IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

NO H3 OF 2016

BETWEEN: **ROBERT JAMES BROWN**
First Plaintiff

**JESSICA ANNE WILLIS HOYT**
Second Plaintiff

AND: **THE STATE OF TASMANIA**
Defendant

10 # ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE COMMONWEALTH (INTERVENING)



Filed on behalf of the Attorney-General of the Commonwealth by:

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## PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

## PART II INTERVENTION

2. The Attorney-General of the Commonwealth (**the Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant (**Tasmania**).

## PART III LEGISLATIVE PROVISIONS

3. The Commonwealth relies on the legislative provisions identified in Annexure A of the plaintiffs' submissions filed 27 February 2017.

## PART IV ARGUMENT

4. Two questions of law have been stated for the opinion of the Full Court (**SCB69[78]**).

5. The first question is: "Do either of the plaintiffs have standing to seek the relief sought in the Amended Statement of Claim?" As Tasmania has abandoned its challenge to standing, the Commonwealth makes no submissions on this question.

6. The second question is: "If the answer to (1) is "yes", is the *Workplaces (Protection from Protesters) Act 2014* (Tas) (**the WPP Act**), either in its entirety or in its operation in respect of forestry land, invalid because it impermissibly burdens the implied freedom of political communication contrary to the Commonwealth *Constitution*?"

7. In summary, the Commonwealth makes the following submissions:

   (a) The two questions set out in *Lange v Australian Broadcasting Corporation*[1] (**the *Lange* test**), as modified in *Coleman v Power*,[2] remain the authoritative statement of the test to be applied to determine whether a law contravenes the implied freedom of political communication.

   (b) Subject to the following points, the approach set out in the joint reasons in *McCloy v New South Wales*[3] (**the *McCloy* approach**) offers an analytical framework by which the *Lange* test may be applied in appropriate cases.

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1 (1997) 189 CLR 520 (***Lange***).
2 (2004) 220 CLR 1 (***Coleman***) at 51 [95] (McHugh J), at 78 [198] (Gummow and Hayne JJ), 82 [211] (Kirby J).
3 (2015) 257 CLR 178 (***McCloy***).

However, it is neither necessary nor appropriate to apply that approach in every case.

(c) The first question in the *McCloy* approach is effectively identical to the first *Lange* question. It will always be necessary to answer and it may be answered in accordance with the existing jurisprudence on the first *Lange* question.

(d) In relation to the "compatibility testing" referred to in the second question in the *McCloy* approach:

(i) the notion of "compatibility" of the ***object*** of an impugned law involves only an enquiry whether the object is ***not incompatible*** with the system of representative and responsible government established by the Constitution;

(ii) the compatibility of the ***means*** adopted by the impugned law to achieve its object cannot be divorced from whether the law is reasonably appropriate and adapted to achieve that object, and is thus properly answered by the third question in the *McCloy* approach.

(e) In relation to the "proportionality testing" referred to in the third question in the *McCloy* approach:

(i) the first stage — whether a law is "suitable", in the sense that the law has a rational connection to its object — will (if reached) be relevant to all cases concerning the implied freedom;

(ii) the second stage — whether a law is "necessary" — is an enquiry in which a court is concerned only with whether there are obvious and compelling alternative measures that would completely and as effectively and efficiently achieve the purpose of the impugned law, while imposing a significantly smaller burden on the freedom, and does not involve a refined analysis of the competing merits of other legislative schemes; and

(iii) the third stage — whether a law is "adequate in its balance" — ought to be considered only in cases where the burden on the implied freedom is direct and substantial, and should be focused only on whether the effect on the freedom is manifestly excessive compared to the importance of the legislative purpose that the impugned law pursues.

(f) In relation to the validity of the WPP Act:

(i) a law that limits the time, place or manner of political communication does not necessarily infringe the implied freedom;

(ii) although the WPP Act burdens the implied freedom of political communication, the purpose pursued by that Act is not incompatible with representative and responsible government, and the means adopted by the WPP Act are reasonably appropriate and adapted to that purpose.

### *(a) The Lange test*

8. The implied freedom of political communication in Australia is derived from the constitutionally prescribed system of representative and responsible government.[4] That being so, no test is prescribed by the Constitution to determine whether a particular law infringes the implied freedom. It has fallen to this Court to develop such a test.

9. This Court has long settled on the two questions set out in *Lange*, as modified in *Coleman*, as the appropriate test to determine whether a law infringes the implied freedom of political communication.[5] The first question asks whether, in its terms, operation or effect, the impugned law effectively burdens freedom of communication about government or political matters. If that question is answered affirmatively, the second question asks whether the law is nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[6]

10. The joint reasons in *McCloy* do not mark a departure from the *Lange* test. As the plurality emphasised in *McCloy*: "*Lange* is the authoritative statement of the test to be applied to determine whether a law contravenes the freedom".[7] In its terms, *McCloy* offers an analytical tool or framework which may, in appropriate cases, be a useful way in which to approach the *Lange* test.[8] But the *McCloy* approach is a tool, not constitutional doctrine. It is not a "precedent-mandated analysis".[9] For that reason, it is not necessary or appropriate to apply all aspects of that approach in every case.

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4 *Lange* (1997) 189 CLR 520 at 559–562 (the Court).

5 See, eg, *Hogan v Hinch* (2011) 243 CLR 506 at 542 [47] (French CJ), 555-556 [94]-[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1 (***Wotton***) at 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions NSW***) at 556 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

6 *Lange* (1997) 189 CLR 520 at 567-568 (the Court); *Coleman* (2004) 220 CLR 1 at 51 [95] (McHugh J), at 78 [198] (Gummow and Hayne JJ), 82 [211] (Kirby J).

