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

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Filed on behalf of the Attorney-General of Victoria

Dated: 28 March 2017

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PART I: CERTIFICATION

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

PARTS II & III: INTERVENTION

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

PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

3. The applicable constitutional and statutory provisions are identified and extracted in the annexures to the submissions of the plaintiffs and the defendant.

PART V: ARGUMENT

4. In summary:

   (a) although the *Workplaces (Protection From Protesters) Act 2014* (Tas) (**Act**) imposes a burden on communication about political or governmental matters, it does so for the legitimate purpose of protecting businesses from conduct that seriously interferes with the carrying out of business activity, or with access to business premises, and from acts causing damage to business premises and business-related objects; and

   (b) the Act is reasonably appropriate and adapted to serve that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

The relevant inquiry

5. The implied freedom of communication about political or governmental matters is a "qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors'."[1] The determination of whether a law infringes the implied freedom involves two questions (***Lange* questions**):[2]

> The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government[.]

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1 *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at 193 [2] (French CJ, Kiefel, Bell and Keane JJ), citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 560.

2 *Wotton v Queensland* (2012) 246 CLR 1 at 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

6. Although recent decisions of this Court have elaborated on the analysis to be employed in answering the *Lange* questions, it is submitted that those questions continue to identify the relevant inquiry for determining whether a law infringes the implied freedom.[3]

Construction

7. Before turning to the *Lange* questions, it is first necessary to construe the Act.[4] The relevant provisions are set out in the submissions of the parties.

8. The offences in ss 6(4) and 8(1) of the Act can only be committed after a police officer has given a valid direction under s 11 of the Act. An officer may only give such a direction to a person who is on business premises (s 11(1)), or in a business access area (s 11(2)) — no valid direction can be given to a person who is not on or in such an area. Further, a police officer may only give such a direction if he or she has reasonable grounds to believe[5] that a person has committed, is committing, or is about to commit, an offence against a provision of the Act, or a contravention of s 6(1), (2) or (3) of the Act, on or in relation to the business premises or business access area.

9. Sections 6(1), (2) and (3) and 7(1) and (2) of the Act proscribe particular conduct on the part of persons engaging in a "protest activity". A person will only be engaging in a "protest activity" within the meaning of the Act if he or she is on business premises or in a business access area in relation to business premises (s 4(2)(a)). Accordingly, a person cannot contravene ss 6(1), (2) or (3) or 7(1) or (2) of the Act unless he or she is on or in such an area. Even if a person is on or in such an area, that person will not be engaging in a "protest activity" if he or she has the consent, whether express or implied, of a business occupier in relation to the business premises to be there and to engage in that activity (s 4(5)).

10. The prohibitions created by s 6(1), (2) and (3) apply to conduct that "prevents, hinders or obstructs" particular activity or access to premises. Ordinary principles of statutory construction, including the principle of legality, require that the words "prevents, hinders or obstructs" in those sub-sections be given a narrow construction, and limited to cases where the relevant conduct seriously interferes with the carrying out of the relevant business activity, or access to business premises.

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3 (2015) 257 CLR 178 at 193 [2] (French CJ, Kiefel, Bell and Keane JJ), 230-232 [125]-[131] (Gageler J), 258 [220] (Nettle J), 280-281 [306]-[307] (Gordon J).

4 *Coleman v Power* (2004) 220 CLR 1 at 21 [3] (Gleeson CJ), 68 [158] (Gummow and Hayne JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 (***Gypsy Jokers***) at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ).

5 See *George v Rockett* (1990) 170 CLR 104 at 112-113; *Gypsy Jokers* (2008) 234 CLR 532 at 557-558 [28] (Gummow, Hayne, Heydon and Kiefel JJ).

11. In a way that reflects the lack of "concrete adverseness" in this case,[6] the plaintiffs argue that s 6 of the Act applies to acts "having even a minor or transient effect on business activity".[7] It is unlikely that persons immediately and directly affected by the Act would advance such an interpretation. Nor should that interpretation be accepted.

