulated to the news media and in the courtroom?
- how can the effectiveness of legal frameworks be assessed?
- could (or should) a new legal category of "legitimate protester or "legitimate forms of protest" be developed to differentiate legitimate forms of protest from criminal activity undertaken in the name of the environment?
- how policy might be communicated and the risk associated with protest mitigated?

PART 3: CONTEMPORARY CHALLENGES FOR INDUSTRY

CONTEXT

The energy sector is diverse and operates across a broad spectrum of energy generation including hydro, wind, solar, gas and coal. Yet despite its diversity, Workshop participants explained that the energy sector (along with its key supply chains including transport) faces common and pressing threats – from terrorism, violent protest, as well as from protest that while non-violent can be dangerous for both protesters and responders as well as threaten the continued electricity supply to whole communities. However, as one Workshop participant pointed out 'the line between peaceful protest and criminality' is not always clear and can change quickly on the ground. Another Workshop participant explained the 'threat to the energy sector is changing' and that change must bring with it new and nationally consistent policy approaches. As was pointed out, the energy sector along with its key supply chains operate across jurisdictions and 'is not going away'.

A COMPLEX OPERATING AND POLICY ENVIRONMENT

Having discussed examples of protest activity in some detail, the discussions drew out that the energy sector is looking to governments for policy leadership, which is currently viewed as politically sensitive, inconsistent and

issues driven. As one participant observed 'no one wants to own this policy space'. What the discussions drew out is that nationally consistent approaches have been adopted for critical infrastructure policy in other fields. While in no way conflating protest with terrorism, one participant explained that the threat facing the energy sector on a day-to-day basis from protest is much higher than the threat from terrorism, yet this is not at all well understood by governments. One participant explained 'even we don't know who the protesters are or what they are intending until they're over the fence'. That said, discussions also identified key factors that must underscore future policy considerations:

- the right to engage in lawful advocacy, protest and dissent must be respected and where possible actively facilitated by police and infrastructure owners and operators
- businesses have the right to operate lawfully[1] – within the legal and regulatory frameworks of the day
- "safety first" underpins business operations in the energy sector and its supply chain
- the energy sector has service obligations to ensure continued supply
- the energy sector has corporate and social responsibilities – including not diverting policing resources unnecessarily away from other policing priorities in small communities
- critical infrastructure policy frameworks incorporate the goal of resilience in the face of "all hazards"
- the energy sector is a critical infrastructure sector as well as an enabling infrastructure for other critical sectors (such as health, finance and water supply)
- key parts of the energy sector can be extremely fragile – described in parts as 'hanging on a thread'
- there are multiple government agencies with specific (and potentially competing) interests
- legal frameworks can support national policy consistency.

Workshop participants identified possible policy responses could include (a) the development of voluntary principles governing the management and policing of demonstrations impacting the energy sector and (b) revised legislative frameworks. However, a key point made at the Workshop is that industry has not necessarily fully articulated, to governments or police, the threat to the continuity of energy supply from radical forms of protest. This has also not been communicated to the public via the news media. As one participant put it, businesses 'have not been as forthcoming as they could be' and owners and operators could 'engage more with both politicians and the media about why this is important'. The counterpoint made by another participant is that business has to be selective about the information given out and to whom it is given. The Workshop heard there can be a public/consumer driven risk (public concerns about vulnerability of infrastructures, public outcry ['how can this happen?'], tipping off people as to vulnerabilities) and a commercially-driven risk (investment confidence, consumer confidence, business reputation). One participant proposed the first step could be establishing a 'national register of incidents – most of which are criminal'. Finding a policy "lead" for this type of initiative could be potentially challenging.

[1] This is itself a contested terrain given the history of protest movements and the causes championed for example anti-whaling protest and logging in Tasmania.