7 *McCloy* (2015) 257 CLR 178 at 200 [23] (French CJ, Kiefel, Bell and Keane JJ).

8 *McCloy* (2015) 257 CLR 178 at 195 [3], 195-196 [4], 211 [58], 213 [68], 215 [72], 215 [73], 216 [77], [78] (French CJ, Kiefel, Bell and Keane JJ).

9 *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at 578 [144] (Gageler J).

### *(b) The McCloy approach*

11. In *McCloy*, the plurality stated that whether a law infringes the implied freedom depends upon the answers to three questions: (1) "[d]oes the law effectively burden the freedom in its terms, operation or effect?"; if yes, (2) "are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of government" ("compatibility testing"); and if yes, (3) is the law "reasonably appropriate and adapted to advance that legitimate object", which involves asking whether the law may be "justified as suitable, necessary and adequate in its balance" ("proportionality testing").[10]

### *(c) Burden*

12. The first question on the *McCloy* approach is effectively identical to the first question in the *Lange* test. It will always be appropriate and necessary to answer this question.

13. It may be accepted that ss 6, 7 and 11 of the WPP Act burden the implied freedom. However, Tasmania is correct to identify, in paragraph [34] of its submissions, that the burden must be assessed upon the premise that, but for the WPP Act, there would have been no freedom to undertake much of the conduct which that Act prohibits. That is because such conduct would have been prohibited by the torts of trespass and nuisance. As McHugh J said in *Levy v Victoria*:[11]

> ... our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, *that right or privilege must exist under the general law*.

McHugh J went on to identify the consequence of that proposition as follows:[12]

> What the Regulations did was to prevent them from putting their message in a way that they believed would have the greatest impact on public opinion and which they hoped would eventually bring about the end of the shooting of game birds. That being so, and subject to one qualification, the Regulations effectively burdened their freedom to communicate with other members of the Australian community on a political matter.
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> The qualification is whether, in the absence of the Regulations, the protesters and the media had the right to be present in the permitted hunting area. The constitutional implication does not create rights. It merely

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[10] *McCloy* (2015) 257 CLR 178 at 193–195 [2] (French CJ, Kiefel, Bell and Keane JJ).
[11] (1997) 189 CLR 579 (***Levy***) at 622 (emphasis added).
[12] (1997) 189 CLR 579 at 625–626.

> invalidates laws that improperly impair a person's freedom to communicate political and government matters relating to the Commonwealth to other members of the Australian community. It gave the protesters no right to enter the hunting area. That means that, unless the common law or Victorian statute law gave them a right to enter that area, it was the lack of that right, and not the Regulations, that destroyed their opportunity to make their political protest. The argument for both parties assumed, however, that, in the absence of the Regulations, the plaintiff and others were entitled to enter the *permitted hunting area* to make their protests. Because of this assumption, the proper course is to proceed on the basis that the Regulations and not the proprietary rights of the Crown or the operation of the general law prevented access to the hunting area.

14. These passages were approved by five members of this Court in *Mulholland v Australian Electoral Commissioner*,[13] which explained that they are a necessary consequence of the fact that the freedom is a freedom from government action, not an individual right. That proposition has been affirmed on many occasions.[14]

15. In this case, Tasmania has not made an assumption of the kind made by the parties in *Levy*. Accordingly, in assessing whether the burden on freedom of political communication is reasonably appropriate and adapted to a legitimate end, the assessment should not proceed from the premise that, but for the WPP Act, all of the conduct which that Act prohibits would be permitted.

16. In many cases, it has not been necessary to focus upon whether, but for the impugned legislation, the common law would allow a person freedom to engage in the prohibited conduct. That is because it has ordinarily been apparent that that would have been the position, at least to a very large extent.[15] But where, as here, much of the conduct prohibited by the impugned legislation substantially overlaps with conduct in which a person has no right to engage under the common law, it will be necessary to take this into account when asking whether a law is reasonably appropriate and adapted. That is so both because the burden that requires justification is much less than the plaintiffs submit, and also because the operation of the impugned law is readily justified with respect to conduct in respect of which a person has no right to engage.

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[13] (2004) 220 CLR 181 (***Mulholland***) at 223–225 [105]–[112] (McHugh J), 245–249 [182]–[192] (Gummow and Hayne JJ), 298 [337] (Callinan J), 303–304 [354] (Heydon J).

[14] See, eg, *Unions NSW* (2013) 252 CLR 530 at 551 [30], 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at 202–203 [30] (French CJ, Kiefel, Bell and Keane JJ), 229 [120] (Gageler J), 258 [219] (Nettle J), 280 [303] (Gordon J).

[15] For instance, in *Hogan v Hinch* (2011) 243 CLR 506, but for the impugned legislation, it was not suggested that there would have been any inhibition on identifying sex offenders. So too, in *Tajjour* (2014) 254 CLR 508, but for the impugned legislation, it was not suggested that there would have been any inhibition on consorting.

### *(d) Compatibility testing*

17. The second question in the *McCloy* approach reflects aspects of the second question in the *Lange* test. However, there are two matters which warrant further examination.

*(i) The meaning of "compatible"*

18. The first is the meaning of "compatible" in relation to the ***object*** of the impugned legislation. There are some isolated statements from members of this Court that may suggest that, in order for an object of a law to be compatible with the system of representative and responsible government prescribed by the Constitution, the object of the law must be to promote or protect that system of government.[16]

10 19. Any such suggestion should be rejected. If adopted, it would constitute a radical limitation upon the legislative power of the Commonwealth, the States and Territories. It would mean that any law that burdens political communication in any way (however modest or justifiable the burden) would be invalid unless the object of the law was to promote or protect the system of representative and responsible government prescribed by the Constitution. Such a limitation would, contrary to *Lange*,[17] cause the implied freedom to go beyond what is necessary for the effective operation of the system of representative and responsible government prescribed by the Constitution. And it would impose the bizarre limitation on State and Territory laws that they must be directed to promoting or protecting the system of government of a different polity.