12. The ordinary connotations of the words "prevents", "hinders" and obstructs", the confinement of "protest activity" to activity that occurs on business premises or in a business access area, and the inclusion in the Act of powers for the removal of obstructions (s 12), and the removal of persons (s 13), all indicate that the focus of s 6 is on physical impediments to the carrying on of business activity, or access to business premises, which impediments are located on business premises or in a business access area. Each of the matters referred to above tends against a construction of s 6 that encompasses conduct constituting a minor or transient interference with business activity, or conduct that merely deters customers without creating any physical impediment. This is consistent with the inclusion of s 6(5) in the Act, given the potential for a march or event to constitute a significant physical impediment to access to business premises lasting for a considerable period.

13. Further, the words "prevents, hinders or obstructs" in s 6 form part of a provision the contravention of which may constitute a criminal offence. That offence has the potential to restrict the freedom of speech recognised at common law. In these circumstances, the principle of legality requires that s 6 should be narrowly construed, so far as constructional choices are open, in order to limit the restriction imposed on the freedom.[8] This tells against a reading of the provision that would extend to minor or transient interference with business activity.

14. Moreover, in circumstances where, as here, constitutional considerations are relevant, the construction of words such as "hinders or obstructs", which can have different meanings, should be constrained by the principle that a construction which avoids constitutional invalidity should be preferred.[9]

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6 See *Kuczborski v Queensland* (2014) 254 CLR 51 (2014) 254 CLR 51 at 109 [186], 113 [207] (Crennan, Kiefel, Gageler and Keane JJ), citing *Baker v Carr* (1962) 369 US 186 at 204. See also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 261-262 [37] (Gaudron, Gummow and Kirby JJ); *Northern Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 626-628 [150]-[153] (Keane J).

7 Plaintiffs' submissions at [45].

8 See *Coleman v Power* (2004) 220 CLR 1 at 75-76 [185]-[188] (Gummow and Hayne JJ), 87 [225], 96-98 [250]-[253] (Kirby J); *Hogan v Hinch* (2011) 243 CLR 506 at 542 [47] (French CJ); *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at 545-546 [28] (French CJ).

9 *Gypsy Jokers* (2008) 234 CLR 532 at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ); *Acts Interpretation Act 1931* (Tas), s 3.

The first *Lange* question

15. As noted above, the first *Lange* question asks whether, in its terms, operation or effect, the impugned law effectively burdens freedom of communication about political or governmental matters. To constitute an "effective" burden, the law must impose a real, meaningful and not insubstantial limit or restriction on the freedom of political communication protected by the Constitution.[10]

16. Tasmania accepts that, in certain circumstances, the Act will impose an effective burden on communication about political or governmental matters.[11] That is sufficient to answer "yes" to this question.

17. However, in addressing the second *Lange* question, it is necessary to have regard to the nature and the extent of the relevant burden. Some analysis of the nature and extent of that burden is therefore warranted.

18. Together, ss 6, 7, 8 and 11 of the Act create a statutory scheme that, when employed, may operate to prevent or terminate conduct which involves the presence of protesters on business premises or a business access area and which has as its aim the promotion of an opinion or belief in respect of a political, environmental, social, cultural or economic issue — but only where a police officer has reasonable grounds to believe, among other things, that a person is engaging in a "protest activity" within the meaning of the Act, and that the conduct would seriously interfere with the carrying out of a business activity or access to business premises, or cause damage to business premises or a business-related object.

19. While it cannot be doubted that conduct which involves the physical presence of protesters on business premises can constitute political communication,[12] it is also true that, where conduct of that kind has effects beyond the communication of ideas or information, there are likely to be legitimate reasons to regulate it. As Brennan CJ observed in *Levy v Victoria*:[13]

> [W]hile the speaking of words is not inherently dangerous or productive of a tangible effect that might warrant prohibition or control in the public interest, non-verbal conduct may, according to its nature and effect, demand legislative or executive prohibition or control even though it conveys a political message. Bonfires may have to be banned to prevent the outbreak of bushfires, and the lighting of a bonfire does not escape such a ban by the hoisting of a political effigy as its centrepiece. A law which prohibits non-verbal conduct for a legitimate

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10 *Wotton v Queensland* (2012) 246 CLR 1 at 24 [54] (Heydon J). See also *Monis v The Queen* (2013) 249 CLR 92 (***Monis***) at 212 [343] (Crennan, Kiefel and Bell JJ).

11 Amended Defence at [42] [SCB 143].

12 *Levy v Victoria* (1997) 189 CLR 579 at 594-595 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-623 (McHugh J).