Having noted the point made by one participant that 'security doesn't come cheap', discussions also explored the question of whether or not, in terms of the continuity of essential energy supply, 'we have the right test of criticality'. In Australia the definition of critical infrastructure adopted by all States and Territories and the Commonwealth has been deliberately constant since the mid-2000s [12]. The definition of critical infrastructure has recently been reaffirmed in the following terms:

> … 'those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact the social or economic wellbeing of the nation or affect Australia's ability to conduct national defence and ensure national security. In this context, 'significantly' means an event or incident that puts at risk public safety and confidence, threatens our economic security, harms Australia's international competitiveness, or impedes the continuity of government and its services [11].

However, in terms of the continuity of essential energy supply, the question is, as one participant put it, 'how critical is critical?' In this respect, participants identified that while not necessarily meeting the threshold definition of critical infrastructure, local as well as State/Territory and national criticality are all equally important. It was also noted how, in response to technological and other changes over time, criticality of different facets of energy infrastructure can shift (for example the development of a national electricity grid can lessen the criticality of particular assets). The question of 'how critical is critical?' depends on your perspective and here governments, regulators, communities and shareholders may hold markedly different views. As Workshop participants highlighted, 'power stations power other power stations', identifying energy sector interdependencies 'boggles the mind', 'the grid system is inherently complex' and while component parts of the energy sector supply chain may not meet the threshold test to be categorised as critical infrastructure, 'the consequences of a full or partial collapse of security could lead to wide scale electricity loss'. Add to this, as another participant pointed out, the question of how broadly "economic security" is considered is highly relevant to parts of the sector not directly engaged in electricity production, yet remains inherently unclear. The questions posed in this respect included (a) 'at what point does protest preventing export become a matter of economic security?' and (b) 'should [or could] this be articulated?'

A key topic of discussion at the Workshop related to legislative frameworks and in particular the adequacy (or otherwise) of available offences and penalties for disrupting (or attempting to disrupt) key parts of the energy sector. The Workshop heard that most protesters merely want the opportunity to be "seen" and "heard". For industry, available offences and penalties at law for more threatening forms of protest need to be 'much more serious', and include 'aggravated forms of trespass' that can be scaled to enable considerations of (a) the criticality of the infrastructure, (b) the risk to responders, and (c) the overall impact (including the cost) of the protest. One participant argued the 'powerful legislation' that is 'specific to critical infrastructure' with the goal of 'keeping protest on the peaceful side'. Workshop participants recognised this is a highly contentious policy area that requires a national approach, political "buy in", strong political, policy and industry leadership and meaningful engagement with civil society groups. As to whether the current policy definition of critical

infrastructure is the “right fit” for considering new laws (Federal, State and Territory) was a key question with no clear answer. The lack of consistent policy leadership on these matters from Australian governments requires urgent attention.

MEDIA

The Workshop also explored in detail questions about the pitfalls and perils industry faces from media coverage of public protest. In recent years, there has been an acknowledgement by scholars that media (news media and social media) have a critical role to play in whether social movements (including protest groups) are able to bring about change [17]. As the Workshop heard, social media platforms can be highly influential in garnering political attention. The Workshop also heard that companies can face similar problems to police ‘when private security is used (or is seen to be used) to control events on company property or leases’. Not the least because ‘protesters have exploited opportunities to record interactions designed to provoke staff and security into action for later “moral” gains in the media and to further their own popularity base and advance their cause’.

It is recognised that media coverage of protests in the news media varies according to a number of factors including the type of media used, the location of the events, the political affiliation of news media organisation and the political orientation of the country in which they are based. News coverage of protests more generally tends to focus primarily on the “news value” of conflict, that is reporting stories through a conflict frame even when there is relatively little or only minor forms of disagreement [18]. The focus is on deviance and violence which seeks to marginalise the protesters - but there are variations in the framing of these stories depending on the country and the political orientation of the media organisations doing the reporting. The Workshop heard that the framing of stories by the news media can take on ‘a broader significance when issues such as fracking are involved’. This is because ‘fracking is used and reported on internationally, and when reported locally can ignite and link direct-action protest groups with the attendant effects of (1) appearing to legitimise illegal protest and (2) broadening the protesters’ stage somewhat’.