20 20. The objective of "compatibility testing" goes no further than ensuring that the object of impugned legislation is ***not incompatible*** with the system of representative and responsible government prescribed by the Constitution. This means that legislation may pursue an object that is unrelated, even "wholly unrelated",[18] to that system of representative and responsible government, providing that the object of the legislation does not undermine[19] or impede[20] that system. The question is analogous to that which arises in cases concerning s 92 of the Constitution. There, it is not necessary that a law which burdens interstate trade or commerce have the object of promoting or protecting the freedom of interstate trade and commerce. What is necessary is only that the

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16 *Coleman* (2004) 220 CLR 1 at 52 [98] (cf 49 [91]) (McHugh J); *Monis v The Queen* (2013) 249 CLR 92 (***Monis***) at 153 [143] (cf 148 [128]) (Hayne J).
17 (1997) 189 CLR 520 at 561 (the Court).
18 cf *Monis* (2013) 249 CLR 92 at 153 [143] (Hayne J).
19 See, eg, *Coleman* (2004) 220 CLR 1 at 50 [92] (McHugh J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 187 (Dawson J).
20 *McCloy* (2015) 257 CLR 178 at 203 [31] (French CJ, Kiefel, Bell and Keane JJ).

object of the impugned law be non-protectionist;[21] i.e. an object that is ***not incompatible*** with the freedom guaranteed by s 92.

21. The above understanding of "compatibility testing" is consistent with the manner in which this Court has decided past implied freedom cases. In numerous decisions, members of this Court have concluded that the object of impugned legislation is "not incompatible" with representative and responsible government, without any suggestion that it was necessary to identify or articulate a relationship between that object and the protection or promotion of the constitutionally prescribed system of government.[22]

*(ii) Compatibility of means*

22. The second issue requiring analysis in the second question in the *McCloy* approach concerns the compatibility testing of the ***means*** adopted to pursue the object of the impugned law.

23. The second question asks whether those means are compatible with the system of representative and responsible government prescribed by the Constitution, divorced from the question whether those means are reasonably appropriate and adapted to the object of the impugned law. This articulation evidently seeks to reflect the development of the *Lange* test in *Coleman*.[23] However, as presently framed, it is apt to lead to error.

24. Rather than being a step that precedes the proportionality enquiry, the "compatibility" of the means adopted is the ***conclusion*** that is required to be reached in the enquiry into whether the law is reasonably appropriate and adapted to the legitimate end. So much is indicated by the terms of the second *Lange* question, as modified by *Coleman*: whether the law is reasonably appropriate and adapted to serve a legitimate end ***in a manner which is compatible*** with the maintenance of the constitutionally prescribed system of government. It is likewise indicated by the passage from *Lange* quoted in *Coleman* by McHugh J in support of the modification of the second *Lange* question.[24]

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[21] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 295 [133], [136] (Kiefel J).

[22] See, eg, *Levy* (1997) 189 CLR 579 at 627 (McHugh J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [29] (Gleeson CJ and Heydon J); *Hogan v Hinch* (2011) 243 CLR 506 at 544 [50] (French CJ), 556 [98] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton* (2012) 246 CLR 1 at 16 [31]-[32] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 90 [221] (Crennan and Kiefel JJ); *Monis* (2013) 249 CLR 92 at 215 [349] (Crennan, Kiefel and Bell JJ); *Tajjour* (2014) 254 CLR 508 at 571 [112] (Crennan, Kiefel and Bell JJ).

[23] *McCloy* (2015) 257 CLR 178 at 200-201 [23] (French CJ, Kiefel, Bell and Keane JJ).

[24] *Coleman* (2004) 220 CLR 1 at 50–51 [93]-[94].

25. If it were otherwise, it is unclear how a court is to determine whether the means adopted to achieve a legitimate end are compatible with the constitutionally prescribed system of government. The purpose of the second limb of the *Lange* test is to permit a law which burdens the implied freedom — and in this respect tends against the system of representative and responsible government prescribed by the Constitution — provided the object is not inconsistent with that system and the means adopted are reasonably appropriate and adapted to that object.

26. Addressed in the language of the *McCloy* approach, it is the third question which allows consideration of the compatibility of the means adopted by the impugned law. That being so, to reflect the *Lange* test, the *McCloy* approach should be refined. Compatibility of means should be removed from the second question and the third question should be rephrased as: "is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the system of representative and responsible government prescribed by the Constitution?"

*(iii) Compatibility of objects of the WPP Act with the system of representative government*

27. Contrary to the plaintiffs' submissions at [36], the WPP Act does not have the general purpose of preventing or punishing onsite political protests throughout Tasmania where those protests might affect a business activity. The plaintiffs' characterisation of the purpose of the WPP Act is too broadly stated and does not have sufficient regard to the terms and operation of the statute.

28. In its terms, the WPP Act relevantly operates to protect workplaces from protest activity that ***prevents, hinders or obstructs*** business activity on business premises, or areas that are necessary to access business premises (business access areas) (s 6). The purpose of the WPP Act is, at least, to protect the productivity, property and personnel of certain workplaces within Tasmania (defendant's submissions at [49]). This purpose is no more incompatible with the constitutionally prescribed system of government than various long established torts, including the tort of nuisance, which are directed against interference with the enjoyment of land or property. The prohibition of protest activity is not the purpose of the Act, but the means by which the purpose is achieved.