13 (1997) 189 CLR 579 at 595 (Brennan CJ).

purpose other than the suppressing of its political message is unaffected by the implied freedom if the prohibition is appropriate and adapted to the fulfilment of that purpose.

20. Implicit in the scheme created by the Act is a recognition that the conduct to which the Act is directed has a dual character: not only will it be capable of being a communication about political or governmental matters, it will also have the effect of retarding lawful business activity. It is the capacity of the conduct to have the latter effect that makes it attractive to the protester: it involves both physically impeding the lawful activity that the protester seeks to stop and drawing attention to that activity. However, it is the desire to protect the carrying out of lawful business activity that renders the conduct of the protester a legitimate subject of regulation.

21. The dual character of the conduct that the Act seeks to regulate is relevant to the extent of the burden, the ascertainment of the purpose of the legislation, and its justification. The direct references to "protester" and "protest activity" in the Act are not simply provocative. Rather, they reflect a judgment that the form of protest is not concerned with the flow of information so much as with the physical disruption of business activity. That disruption is not an incident of the protest or a by-product of the expression of opinion but rather an end in itself.

22. The plaintiffs seek to emphasise the aspect of communication while underplaying the narrowness of the limits that are reflected in the Act. The Act is limited both in the location of its operation (business premises and business access areas) and in the conduct that it seeks to proscribe (conduct that "prevents, hinders or obstructs" the carrying out of business activity, or access to business premises, or causes damage to business premises or business-related objects), and is agonistic as to the content of any communication that it burdens. These limits are explored below.

23. ***First***, as noted above, the Act limits its definition of "protest activity" to activity that occurs on business premises or in a business access area in relation to business premises, and limits the class of persons to whom a direction may be given under s 11 to persons who are on or in such an area. The Act has no effect on political communication that does not involve the physical presence of participants (for example, communication that takes place online, by broadcast media, or by post). In particular, it does not prevent broadcasting images of parts of the environment at risk of forestry operations [SCB 63-64 [58]]. Nor does the Act have any effect on protests that take place on land that is not business premises or a business access area.

24. The ability of any person to be physically present on business premises or a business access area is already significantly limited by laws the validity of which is not

challenged in this proceeding. For example, a person's ability lawfully to enter or remain on private business premises is limited by the law of trespass.[14] Similarly, a person's ability lawfully to remain in a business access area is limited by the law of nuisance, and by other laws prohibiting the obstruction of highways.[15] Police officers in Tasmania have the power to require persons to cease obstructing the movement of pedestrians or vehicles.[16] Further, in respect of forestry land, provisions of the *Forest Management Act 2013* (Tas) (**FMA**) allow for forest roads and permanent timber production zone land to be closed to members of the public.[17]

25. It must be remembered that analysis of the extent of the burden that a law imposes on political communication must proceed on the basis that the implied freedom "exists to protect: systemic integrity, not personal liberty; communication, not expression; and political communication, not communication in general".[18] The focus of the analysis is on how the Act affects the freedom generally, not the extent to which a particular person is limited in expressing himself or herself.[19] As this Court has observed many times, the Constitution does not protect a personal right of political communication.[20] The implied freedom:[21]

> gives immunity from the operation of laws that inhibit a right or privilege to communicate political and governmental matters. But, as *Lange* shows, that right or privilege must exist under the general law.

26. ***Second***, the Act does not apply to protest activity unless it "prevents, hinders or obstructs" the carrying out of a business activity, or access to business premises, or causes damage to business premises or a business-related object. For the reasons given above, the words "prevents, hinders or obstructs" must be given a narrow meaning, limited to serious interference. It follows that the Act will have no effect on protests on business premises that cause only minor or transient interference with the carrying out of business activity. Nor will it have any effect on protests on business

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14 *Coco v The Queen* (1994) 179 CLR 427 at 435 (Mason CJ, Brennan, Gaudron and McHugh JJ). See also *Police Offences Act 1935* (Tas), s 14B.

15 See, generally, *R v Commissioner of Police; Ex parte North Broken Hill Ltd* (1992) 1 Tas R 99.

16 *Police Offences Act 1935* (Tas), s 15B.

17 FMA, ss 21, 22 and 23.

18 *McCloy* (2015) 257 CLR 178 at 288-289 [119] (Gageler J).