More specifically there is evidence that local newspapers tend to treat environmental protest groups that are organised and that use PR tactics differently from those that do not use these tactics. One study which combined surveys of environmental organisations and analyses of local newspaper coverage of these groups found that local news media favor professional and formalised groups that employ routine advocacy tactics, mobilise large numbers of people, and work on issues that overlap with newspapers’ focus on local economic growth and well-being [17]. Social media has also added layers of complexities to the relationship and dynamics between protest groups and sectors such as the energy sector. In another study, the Workshop heard that a researcher surveyed groups and individuals demonstrating against education and energy policy in Chile and found that ‘using social media for opinion expression and activism mediates the relationship between overall social media use and protest behavior’ [19, p. 920]. However, a key issue for owners and operators of energy infrastructure identified by participants is deciding when protest groups take to (a) social media and (b) engage with traditional news media, relates to who and what to engage with, as well as for how

long. This is complex terrain for industry because if serious issues are raised through the media (among other things), companies have responsibilities to regulators and governments to 'prove compliance, legitimacy and safe operating procedures'. Adding to the complexity is the view expressed that 'industry can be proactive and use public relations tactics and social media to communicate its points of view'.

POSSIBLE AREAS FOR RESEARCH AND POLICY ATTENTION

Looking forward, research and policy attention could focus on questions such as:

- what are the incidences of radical protest involving serious criminality in Australia and how can they be better mapped and understood? (how big a problem is this exactly!)
- should there be a register of incidents to better inform security planning and policy?
- are the legislative frameworks relating to radical forms of protest involving serious criminality adequate – if so, why and if not, why not?
- what is the "flash point" for the news media to shift coverage of protest (from demonising protest to lauding it and vice versa)?
- what principles might underpin how industry and police engage with protesters via social media?
- what responsibility is there on industry to proactively communicate?

PART 4: CONTEMPORARY CHALLENGES FOR POLICE

CONTEXT

The body of research focused on social movements, environmentalism, environmental activism, radical environmental protest, and the policing of protest is multi-disciplinary and extensive. In this context, there is a substantial body of literature focused on public order policing and the concepts of escalated force and negotiated management. There is also a growing body of research (though still limited) specifically focused in on the policing of radical environmental protest targeting energy infrastructures in Australia [1, 20]. Influencing the discussions at the Workshop in terms of the challenges facing police, were the questions of "what is policing?" and "who polices?" These were seen as being inherently complex. Taken narrowly, policing can be viewed as something "done" by the police officers of nation states (constabularies). However, this is not the full picture as it fails to take into account the far broader ways that "policing" and "the police" can be considered. This includes "policing" by private security bodies, private intelligence bodies, voluntary organisations and government agencies (for example transport, tax offices, regulatory organisations) to name just a few [21-24]. While recognising this broad context, discussions at the Workshop focused predominantly on policing by constabularies within their respective jurisdictions and their interactions with private security. The Workshop discussions also focused on mass public protest (for example, the type of protest that has been associated with some G20 summits) as well as more clandestine forms of protest. Discussions were also underscored by two key factors (a) that in enforcing the laws of the day, police ought to and do exercise discretion and (b) there are tactical and policy aspects of policing protest. The latter includes location of protest, number of protesters, the time of day and the weather conditions to name a few.

KEY CONSIDERATIONS

In exploring contemporary challenges for police, the Workshop considered the policing of Climate Camps, clandestine forms of protest targeting specific energy infrastructure, and the G20 summit held in Brisbane in November 2014. This breadth enabled participants to explore the key concepts of (a) different ways police engage with protesters and protest groups, and (b) the merits (or otherwise) of event-specific legislation. The discussions drew out that for police, there are significant distinctions in tactical and policy terms between planned mass public protest (that may bring with it serious criminality and/or violence) and clandestine forms of protest (that may, or may not, also bring with it serious criminality and/or violence). A key distinction between these different forms of protests that poses ongoing challenges for police is that in the case of the former, there are identifiable protesters and protest groups police can and do engage with, while in the case of the latter, leaderless cell-like structures make engagement highly problematic if not impossible.