***(e) Proportionality testing***

29. The third question in the *McCloy* approach, both as stated in *McCloy* and as refined above, is identical, at its highest level, to the central aspect of the second question of the *Lange* test. What is novel in *McCloy*, within the Australian constitutional

landscape,[25] is the analytical framework by which it is proposed that that question may be answered, namely the three stages of "proportionality testing": whether the law is suitable, necessary and adequate in its balance.

30. As noted at paragraph [10] above, the plurality reasons in *McCloy* make clear that these three stages of proportionality testing are only "analytical tools which, according to the nature of the case, may be applied in the Australian context".[26] The conclusion that proportionality testing provides a set of "analytical tools" that ***may*** assist gives rise to the further question of ***when*** it will be appropriate to employ those tools.

*(i) Suitable*

31. The first stage of proportionality testing asks whether the law is "suitable", in the sense that the law has a rational connection to the purpose of the provision. A law will have such a connection where the means adopted by the law are capable of realising the purpose of the provision.[27] The significance of this question for the *Lange* test was demonstrated in *Unions NSW*,[28] where a majority of the Court found that the impugned provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) were invalid on the basis that they burdened the implied freedom but did not further the anti-corruption purposes of that Act.[29]

32. If a law burdens the freedom, and does so for an object not incompatible with the constitutionally prescribed system of government, it is difficult to conceive of a case in which the suitability question would not need to be considered. Consistently with that submission, in *Murphy v Electoral Commissioner*,[30] French CJ and Bell J suggested that this requirement (and this requirement alone) would have universal application in determining whether a law was reasonably appropriate and adapted.

*(ii) Necessary*

33. The second stage of proportionality testing asks whether a law is "necessary", in the sense that there is "no obvious and compelling alternative, reasonably practicable

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[25] *McCloy* (2015) 257 CLR 178 at 200-201 [23] (French CJ, Kiefel, Bell and Keane JJ). See also *Monis* (2013) 249 CLR 92 at 153 [144] (Hayne J).

[26] *McCloy* (2015) 257 CLR 178 at 195 [3] (French CJ, Kiefel, Bell and Keane JJ). See also *McCloy* (2015) 257 CLR 178 at 235 [142] (Gageler J); *Monis* (2013) 249 CLR 92 at 153 [144] (Hayne J).

[27] *Tajjour* (2014) 254 CLR 508 at 563 [81] (Hayne J).

[28] (2013) 252 CLR 530.

[29] In *McCloy* (2015) 257 CLR 178 at 197 [9] the plurality treated *Unions NSW* (2013) 252 CLR 530 as having been decided by reference to criteria of the kind the subject of the "suitability" question, although at the time that reasoning was expressly directed more generally to the second question in the *Lange* test.

[30] (2016) 90 ALJR 1027 at 1039 [38].

means of achieving the same purpose which has a less restrictive effect on the freedom".[31] Properly understood, this question offers a tool by which to assess whether a law is reasonably appropriate and adapted to the identified object, and is likely to be relevant in many, although not all, cases involving the implied freedom where the suitability question has been answered in the affirmative. However, the scope of enquiry permitted by the "necessary" requirement is informed by the use and application of the "reasonably appropriate and adapted" test in Australian constitutional law. That test has been deployed in two relevant ways.

34. First, the "reasonably appropriate and adapted" test has been employed to determine whether laws passed pursuant to a purposive head of power *actually* pursue the relevant purpose.[32] That test has likewise been used, in the s 92 context, to identify whether a law, which purports to have a non-protectionist purpose, in fact has a different, and protectionist, "true purpose".[33] In both of those contexts, the question is one of characterisation,[34] and the fact that the means adopted by the law go beyond those which are reasonably appropriate adapted to achieving the purported purpose of the law provides the foundation from which an "ulterior" purpose can be inferred.

35. Second, to ask whether a law is reasonably appropriate and adapted to a particular purpose can have an additional function, quite unconnected with testing whether a law has an "ulterior" purpose. It can mark out the limit upon the *extent* to which a law may permissibly burden a constitutional right or freedom, demarcating the boundary between those legislative intrusions into a constitutionally protected right or freedom that pursuit of a particular purpose may justify, and those legislative intrusions that the same purpose cannot justify.

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[31] *McCloy* (2015) 257 CLR 178 at 194-195 [2], 210-212 [57]-[63] (French CJ, Kiefel, Bell and Keane JJ).

[32] See *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 674 (Dixon J); *Gerhardy v Brown* (1985) 159 CLR 70 at 148-149 (Deane J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 260-261 (Deane J); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 312 (Deane J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 253-254 (Fullagar J).

[33] *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436 at 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[34] *Cole v Whitfield* (1988) 165 CLR 360 at 408 (the Court); *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436 at 471-472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217 at 265-268 [37]-[46] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 272 [61] (Heydon J), 285 [102], 288 [110], 290-291 [120]-[122], 296 [139] (Kiefel J).