19 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 [381] (Hayne J); *Wotton v Queensland* (2012) 246 CLR 1 at 31 [80] (Kiefel J); *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 (***Adelaide Corporation***) at 89 [220] (Crennan and Kiefel JJ); *Monis* (2013) 249 CLR 92 at 129 [62] (French CJ); *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions NSW***) at 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

20 See, for example, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 150 (Brennan J); *Lange* (1997) 189 CLR 520 at 560; *Adelaide Corporation* (2013) 249 CLR 1 at 73-74 [166] (Crennan and Kiefel JJ); *Unions NSW* (2013) 252 CLR 530 at 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

21 *Levy v Victoria* (1997) 189 CLR 579 at 622 (McHugh J).

premises conducted after business hours, provided that the protest does not damage the business premises or a business-related object.

27. Like a person's ability to be physically present on business premises or a business access area, a person's ability to engage in conduct that seriously interferes with the carrying out of business activity, or access to business premises, or causes damage to business premises, is already limited by laws the validity of which is not challenged in this proceeding. For example, obstructing access to business premises may be a tort or an offence.[22] Further, it is an offence in Tasmania unlawfully to destroy or injure property.[23]

28. ***Third***, contrary to the plaintiffs' submissions,[24] in regulating conduct of the kind described above, the Act does not discriminate with respect to the content of political communication. No discrimination arises from the types of business premises that are subject to the operation of the Act. The term "business premises" has a broader meaning than the plaintiffs suggest, including premises used for manufacturing, building or construction, or as a shop, market or warehouse (s 5(1)), and is by no means limited to primary industries.

29. The Act can be distinguished from the law at issue in *ACTV*, which took a medium of communication that was previously available to all and imposed discriminatory limits on the extent to which it could be accessed by different groups.[25] Here, by contrast, protesters were never free to behave as they wished on business premises belonging to another. The common law has long recognised the right of the occupier of private premises to consent to a person's presence, or require that person to leave.[26] The Act does not give rise to discrimination between different ideas or views in the same way as the law at issue in *ACTV*.

30. For these reasons, although the Act will, in some circumstances, impose an effective burden on political communication, it is a burden that is limited in its extent, and not discriminatory in its operation.

The second *Lange* question

31. As noted above, if an impugned law does effectively burden freedom of political communication, the second *Lange* question asks whether the law is reasonably

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22 See *Sid Ross Agency Pty Ltd v Actors & Announcers Equity Association of Australia* [1971] 1 NSWLR 760 (***Sid Ross***) at 767 (Mason JA); *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383 (***Dollar Sweets***) at 388-389; *Police Offences Act 1935* (Tas), s 13.

23 *Criminal Code* (Tas), s 273.

24 Plaintiffs' submissions at [41]-[42].

25 See *ACTV* (1992) 177 CLR 106 at 129, 132 (Mason CJ).

26 *Coco v The Queen* (1994) 179 CLR 427 at 435 (Mason CJ, Brennan, Gaudron and McHugh JJ).

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. There are two stages to this inquiry.

Compatibility with the constitutionally prescribed system

32. At the first stage, it is necessary to identify the purpose of the law[27] and to ask whether that purpose is legitimate, in the sense of being compatible with the maintenance of the constitutionally prescribed system.[28] This stage "requires that the imposition of the restriction on political communication is *explained* by the law's pursuit of an end which is consistent with the preservation of the integrity of the system of representative and responsible government".[29]

Identification of the purpose

33. Identifying the object or purpose of the impugned law involves the application of ordinary processes of statutory construction,[30] with a view to identifying what the law is designed to achieve in fact.[31]

34. Read together, ss 6, 8 and 11 of the Act are directed to the prevention or termination of conduct that seriously interferes with the carrying out of business activity, or access to business premises. Sections 7, 8 and 11 are directed to the prevention or termination of acts causing damage to business premises or business-related objects (including acts likely to cause a risk to the safety of a business occupier in relation to business premises), and from threats of such damage. Sections 9 and 12 provide for the removal of obstructions that seriously interfere with the carrying on of business activity, or access to business premises, or cause damage to business premises.

35. It follows that the purpose of the Act — what it is designed to achieve in fact — is to protect businesses in Tasmania from conduct that seriously interferes with the carrying out of business activity, or access to business premises on which that business activity is conducted, and from acts that cause damage to business premises and business-related objects.