In a departure from earlier G20 summits (notably London and Toronto) the 2014 G20 summit was not marred by violent protest. It is viewed as "a successful policing operation" that offers lessons for future G20 summits. The Workshop explored the reasons for this concluding that three factors were significant (a) a lengthy lead in time, (b) effective and flexible police-protester dialogue, and (c) event-specific legislation. The relatively lengthy lead in time to the 2014 G20 summit (18 months compared to six months for the 2010 G20 summit in Toronto) was considered by participants to be a key factor in what is viewed as a successful policing operation. As the Workshop heard from a number of participants, it enabled police to educate their own members about facilitating large-scale protest but also prepare for "the worst case scenario". It also enabled police to meaningfully engage with the owners and operators of businesses (including critical infrastructure) that would (or could) be impacted by the summit itself and/or potential protest. The Workshop also heard from a number of participants that this lead time enabled them to tailor security plans, brief their boards or executives about threats and contingency plans, and have a high degree of comfort that information and intelligence would be shared with them as necessary. Putting this in context, one participant explained there were '67,000 hours of police training ahead of the G20' and 'it was a sophisticated policing response'.

Policing scholars have for some time endorsed meaningful police-protester dialogue as a best practice approach to policing public protest [6, 25]. It is in this context and in respect of protest that one participant explained 'ensuring that individuals have an "equality of protest opportunity" is a new policing responsibility in the 21st century'. The Workshop heard that the approach taken by the Queensland Police Service in policing the 2014 G20 summit in terms of police-protester dialogue was underpinned by four distinct principles:

- negotiation
- facilitation (of protest)
- de-escalation (of tensions, force and violence)
- differentiation (between different protest groups).

The Workshop heard from a number of participants that these principles were employed at all stages of the planning for the 2014 G20 summit – pre-event, during the event and post-event. For police, the goal was "no surprises" – for businesses impacted or potentially impacted, for protest groups and for policy makers.

The Workshop also focused discussion on the issue of general versus event-specific legislation and as one participant described it 'the rise of exceptionalism'. The *G20 Safety and Security Act 2013* (Qld) introduced as its name suggests specifically for the 2014 G20 was 'modeled on legislation applied to "special" events in other jurisdictions' and its 'policy objective … was to promote the safety and security of those attending the event' [6]. As one participant observed for the 2014 G20, police 'had legislation … which we may never see the likes of again'. When the Bill was first aired, it raised serious questions and attracted significant scrutiny vis-à-vis its 'potential draconian reach', its suspension of the right to protest otherwise provided at law, and its absence of any express reference to the civil and political rights of protesters [6]. In any event, the concerns were not realised because the full powers of the laws were not needed because of effective police-community dialogue. However, what the discussions did highlight is that while there are lessons from event-specific legislation and the policing of specific mass events, caution must be exercised in inferring that such legislation has broader merit in responding to more clandestine forms of protest. This is because as participants highlighted, the threat from clandestine protest is different and so too is the policing response.

LESSONS FROM THE PAST

Another key discussion point at the Workshop then focused on the key learnings that are still relevant today from some of the first identifiable radical protests motivated by solely environmental concerns in Australia.[2] Here, the discussions focused on the bombing in 1976 of port infrastructure in Bunbury in Western Australia to protest wood chipping and the site occupations in 1979 of land at Wagerup in Western Australia to protest the building of a bauxite refinery. Examining these protests reveal that there were tensions for policy makers and police at the time about how to consider these crimes. The tensions arose from the question of whether radical protest involving serious criminality should be considered an "ordinary crime" (where the ordinary criminal law ought to prevail) or whether radical protest involving serious criminality should be considered "something special" that warrants a specific political, policy and therefore special policing responses. The shortcomings of each approach, as was pointed out during the discussion, are borne out in these two historic examples, with concerns on the one hand, of excessive leniency when the offenders were treated as "regular criminals" and, on the other hand, with hasty and poor legislation the result of the special purpose approach. As one participant pointed out 'this remains a key question for policy makers' and while there are mechanisms in Australia for harmonisation of laws, 'the fundamental question remains under-debated and unresolved'. Examining these early protests also reinforced, as one participant pointed out, 'that policing occurs in a political, cultural and social context'. These early Australian cases highlight that the "causes" being championed by protesters can garner strong opinions and divide communities but those opinions can change markedly over time drawing communities together. As one participant observed 'it is inconceivable now that