36. In the implied freedom context, it would appear that both approaches are relevant: in *Lange*,[35] the Court, in adopting the "reasonably appropriate and adapted" test, cited passages from *Cunliffe v Commonwealth*[36] which indicate that "reasonably appropriate and adapted" may involve both an enquiry into whether the law possesses a purpose other than the apparently compatible purpose,[37] or whether the law imposes a restriction that is "disproportionate" to the object sought to be achieved.[38]

37. In either case, these enquiries are expressed at a broad level of generality. That generality reflects the level at which the analysis is undertaken:[39] the words ***reasonably***, ***appropriate*** and ***adapted*** do not suggest a finely calculated enquiry into the merits of one legislative scheme versus another.[40] As French CJ said in *Maloney v The Queen*,[41] the reasonably appropriate and adapted test is not "a prescription for merits review of legislation … [as] 'the Court is not concerned to determine whether the provisions are ***the*** appropriate ones to achieve … the particular purpose'". That is to say, the test does not require a Court to engage in any assessment of the relative merits of competing legislative models.[42] Rather, legislation has been found to fail the "reasonably appropriate and adapted test" where broad legislative prohibitions[43] have been found to be "grossly disproportionate",[44] or to constitute an "extraordinary intrusion" into a constitutionally protected freedom,[45] or to go "far beyond" what was necessary to achieve a legitimate end.[46]

38. One reason that the enquiry is limited is that, unless the alternative means are ***obvious and compelling***, the existence of alternative means provides poor evidence that the true purpose of the impugned law is different from its apparent purpose.

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35 *Lange* (1997) 189 CLR 520 at 567 fn 272 citing *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) at 300, 324, 339, 387-388.

36 (1994) 182 CLR 272; see also *Betfair v Western Australia* (2008) 234 CLR 418 at 484 [134], 488 [145] per Heydon J.

37 *Cunliffe* (1994) 182 CLR 272 at 388 (Gaudron J).

38 *Cunliffe* (1994) 182 CLR 272 at 324 (Brennan J), 340 (Deane J).

39 See further *Mulholland* (2004) 200 CLR 181 at 200-201 [41] (Gleeson CJ).

40 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 198 (Dixon J).

41 (2013) 252 CLR 168 at 184 [20] citing Deane J in *Gerhardy v Brown* (1985) 159 CLR 70 at 149 (emphasis in original).

42 *Levy* (1997) 189 CLR 579 at 598 (Brennan CJ); *Coleman* (2004) 220 CLR 1 at 52-53 [100] (McHugh J).

43 *Davis v Commonwealth* (1988) 166 CLR 79 (***Davis***) (a prohibition on the use of certain words in connection with a business, trade or the sale or supply of goods); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (a prohibition on the use of words, in the nature of criticism, about the Industrial Relations Commission and its members); *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 (a prohibition on betting exchanges).

44 *Davis* (1988) 166 CLR 79 at 99-100 (Mason CJ, Deane and Gaudron JJ), 101 (Wilson and Dawson JJ agreeing).

45 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 101, 102 (McHugh J).

46 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 78 (Deane and Toohey JJ).

39. However a more fundamental reason, which applies to both modes of reasoning discussed above, is that a more refined enquiry would involve the Court encroaching impermissibly on the role of the legislature. So much was recognised by Crennan, Kiefel and Bell JJ in *Monis*,[47] in reasons which appear to be the origin of the "obvious and compelling" phraseology. As stated by French CJ and Bell J in *Murphy v Electoral Commissioner*,[48] it would not be appropriate for a Court to "undertake a hypothetical exercise of improved legislative design by showing how such alternatives could work" because to do so would involve the Court "depart[ing] from the borderlands of the judicial power and enter[ing] into the realm of the legislature". Or, as French CJ put it in *Tajjour*:[49]

> The cautionary qualification that alternative means be "obvious and compelling" ensures that consideration of the alternatives remains a tool of analysis in applying the required proportionality criterion. Courts must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments.

40. The requirement identified in the authorities cited above is that the alternative means be both obvious ***and*** compelling. An alternative may be obvious but, on analysis, it may not be compelling. That may be so, for instance, because it is costly or difficult to implement. It is open to Parliament to select a legislative measure that is not the least burdensome on the freedom because it is preferable on such other grounds. Conversely, if the alternative means are abstruse, the fact that they are, when finally identified, compelling, is insufficient. The requirement of "obviousness" is an important guard against the prospect of hypothetical laws proffered by a plaintiff, bearing no resemblance to any law ever enacted by an Australian Parliament.

41. More generally, an alternative measure cannot be obvious and compelling unless it completely and as effectively achieves the object of the impugned measure (for otherwise it is not a true alternative).[50] Even then, there may be cases where the identification in argument of an obvious and compelling, and equally effective, alternative will not lead to invalidity. As recognised by Kiefel J in *Rowe v Electoral Commissioner*,[51] "a test of reasonable necessity, by reference to alternative measures, may not always be available or appropriate having regard to the nature and effect of

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47 (2013) 249 CLR 92 at 214 [347].
48 (2016) 90 ALJR 1027 at 1039 [39]. See also at 1080 [303]–[305] (Gordon J).
49 (2014) 254 CLR 508 at 550 [36].
50 See, eg, *Tajjour* (2014) 254 CLR 508 at 564–566 [84]–[90] (Hayne J), 571–572 [114]–[115] (Crennan, Kiefel and Bell JJ).
51 (2010) 243 CLR 1 at 136 [445].

the legislative measures in question".

42. That may be so, for instance, where any burden is slight and indirect. It may also be so where the difference in any restriction on the freedom is not very significant or where, though there is a decrease overall, some aspects of political communication are burdened more than others under the impugned scheme. In such cases, it would be open to conclude that, notwithstanding the existence of an obvious and compelling alternative which leads to ***some*** decrease in the burden on the freedom, the impugned law is nevertheless ***reasonably*** appropriate and adapted. Such laws are within the "domain of selections"[52] open to the legislature. For that reason, an alternative ought not be regarded as obvious and compelling unless it involves a ***significant*** reduction in the burden on the freedom.