36. It is true that s 6(1), (2) and (3) and s 7(1) and (2) of the Act are limited in their operation to interference and damage which is caused by persons engaging in "protest

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27 *Unions NSW* (2013) 252 CLR 530 at 556 [46] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

28 *McCloy* (2015) 257 CLR 178 at 212-213 [67] (French CJ, Kiefel, Bell and Keane JJ), 231 [130] (Gageler J), 284 [320] (Gordon J).

29 *McCloy* (2015) 257 CLR 178 at 231 [130] (Gageler J).

30 *Monis* (2013) 249 CLR 92 at 147 [125] (Hayne J), 205 [317] (Crennan, Kiefel and Bell JJ); *Unions NSW* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at 212-213 [67] (French CJ, Kiefel, Bell and Keane JJ).

31 *McCloy* (2015) 257 CLR 178 at 232 [132] (Gageler J).

activity". However, this does not lead to the conclusion, contended for by the plaintiffs,[32] that the purpose of the Act is to prevent or to punish the expression of particular views, or to prevent or punish protest activity more generally. That purpose is not apparent on any fair reading of the Act.

37. The Act does not prohibit or even regulate political communication or protests *per se*. It attaches no consequence to the mere fact that a person engages in an act of political communication or protest, or in "protest activity" as defined. Rather, as noted above, the Act operates in respect of conduct which seriously interferes with the carrying out of business activity, or access to business premises, or involves damage to business premises or business-related objects, where that conduct is engaged in as part of "protest activity". It has already been noted that "protest activity" as defined is limited to activity that takes place on business premises or a business access area.

38. Nor does the Act single out a particular idea or point of view for regulation. Instead, it regulates a particular form of activity by which ideas may be communicated.[33] The presence of a mechanism for business occupiers to consent to conduct occurring on their business premises does not render the Act discriminatory in its operation. Rather, it reflects long-standing conceptions of the rights of an occupier of property which, among other things, form part of the law of trespass.

39. The fact that ss 6(1), (2) and (3) and 7(1) and (2) of the Act are limited in their operation to serious interference and damage which is caused by persons engaging in "protest activity" does not determine the purpose of the Act. To find that it does would be to conflate what the law does with what it seeks to achieve. Instead, the fact that those provisions operate in relation to "protest activity" goes to whether the means adopted by the Act are connected to, and promote the achievement of, its purposes[34] — a matter addressed in paragraphs 55 to 60 below.

Compatibility of this purpose with the constitutionally prescribed system

40. Having identified the purpose of the law, it is necessary to consider whether that purpose is compatible with the system of representative and responsible government established by the Constitution.[35]

41. For a legislative purpose to be compatible with that system, it is not necessary that it involve the maintenance or enhancement of freedom of political communication.[36]

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32 Plaintiffs' submissions at [36].
33 See *ACTV* (1992) 177 CLR 106 at 143 (Mason CJ).
34 See *McCloy* (2015) 257 CLR 178 at 232 [132] (Gageler J).
35 *McCloy* (2015) 257 CLR 178 at 212-213 [67] (French CJ, Kiefel, Bell and Keane JJ), 231 [130] (Gageler J), 284 [320] (Gordon J).

Legislative ends that have been accepted as being legitimate in this context include: the protection of reputation;[37] the prevention of physical injury;[38] the prevention of violence in public places;[39] the prevention of the obstruction of roads;[40] the protection, preservation, maintenance and equitable use of public places;[41] and the protection of citizens from the intrusion into their personal domain of unsolicited material which is seriously offensive.[42]

42. Like these ends, the protection of businesses from conduct that seriously interferes with the carrying out of business activity, or access to business premises, and from acts causing damage to business premises and business-related objects, is compatible with the maintenance of the constitutionally prescribed system described in *Aid/Watch Inc v Federal Commissioner of Taxation*.[43]

43. Business activity of the kind protected by the Act forms an important part of the economies of the States and Territories. Among other things, it generates employment, contributes to the availability of goods and services, and provides a source of taxation revenue. It is legitimate for a State to seek to protect that activity from serious interference and to protect business premises from damage. That is not a purpose which is directed to limiting freedom of communication or otherwise interfering with the constitutionally prescribed system referred to above. To the contrary, ss 51(i), 90, 92, 100, 101 and 112 of the Constitution indicate that, at a broad level, that system was predicated on the continuation of economic activity in the various States.