[2]Earlier animal rights protest had focused on whaling.

the community would support cutting down old growth forest for wood chips' and that 'part of the community at Wagerup that had previously supported the building of a bauxite refinery is now engaged in protest against it'. However in enforcing the laws of the day, police need to strike a difficult balance between "over policing" and "under policing" which is extremely complex on the ground. It ought not, with respect, be left completely to the police to sort out.

The Workshop also explored the tensions for police in their relationships with the owners and operators of critical infrastructure. These early Australian cases highlight that not only have the threats facing industry changed (criminality and violence associated with protest is now a part of security planning) but so too have the interactions between police and private security providers (whether in house or contracted). In these earlier cases, policing of the protests was the sole domain of the local constabulary [1]. Today's landscape is markedly different and there are significant differences in how, when and why police interact with industry and their private security providers. This raises a new set of tensions for contemporary policing arising from the underlying questions of (a) how close should police get to industry or protesters? (b) does ensuring continued energy supply warrant special arrangements? (c) if so, how are these relationships managed? One participant pointed out that here again community expectations can influence policing – the community, regulators and shareholders certainly have an expectation, even a demand 'that the lights will stay on'. The Workshop discussed that while police should (and should be seen to) act impartially, there are particular stressors for officers policing small communities they themselves form part of. These stressors are exacerbated when there are existing tensions and community divisions about energy infrastructures and operations.

POSSIBLE AREAS FOR RESEARCH AND POLICY ATTENTION

Looking forward, research and policy attention could focus on:

- what is the proper role of police in managing these issues and what can governments do in the policy realm to assist the police with that management?
- what are the incidences of radical protest in Australia and how can they be better mapped and understood?
- what are (or should be) the relationships between police, industry and private security? – should this be different for critical infrastructure?
- what information is (or should be) shared by police and intelligence bodies with industry?
- what are the merits (or otherwise) of event-specific legislation?
- should there be limits around what news media can report?
- how does the media influence the perceptions of protest - "good" and "bad", as well as "winners and losers"?
- should there be national protest laws on the books?

PART 5: PUBLIC PROTEST AND COVERT POLICING

CONTEXT AND A CAUTIONARY TALE FROM THE UK

In late 2010 in the UK, committed "green anarchist" Mark Stone - in reality undercover officer (UCO) Mark Kennedy - was "outed" as a police officer by the activist community in which he had been living for seven years [26]. Kennedy's "outing" was soon picked up by the news media, most notably investigative journalists Rob Evans and Paul Lewis at the UK based newspaper *The Guardian* [27]. Informed by well-placed sources including a former UCO, Evans and Lewis doggedly pursued the story [28]. What was soon revealed was that in his undercover persona, Kennedy had: infiltrated dozens of protest groups; operated in the UK and other countries; and acted as an agent provocateur [1]. In the months that followed, what was further revealed was that Kennedy and other UCOs had been deployed by (at the time) the highly secretive National Public Order Intelligence Unit (NPOIU) that had been formed in 1999 within Special Branch of the Metropolitan Police [1]. Of note is that the NPOIU was formed solely to gather and coordinate intelligence about public protest [29, 30]. At the time the NPOIU was formed, policing and policy attention was focusing in on the very serious criminality associated with animal rights protest (for example, arson and bombings) [1]. The initial focus of the NPOIU was on animal rights protest but its remit soon expanded to include environmental protest [30].