*(iii) Adequate in its balance*

43. The third stage of proportionality testing asks whether a law is "adequate in its balance – a criterion requiring a value judgment, consistently within the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom".[53]

44. Unlike the first two stages of proportionality testing identified in *McCloy*, this tool of proportionality testing has — at most — shallow foundations in Australian law. One reason for this is that the implied freedom of political communication is not an individual right, and so is not well suited to the rights-based analysis that underpins the use of "strict" proportionality testing in many comparative jurisdictions. This was acknowledged by Crennan, Kiefel and Bell JJ in *Tajjour*:[54]

> The question whether a test of strict proportionality is useful and appropriate in the Australian constitutional context has not been debated in a matter before this Court since *Lange*. Its determination is likely to involve a number of considerations, not the least of which concerns the role of this Court with respect to the freedom. That role does not involve assessing the loss of a fundamental right or freedom enjoyed by individuals. It involves protecting the freedom in order to preserve the system of representative government.

45. A further reason for caution is that the task involved is one which is alien to the ordinary judicial function. It is not ordinarily the case that courts of this country are required to consider the "importance" of the object pursued by legislation that the democratically

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[52] *McCloy* (2015) 257 CLR 178 at 217 [82] (French CJ, Kiefel, Bell and Keane JJ).
[53] *McCloy* (2015) 257 CLR 178 at 195 [2] (French CJ, Kiefel, Bell and Keane JJ).
[54] (2014) 254 CLR 508 at 574-575 [130]-[133].

elected Parliament has chosen to enact, whether as a criterion of its validity or otherwise. The importance or wisdom of laws has hitherto generally been regarded as an exclusively legislative question.[55] In addition, there are practical and institutional difficulties with the determination by a court of whether the object of a particular law is to be regarded as "important" in an absolute sense, or even relatively to other objects which may be legislatively pursued. These difficulties are compounded by a requirement to "balance" the importance of the object against the extent of the restriction it imposes on political communication. That is to require the court to "balance incommensurables".[56] The questions involved, if contested, would often invite copious evidence of a kind more readily to be considered by a law reform commission than a court. Further, the answers to those questions would often turn on conclusions about competing social and economic values, priorities and objectives[57] which are contestable and inherently political.[58]

46. These matters invite attention to what Gleeson CJ said in *Mulholland*:[59]

> Judicial review of legislative action, for the purpose of deciding whether it conforms to the limitations on power imposed by the Constitution, does not involve the substitution of the opinions of judges for those of legislators upon contestable issues of policy. When this Court declares legislation to be beyond power, or to infringe some freedom required by the Constitution to be respected, it applies an external standard. ...
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> Identification of the end served by a law, and deciding its compatibility with a system of representative government, is a familiar kind of judicial

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55 See, eg, *Broken Hill South Ltd (Public Officer) v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 359 (Latham CJ); *South Australia v Commonwealth* (First Uniform Tax Case) (1942) 65 CLR 373 at 409 (Latham CJ); *Burton v Honan (*1952) 86 CLR 169 at 179 (Dixon CJ); *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 152 (Latham CJ); *Johanson v Dixon* (1979) 143 CLR 376 at 385 (Mason J); *South Australia v Tanner* (1989) 166 CLR 161 at 168 (Wilson, Dawson, Toohey and Gaudron JJ); *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 40 [60] (French CJ), 57 [117] (Hayne J); *A-G (NT) v Emmerson* (2014) 253 CLR 393 at 439 [85] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

56 See *Monis* (2013) 249 CLR 92 at 150 [134], 151 [138] (Hayne J). See also *Bendix Autolite Corp v Midwesco Enterprises*, 486 US 888 (1988) at 897 (Scalia J): "whether a particular line is longer than a particular rock is heavy".

57 For instances of competing social objectives see, eg, *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1; *Monis* (2013) 249 CLR 92; *Kerrison v Melbourne City Council* (2014) 228 FCR 87; *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382.

58 See further Webber, *The Negotiable Constitution* (2009) at pp 87–115; Urbina, "A Critique of Proportionality" (2012) 57 *American Journal of Jurisprudence* 49; Webber, 'Rights and the Rule of Law in the Balance' (2013) 129 *Law Quarterly Review* 399; Urbina, "Is it Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning'" (2014) 27 *Canadian Journal of Law and Jurisprudence* 167; von Bernstorff, "Proportionality Without Ad Hoc Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination" in Lazarus et al (eds), *Reasoning Rights: Comparative Judicial Engagement* (2014) at p 63.

59 (2004) 220 CLR 181 at 197 [32]–[33].

> function. ... For a court to describe a law as reasonably appropriate and adapted to a legitimate end is to use a formula which is intended, among other things, to express the limits between legitimate judicial scrutiny, and illegitimate judicial encroachment upon an area of legislative power.

It was in light of these remarks that Gleeson CJ reviewed the comparative jurisprudence on "proportionality" and concluded: "I have no objection to the use of the term proportionality, provided its meaning is sufficiently explained, *and provided such use does not bring with it considerations relevant only to a different constitutional context*".[60]

47. Prior to *McCloy*, the *Lange* test had not been said to countenance a circumstance where legislation might pursue an object that is compatible with the constitutionally prescribed system of government, and do so in a rational manner in circumstances where there is no obvious and compelling way to achieve the object that would impose any lesser burden on the freedom, yet the legislation would be invalid because of a conclusion by a court that the object is of insufficient importance to justify the burden. Such a conclusion would amount to a decision by a court that the object is not important enough to be pursued. Under our constitutional system, value judgments of that kind are ordinarily left to the democratically elected legislature. It would be ironic if a constitutional implication that exists to protect representative democracy is developed in a way that gives the courts a veto over the value judgments of Parliamentarians, who in passing an impugned law expressed a judgment that the object of the law warranted the burden on political communication it imposes. Accordingly, as described below, it should be in only the most limited circumstances, and with the greatest circumspection, that the Court should seek to make a value judgment as to the balance between the importance of the object pursued and the extent of the restriction on the freedom.