44. The compatibility of this purpose with the constitutionally prescribed system referred to above is also demonstrated by the policy and principles underlying aspects of the general law that protect the rights of business occupiers in relation to business premises, and by the history of Australian laws directed to the same or similar ends.[44]

45. Many aspects of the general law reflect a long-standing recognition of the desirability of business occupiers being able to carry on business activity and access business

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36 *Monis* (2013) 249 CLR 92 at 148 [128] (Hayne J).
37 *Lange* (1997) 189 CLR 579.
38 *Levy v Victoria* (1997) 189 CLR 579.
39 *Coleman v Power* (2004) 220 CLR 1.
40 *Adelaide Corporation* (2013) 249 CLR 1.
41 *Muldoon v Melbourne City Council* (2013) 217 FCR 450. See also *Thomas v Chicago Park District* (2002) 534 US 316.
42 *Monis* (2013) 249 CLR 92 at 205 [320] (Crennan, Kiefel and Bell JJ).
43 (2010) 241 CLR 539 at 556 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Wotton v Queensland* (2012) 246 CLR 1 at 13 [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
44 As to the relevance of the general law, see *Monis* (2013) 249 CLR 82 at 148-149 [128] (Hayne J), 189 [266] (Crennan, Kiefel and Bell JJ).

premises without serious interference. It is a fundamental common law right of an occupier of private premises to determine who may enter and remain on those premises.[45] It is also a common law right of an occupier of premises to enter and exit those premises without interference.[46] Further, the action for trespass is available for acts causing damage to business premises or business-related objects.

46. These common law rights are reflected in long-standing State laws. In Tasmania, it is an offence to commit a nuisance,[47] unlawfully to enter land without the consent of the occupier,[48] or unlawfully to destroy or injure property.[49] Police officers in Tasmania have the power to require persons to cease obstructing the movement of pedestrians or vehicles.[50] Specific legislative regimes apply in relation to parts of Crown lands used as business premises.[51] The plaintiffs do not challenge the validity of these laws, or the long-standing common law rights that they reflect.

47. Apart from protests, the form of organised activity with the most obvious potential seriously to interfere with the carrying out of business activity is industrial action. The long history of regulation of industrial action in Australia may be taken, at least in part, to reflect a desire that industrial disputes not unduly interfere with the carrying on of business activity. This is perhaps most evident in Australia's systems of compulsory conciliation and arbitration of industrial disputes. On its introduction in 1904, the relevant federal law made it an offence to engage in a strike.[52] Today, the circumstances in which most persons can lawfully engage in industrial action are controlled by the *Fair Work Act 2009* (Cth).[53]

48. For these reasons, the purpose of protecting businesses from conduct that seriously interferes with the carrying out of business activity, or access to business premises, and from acts causing damage to business premises and business-related objects, is compatible with the maintenance of the constitutionally prescribed system of representative government.

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45 See *Coco v The Queen* (1994) 179 CLR 427 at 435 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Kuru v New South Wales* (2008) 236 CLR 1 at 14-15 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

46 See *Sid Ross* [1971] 1 NSWLR 760 at 767 (Mason JA); *Dollar Sweets* [1986] VR 383 at 388-389. See also *Folland v Stevens* [1915] SALR 25; *McFadzean v Construction Forestry Mining and Energy Union* (2007) 20 VR 250 at 282-283 [123]-[126].

47 *Police Offences Act 1935* (Tas), s 13.

48 *Police Offences Act 1935* (Tas), s 14B.

49 *Criminal Code* (Tas), s 273.

50 *Police Offences Act 1935* (Tas), s 15B.

51 See, for example, FMA, ss 21, 22 and 23; *Mineral Resources Development Act 1995* (Tas), s 84; *Crown Lands Act 1976* (Tas), s 47.

52 *Commonwealth Conciliation and Arbitration Act 1904* (Cth), s 6(1). See also *Conciliation Act 1894* (SA), s 63; *Industrial Arbitration Act 1901* (NSW), s 34.