Kennedy's "outing" and the revelations that followed triggered a series of still ongoing official reviews and inquiries spurred on by rising political and public ire about "the ways and means" police were gathering information about protest and protesters [29-34]. Detailed information about the targets and tradecraft of covert policing dating back decades cascaded into the public domain. To an increasingly incredulous public and an increasingly uncomfortable police hierarchy and concerned Parliament, the revelations broadened beyond those specifically relating to Kennedy to include:

- that UCOs had engaged in long-term intimate and sexual relationships with those surveilled;
- in some circumstances, children were born to those relationships;
- as part of building their "legends" (or cover stories), reminiscent of Frederick Forsyth's *Day of the Jackal,* police officers assumed and built on the identities of dead children;
- UCOs gave evidence in court under assumed identities without the court's knowledge (including as defendants); and
- UCOs acted as agents provocateur [1].

The revelations also led to the collapse of the trial of environmentally-motivated protesters charged with aggravated trespass as it was about to get underway, and over time the exoneration of close to 50 protesters who had been convicted and sentenced on various charges [1].

THE AUSTRALIAN CONTEXT – LOOKING FOR KEY LESSONS

Looking beyond the very serious legal, ethical and governance issues that the "outing" of Kennedy revealed (only touched on in this Discussion Paper), is that for policymakers and/or police, the threat environmentally-motivated protesters posed to businesses operating critical parts of the nations' infrastructures in the UK was considered sufficiently grave, that it warranted intrusive and sustained covert policing operations.

As the discussion went on to draw out, the Australian and UK policy contexts are markedly different and the differences highlight lessons for policymakers, industry and police. A key discussion point at the Workshop was that in Australia, while the risk to the continuity of essential energy supply from radical forms of protest is significant (as one industry participant summarised 'it is a more pressing risk than terrorism'), this and the implications that could arise are not well understood by policymakers. In underscoring the point, another participant observed that while significant policy attention has been devoted by governments of all jurisdictions to working with industry to prepare for and respond to the threat from terrorism, no such guidance is available for how industry could (or should) face the threat posed by radical protest.

As one of the Workshop participants pointed out, the UK's broadly targeted and highly intrusive covert policing response to environmentally-motivated protest was 'entirely disconnected from critical infrastructure policy frameworks which are yet to adopt the holistic "all hazards" approach that is a feature of the Australian policy landscape'. This is a sharp lesson in the Australian context where critical infrastructure policy frameworks have for many years through adoption of the policy goal of resilience in the face of all hazards, captured criminality linked to protest. This arguably opens the door for a coordinated and national policy focus on radical protest. As to whether there is an appetite on the part of policymakers to develop guidelines for industry remains a live and potentially contentious question. As the earlier discussion noted, there is no lead policy home for these matters in the State/Territory or Commonwealth jurisdictions.

Research shows that covert policing (including covert intelligence gathering) is undertaken by the police as well as by private bodies (such as private intelligence companies) [21]. As the UK experiences highlight, despite operating within legislative and regulatory frameworks that ought to have "red flagged" the nature and focus of covert policing well before the "outing" of Kennedy, public police are not immune from significant overreach. One of the Workshop participants pointed out that the private intelligence bodies 'operate in a largely unregulated environment' and without the oversight and scrutiny that applies to the public policing bodies. However, the discussion highlighted that 'private intelligence and security is a growing business' that is seeing 'governments outsource the collection of intelligence'. In the context that covert policing (when undertaken within strict guidelines) is a valuable part of the policing assemblage [35], the questions for Australia include:

- what are (or should be) the limits on covert policing by public and private bodies of protest groups?
- how is intelligence passed between public and private bodies?
- in respect of prosecutions, how can intelligence (whether collected by public or private bodies) best enter the evidence chain?
- who watches the watchers (including particular private security bodies)?
- how can civil society operate a monitoring role to guard against excesses?