48. Recognising the need to limit the circumstances in which such balancing should be undertaken, in *Tajjour*, Crennan, Kiefel and Bell JJ said:[61]

> Inquiry as to whether a burden is undue or as to the importance of a legislative purpose *is necessitated only when the burden effected by the legislation is substantial*. The legislation now under consideration is unlikely to have that effect. Section 93X is not *directed* to the freedom and its effect upon the freedom is *incidental*.

That passage suggests that the "adequate in its balance" question will not have utility unless the burden on the implied freedom is both ***direct*** and ***substantial***.[62]

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[60] (2004) 220 CLR 181 at 200 [39] (emphasis added).
[61] (2014) 254 CLR 508 at 575 [133] (emphasis added).

49. The explanation for that limitation was not expressly addressed in *Tajjour*. However, the explanation may be the distinction, recently affirmed by this Court,[63] between laws that directly prohibit or restrict political communication by reference to its character as such and laws that regulate some other subject matter and only incidentally burden political communication.[64] In *Wotton*[65] it was said that a burden on communication would be more readily seen to be appropriate and adapted where it incidentally, rather than directly, regulated political communication. The "adequate in its balance" test identified at the third stage of the *McCloy* approach may expose the reasoning by which that more stringent testing of laws that directly and substantially burden political communication as such should occur.

50. Alternatively, though this was not in terms foreshadowed in *Tajjour*, it may be that the "adequate in its balance" question is appropriate primarily in cases that concern legislation that has as its object the protection, promotion or enhancement of the system of representative government.[66] In such cases the Court, in determining whether a law is adequate in its balance, will be concerned with balancing positive and negative impacts of an impugned law on the functioning of the system of representative and responsible government. That task may be more suited to the judicial function than the making of value judgments as to the relative weight to be accorded to the freedom of political communication and the promotion of other social values.

51. Irrespective of whether the limitations identified above as to the circumstances in which the "adequacy in its balance" criterion should be applied are adopted, having regard to the matters in paragraphs [44]-[47] above, and consistently with the way in which similar concerns are addressed at the "necessary" stage of the analysis (as explained in paragraph [39] above), the balancing between the importance of the legislative purpose and the effect on the freedom should not involve a refined analysis. As Kiefel CJ has written extra-judicially, when analysing the European approach:[67]

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62 The "direct and substantial" language was also used in McCloy (2015) 257 CLR 178 at 214 [71] (French CJ, Kiefel, Bell and Keane JJ).

63 *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

64 See also *McCloy* (2015) 257 CLR 178 at 214 [70] (French CJ, Kiefel, Bell and Keane JJ).

65 (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

66 See, eg, *ACTV* (1992) 177 CLR 106; *Unions NSW* (2013) 252 CLR 530; *McCloy* (2015) 257 CLR 178.

67 Justice Susan Kiefel, "Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives" (2010) 36(2) *Monash University Law Review* 1, 12.

> The requirement of *proportionality in the strict sense* is said to involve some weighing of the interests involved, but does not seek to achieve the right balance. In requiring that the means used not be disproportionate to the objective, it operates negatively. Importantly, for the purposes of a later Australian comparison, it may be noted that the *relationship* between the means and the end must be a *reasonable* one. The ECJ sometimes uses terms such as 'manifestly inappropriate' to describe infringing legislation but these appear to be statements of a conclusion rather than tests to be applied in reasoning to an outcome of invalidity. (underline added)

52. In this light, the question should be whether the effect on the freedom is manifestly excessive compared to the importance of the legislative purpose. Cast in that way, at least some of the objections in paragraphs [44]-[47] above will be reduced. Among other things, it would not be either suitable or necessary to engage in lengthy debate, perhaps supported by extensive evidence, upon essentially political matters. If the manifestly excessive burden was not readily apparent, the legislation would meet the "adequate in its balance" requirement.

### *(f) The WPP Act*

*(i) Time, manner and place restrictions*

53. As stated above, the object of the WPP is not to prevent political protest, but the protection of the productivity, property and personnel of workplaces. However, the manner in which the WPP Act seeks to achieve this object is by limiting protest activity. This gives rise to a question of principle: whether a law that limits the time, place or manner of political communication, to achieve some other purpose, is necessarily invalid.

54. There is no reason, in principle, why such limitations are necessarily incompatible with the implied freedom. It is well established that the freedom is not absolute,[68] and that laws may pursue social objectives not related to representative or responsible government providing they satisfy the *Lange* test, as modified by *Coleman*. Relevantly, as explained in paragraphs [18]–[261] above, the requirement that the object of the impugned law be compatible with the constitutionally prescribed system of representative and responsible government does not require that that object promote, protect or enhance representative or responsible government, but only that it does not undermine or impede representative or responsible government. The pursuit of such

[68] *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1 at 50-53 (Brennan J), 76-77 (Deane and Toohey JJ), 94-95 (Gaudron J); *ACTV* (1992) 177 CLR 106 at 142-144 (Mason CJ), 169-171 (Deane and Toohey JJ), 217-218 (Gaudron J), 234-235 (McHugh J); *Cunliffe* (1994) 182 CLR 272 at 299 (Mason CJ); *Lange* (1997) 189 CLR 520 at 561 (the Court).

other goals may involve direct restrictions or prohibitions on political communication. The principle that such restrictions will require a "compelling" or "more convincing"[69] justification implicitly confirms that political communication may be directly regulated. Accordingly, the well-established principles in relation to the implied freedom permit direct regulation of political communication in pursuit of other social objectives.