53 See *Fair Work Act 2009* (Cth), Part 3-3.

Compatibility of the means with the constitutionally prescribed system

49. In *McCloy*, a majority of the Court stated that it is necessary to consider not only whether the purpose of the impugned law is compatible with the maintenance of the constitutionally prescribed system, but also whether the means adopted to achieve that purpose are compatible with that system.[54] Although reference was made to the judgment of McHugh J in *Coleman v Power*,[55] the majority did not expressly identify how the compatibility of the means with the constitutionally prescribed system was to be determined.

50. It is submitted that there are two inquiries relevant to the determination of this question. The first is whether the means adopted by the law are rationally connected to the law's legitimate purpose. The second is the ultimate inquiry to which the second *Lange* question is directed: whether the law is reasonably appropriate and adapted to serve the identified legitimate purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government. Both of these inquiries are addressed below.

51. It is submitted that, apart from these inquiries, there is no independent test by which the compatibility of the means adopted by a law with the constitutionally prescribed system can be tested. It is the premise of the *Lange* questions that a law may adopt means that impose a burden on political communication. The implied freedom is not absolute. The means adopted by a law will be compatible with the constitutionally prescribed system of representative and responsible government where they are both explained and justified by the law's pursuit of a legitimate purpose.

Reasonably appropriate and adapted

52. At the second stage of considering the second *Lange* question, it is necessary to examine the way in which the law operates and to ask whether the law is reasonably appropriate and adapted to serve the identified legitimate purpose in a manner compatible with the maintenance of the constitutionally prescribed system.[56] It "requires that the restriction on political communication that is imposed by the law be *justified* by the law's reasonable pursuit of the identified legitimate end".[57]

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54 *McCloy* (2015) 257 CLR 178 at 193-195 [2], 203 [31] and 212-213 [67] (French CJ, Kiefel, Bell and Keane JJ).

55 *McCloy* (2015) 257 CLR 178 at 203 [31] (French CJ, Kiefel, Bell and Keane JJ), citing *Coleman v Power* (2004) 220 CLR 1 at 50-51 [92]-[96] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J).

56 *McCloy* (2015) 257 CLR 178 at 193-195 [2] (French CJ, Kiefel, Bell and Keane JJ), 232 [131] (Gageler J), 285 [327] (Gordon J).

57 *McCloy* (2015) 257 CLR 178 at 232 [131] (Gageler J).

53. In *McCloy*, the majority identified several "tools to assist in the determination of the limits of legislative powers which burden the freedom".[58] The way in which these tools of analysis apply to the Act is considered below. However, it is submitted that the relevant question remains whether the Act is reasonably appropriate and adapted to serve the identified legitimate purpose in a manner compatible with the maintenance of the constitutionally prescribed system referred to above. While the tools of analysis identified in *McCloy* may be applied as a means of elucidating the answer to that question, they do not displace the question.

54. For the reasons given below, it is submitted that the burden that the Act imposes on political communication is appropriate and adapted to serve the legitimate purpose of protecting businesses from activity that seriously interferes with the carrying out of business activity, or access to business premises, or causes damage to business premises or business-related objects.

Rational connection between means and purpose

55. One tool of analysis that has been employed in answering the second *Lange* question is to ask whether the means employed by the impugned law are rationally connected to the law's identified legitimate purpose.

56. The means employed by a law can only be explained (and, it follows, justified) by the law's pursuit of a legitimate purpose if those means are rationally connected to that purpose.[59] For such a connection to exist, the means employed must be "capable of advancing" the purpose.[60] They must "further [the purpose] in some way",[61] or be capable of contributing to its realisation.[62] It is not necessary to show that the law has in fact achieved, or will in fact achieve, the relevant purpose.[63]

57. The means employed by the Act are capable of advancing the legitimate purpose of protecting businesses from conduct that seriously interferes with the carrying out of business activity, or access to business premises, and from acts causing damage to business premises and business-related objects.

58. As discussed above, ss 6, 7, 8 and 11 of the Act are directed to conduct of precisely that character occurring on business premises or a business access area. Where such conduct is engaged in by a person who is engaging in protest activity, it may

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58 *McCloy* (2015) 257 CLR 178 at 195-196 [4] (French CJ, Kiefel, Bell and Keane JJ).
59 *McCloy* (2015) 257 CLR 178 at 232-233 [132]-[133] (Gageler J).
60 *Tajjour* (2014) 254 CLR 508 at 571 [112] (Crennan, Kiefel and Bell JJ).
61 *Unions NSW* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
62 *McCloy* (2015) 257 CLR 178 at 217 [80] (French CJ, Kiefel, Bell and Keane JJ).
63 *Tajjour* (2014) 254 CLR 508 at 563 [82] (Hayne J).

constitute an offence under s 7, or provide a police officer with reasonable grounds to issue a direction under s 11 (a failure to comply with which may constitute an offence under s 6(4) or 8(1)). It is evident that the Act provides means by which conduct of the kind described above can be prevented or terminated. It is apt to further the purpose of protecting businesses from conduct of that kind.