In further dissecting other lessons from the recent UK experiences, one of the participants expressed the view that 'labels matter'. As the discussion drew out, what has been evident in the UK is that a broad spectrum of activists came to be labelled and policed as "domestic extremists". As a result of the crisis of policing that

followed the "outing" of Mark Kennedy, the very term "domestic extremism" and how it has been defined in UK policy has recently been subject to intense scrutiny [30, 33]. Recent research and official inquiries into covert policing in the UK identified that definitional creep saw the meaning of the term "domestic extremism" expand from its initial narrowly drawn focus on very serious criminality by animal rights protesters (where the harms were considered almost akin to the harms caused by terrorism) to later encompass low level criminality and arguably even lawful advocacy, protest and dissent [1, 30, 33].

The lesson for Australia is sharp. This is because in Australia the full spectrum of environmental activism from groups viewed as stakeholders in environmental stewardship through to protest groups involved in serious criminality are collectively referred to as "Issue Motivated Groups" (IMGs) [1]. One participant argued that 'despite the boundaries being blurred, better differentiating between groups of activists could assist in matching policy and policing attention'.

PRIVATE INTELLIGENCE GATHERING

Until the 1980s policing scholarship was primarily focused narrowly, 'as something "done" by the public police' [1]. However, contemporary policing scholarship now reflects that private policing is an inherent part of the "policing assemblage"[3] and moreover that it is pervasive, corporatized and internationalised [1]. In respect of private policing, contemporary policing theory also seeks to distinguish between overt policing by private bodies (for example, uniformed private security guards) and covert policing by private bodies (for example, intelligence gathering) [21]. It is the latter that while only briefly discussed at the Workshop, drew out diverse opinions. From a theoretical perspective, covert private policing is a recognised part of the "policing assemblage" that scholars have identified, described, assessed and critiqued. However, as the Workshop concluded, in practice its use is fraught.

One participant explained that in the context of public policing bodies assessing the threat from IMGs, there is 'often political pressure on police and security agencies to monitor issue motivated groups'. However, the Workshop also heard that 'the political optics of police or government agencies monitoring environmental groups are seldom good'. This was evident in 2012, when it was revealed that the then Minister for Resources and Energy had pushed for increased police surveillance of environmental groups. When this was revealed by the media, the Minister drew harsh criticism [36]. What is noteworthy is that this occurred in the context that there are specific legal frameworks that govern how public policing bodies (constabularies and security agencies) may operate covertly. Monitoring of IMGs by private bodies was described by an academic participant as 'a slippery slope'. Not the least because of the fact brought up in the Workshop that different agencies utilise different definitions of IMGs, which entail different levels of threat and criminality. The Workshop heard that the Australian Federal Police (AFP) currently outsources some of its open-source intelligence gathering to private security organisations. The discussion that followed focused on the potential role of private intelligence bodies in policing protest – in particular "its optics" and limits.

[3] The term policing assemblage was coined by Jean-Paul Brodeur in recognition that a broad range of actors are involved in policing and that they collectively require no formal or informal coordination.

The Workshop heard that using private investigations firms equipped with intelligence gathering techniques and analytical abilities could be a live option for industry. The Workshop also heard that private intelligence carries certain disadvantages inherent to its private status such as (a) proclivity for doing things "on the cheap", (b) as private citizens, private investigators are bound by different laws than are the public police, (c) there is an unwillingness to disclose the true cost of surveillance, and (d) the absence of quality control measures. As one participant described 'techniques to monitor issue motivated groups while sometimes covert in nature do not have to be underhanded'. Rather, 'an intelligence led approach to monitoring radical protest groups would begin in an academic sense through understanding the anthropology of such groups'. The overarching goal was described by one participant as 'knowing and deeply understanding the motivations of these groups, their structures, ideologies and outlooks to allow better security assessments'. The rationale was described as 'developing target profile reports and operational reports to assist energy providers understand the actions of the groups, its leadership and ideology – such knowledge would better inform risk potential'. This was a heated point of discussion, not the least because of board policies, shareholder expectations, public confidence and civil liberties.