55. To a limited extent, parallels may be drawn with the time, manner and place restrictions on the right to free speech that have been upheld in the United States. These restrictions have been upheld on the basis that freedom of speech must exist in an ordered society.[70] Such restrictions must satisfy four criteria in order to be valid: they must be content neutral; they must serve a significant governmental interest; they must be narrowly tailored to that interest; and they must leave open ample alternative channels for communication.[71] The extent of the restrictions that are permitted depends upon the place being regulated: "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time".[72]

56. Time, manner and place restrictions similar to those imposed by the WPP Act have been upheld in US Courts.[73] Most similarly, in *United States v Fee*,[74] the District Court upheld a time, manner and place restriction in an order that closed an area of forest to the public, banning any expressive conduct in that area by protesters. Even though the order in question was made in response to protests, and its only practical impact was to prevent environmentalists from entering the area to protest, the "principal justifications for the closure of the timber sale area were the protection of public health and safety and the protection of property".[75] Further, although the protesters wished to demonstrate "where the trees were endangered",[76] they were only barred from a specific section of the forest, and were permitted to protest within the forest outside the logging area. It was held they were left ample alternative channels of communication.

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69 See also *McCloy* (2015) 257 CLR 178 at 214 [70] (French CJ, Kiefel, Bell and Keane JJ).
70 *Cox v Louisiana*, 379 US 536 (1965) at 554; *Cox v New Hampshire*, 312 US 569 (1941) at 574.
71 *Ward v Rock against Racism*, 491 US 781 (1989); *Clark v Community for Creative Nonviolence*, 468 US 288 (1984).
72 *Grayned v City of Rockford*, 408 US 104 (1972) at 116.
73 See, eg, *Boos v Barry*, 485 US 312 (1988); *Clark v Community for Creative Non-Violence*, 468 US 288 (1984); *City of Beaufort v Baker*, 315 SC 146 (1993); *Frisby v Schultz*, 487 US 474 (1988); *Hill v Colorado*, 530 US 703 (2000); *Madsen v Women's Health Center*, 512 US 753 (1994); *Schenck v Pro-Choice Network of Western New York*, 519 US 357 (1997).
74 787 F Supp 963 (1992) (***Fee***).
75 787 F Supp 963 (1992) at 969.
76 787 F Supp 963 (1992) at 969.

57. So far as it is relevant, it may also be noted that the WPP Act is "content-neutral". Contrary to the plaintiffs' submissions at [41]–[43], ss 6 and 7 of the Act cannot fairly be characterised as directed to or having the effect of suppressing particular points of view. The definition of "business premises" in s 5(1) covers a broad range of industrial and commercial activities. To take one example, it covers any "shop". Further, while it may be accepted that aspects of that definition make it more likely that the protests caught by the Act will be about mining, forestry and agriculture, nothing in the Act turns on whether the protests are in favour of or against the conduct of those activities. The position is somewhat similar to *Fee*, discussed above, in which it was also held that the legislation was content-neutral, and to *McCullen v Coakley*.[77] In *McCullen*, an Act providing for buffer zones around reproductive centres was held to be content neutral, because: the Act did not draw content distinctions on its face; whether persons violated the Act did not depend on what they said but where they said it; the purpose of the Act was to protect public safety, patient access to health care, and ensure unobstructed use of public streets; and there was no intent to single out speech about abortion.[78]

58. That time, manner and place restrictions are accepted as valid limitations on freedom of speech in the United States of America indicates that such limitations are not inimical to the concept of free speech or, relevantly to Australia, the implied freedom of political communication. Further, the United States jurisprudence emphasises that, at least where time, manner and place restrictions leave open ample alternative channels of communication, they are not to be equated with laws prohibiting political communication, and they ought not attract the degree of scrutiny which would be attracted by such laws.

*(ii) Proportionality testing of the WPP Act*

59. The Commonwealth submits that the means adopted by the WPP Act are reasonably appropriate and adapted to the purpose of the WPP Act.

60. The means adopted under the WPP Act are suitable. The prohibition of protest activity that prevents, hinders or obstructs business activity is capable of realising the purpose of protecting workplace productivity, property and personnel.

61. The means are also necessary, in that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less

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[77] 573 US _ (2014) (***McCullen***).
[78] The Act was held invalid because it was not "narrowly tailored".

restrictive effect on the freedom. The WPP Act only prohibits protest activity that ***prevents, hinders*** *or* ***obstructs*** business activity on business premises or business access areas (s 6), or would cause *damage* to business premises or pose a ***risk to the safety*** of a business occupier (s 7). Both ss 6 and 7 incorporate an element of intention. Further, the WPP Act expressly provides that it does not prevent a person from engaging in a procession, march or event that passes business premises or a business access area at a reasonable speed, once on any day (s 6(5)). This confirms that the WPP Act is not directed to protest activity in and of itself.

62. It is not necessary, in this case, to address the question of whether the law is adequate in its balance. Plainly the WPP Act is not a law the object of which is the protection, promotion or enhancement of the system of representative government, so if the adequate in its balance question is confined to such laws then it has no operation. Even if the question is not so confined, the question nevertheless is not reached because the burden on political protest is not substantial. That follows because, quite independently of the WPP Act, protesters have no right to do many of the things that that Act prohibits. Further, the restrictions on protest activity under the WPP Act are content neutral, and are limited by reference to place and manner, leaving protesters otherwise free to engage in such protest activity as they wish, including protest activity adjacent to business premises and access areas.

## PART V LENGTH OF ORAL ARGUMENT

63. Approximately 30 minutes will be required for the presentation of oral argument.

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