POSSIBLE AREAS FOR RESEARCH AND POLICY ATTENTION

Looking forward, industry, civil society groups and academe would welcome meaningful engagement with policymakers on these issues. This includes examining the following questions:

- could (or should) the term IMG be re-examined to better reflect a spectrum of protest?
- how can the threat to critical energy infrastructure from radical environmental protest be better understood by governments across all jurisdictions?
- could (or should) governments take a policy lead in working with industry and civil society groups to develop guidelines focused on preparing for and responding to the threat from radical environmental protest?
- what are the limits of private intelligence?

PART 6: CONCLUDING COMMENTS

The history of law is in part the history of the effects of protests directed to laws deemed unfair, unjust or wrong. The Suffragettes, the Civil Rights movement, the ANC in South Africa – all these movements effected change through various means labelled unlawful, and which would still be unlawful today. But laws changed in their wake, and countries changed for the better. Environmental protesters in IMGs fervently believe in their causes. A few would break current laws to stop a gas pipeline or a bauxite mine from operating, or draft an ASX release misleading the market about the status of a coal company's operations. We simply need to do more academic and policy work to enable new legal definitions and policy frameworks to be created to deal with these complex issues and types of protest. Work needs urgently to be done on these things before a piece of critical infrastructure is adversely affected and property, service provision and possibly even lives are put at risk.

The aim of the Workshop was to bring senior industry experts, government, police and leading experts and scholars in law, civil rights, policing, criminology, history, policy and crisis management to discuss in a closed forum the contentious and highly charged issues relating to protest that targets the energy sector and potentially threatens continued energy supply. As this Discussion Paper reflects, the discussions were wide ranging and canvassed different perspectives, opinions and possible options. Where there was common ground is that these issues are intrinsically complex, there is no "one way" forward and there will be inherent challenges in initiating and sustaining policy consideration of these issues. Moving forward will require "political will" that may only be triggered by industry more strongly articulating (a) the dangers associated with radical forms of protest and (b) the possible impact on communities should energy supply be disrupted by protest. For industry, building new alliances with government agencies, police, academe, civil society groups, and even protest groups will be key. If the issue is soft penalties for convictions, that is worth discussing. If the issue is a lack of a specific crime for damaging critical infrastructure, there are options to build on what exists rather than starting afresh.

Discussions at a one day Workshop necessarily only scraped the surface of what is an inherently challenging issue for policymakers, police, industry, civil society groups and activists. The reality is as one participant pointed out that 'infrastructure is not necessarily designed to be a fortress against protest' and that there are 'finite police resources'.

A proposal that in Workshop participants' view warrants serious consideration by policy makers is that a broad-based working group be convened to prioritise and initiate a range of actions geared towards assessing and progressing with the potential policy responses identified. The outstanding questions relate to resourcing and responsibilities. The Workshop was not able (in the one day it had) to analyse the Commonwealth response to protest (and terrorism) which it noted has been the subject of so much focus over the past 15 years. The Workshop noted that extensive pre-event community consultation was vital to successful Queensland G20 laws and police supervision of the Brisbane events. Similarly, civil society involvement in any new working group from the outset would appear to be equally important. Protesters, dissidents, anti-infrastructure groups and civil liberties organisations should all be considered stakeholders with roles in formulating the rules and regulations, rather than being "anonymous" and "top down" recipients of laws. As Civil Liberties Australia notes 'all of us share the need to get a proper balance in place between rights and responsibilities'.

Further, self-regulation by industry, including by the adoption of voluntary principles and/or guidelines, was also suggested as a way of breaking through policy torpor and political lag time.

We simply need to do more academic and policy work to enable new legal definitions and policy frameworks to be created to deal with these complex issues and types of protest. Work needs urgently to be done on these things before a piece of critical infrastructure is adversely affected and property, service provision and possibly even lives are put at risk.

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