59. The plaintiffs contend that the fact that ss 6(1), (2) and (3) and 7(1) and (2) of the Act are limited in their operation to serious interference and damage which is caused by persons engaging in "protest activity" means that the Act is not rationally connected to its purpose.[64] However, the means employed by a law may be rationally connected to the law's purpose even if the law does not provide comprehensively for the achievement of that purpose.[65] Where the purpose of a law is to prevent conduct of a particular kind, the law may have a rational connection to that purpose even if it does not prevent all instances of that conduct. In *McCloy*, for example, the fact that the law targeted only property developers (and certain other entities) did not preclude a finding that it was rationally connected to its purpose of preventing corruption.[66]

60. The recent history of protest activity in relation to forest operations in Tasmania shows that protesters regularly engage in conduct that seriously interferes with the carrying out of business activity, or in acts causing damage to business premises and business-related objects [SCB 65-66 at [64]-[67]]. The most obvious other form of activity with the potential seriously to interfere with the carrying out of business activity — industrial action — is already subject to extensive regulation at both a State and federal level. In these circumstances, even though ss 6(1), (2) and (3) and 7(1) and (2) of the Act are limited in their operation to interference and damage which is caused by persons engaging in "protest activity", there is a clear basis to find that those provisions are connected to the Act's purpose as described above, and will further that purpose.

Alternative, reasonably practicable, less restrictive means

61. Another tool of analysis that has been employed in answering the second *Lange* question is to ask whether there are alternative, reasonably practicable means of achieving the same end which have a less restrictive effect on the freedom.[67] If such means are available, the pursuit of the legitimate purpose will not justify the use of means that impose a greater burden on the freedom.

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64 Plaintiffs' submissions at [39]-[40].
65 *McCloy* (2015) 257 CLR 178 at 212 [64] (French CJ, Kiefel, Bell and Keane JJ).
66 See *McCloy* (2015) 257 CLR 178 at 209-210 [54]-[56] (French CJ, Kiefel, Bell and Keane JJ).
67 *McCloy* (2015) 257 CLR 178 at 210 [57] (French CJ, Kiefel, Bell and Keane JJ).

62. It has been recognised that this tool of analysis has limitations reflecting the proper role of courts in the constitutional system. In considering alternative means that may be available to achieve a particular end, courts "must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments".[68] Three relevant limitations may be identified.

63. First, the Court must not engage in a "hypothetical exercise of improved legislative design" and, in so doing, enter the realm of the legislature.[69] Rather, any alternative means relied upon must be "obvious and compelling".[70] Where another State has legislated on the same topic, that legislation may be found to constitute an obvious and compelling alternative,[71] but that will not always be the case.[72] Other polities may adopt different laws because they are in fact directed to different ends, or because those polities exist in different environments.[73] Even where laws are directed to the same ends, the different means used to achieve them will reflect policy choices, in which factors such as the cost of a measure have been balanced against its perceived importance as part of the State's policy agenda.

64. Second, any alternative means must be "equally practicable".[74] That is, they must be "as effective as" the provisions of the impugned law in achieving the desired end,[75] and must not reduce the efficacy of the statutory scheme.[76] Apart from imposing a lesser burden on freedom of political communication, the alternative means must be "identical in its effects to the legislative measures which have been chosen".[77] The Court must not proceed on the basis that the legislature would adopt a measure which was less effective in achieving its purpose — to approach the matter in that way "would involve the Court impermissibly substituting the legislative provision under consideration for something else."[78]

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68 *Tajjour* (2014) 254 CLR 508 at 550 [36] (French CJ); *McCloy* (2015) 257 CLR 178 at 211 [58] (French CJ, Kiefel, Bell and Keane JJ).

69 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 (***Murphy***) at 1039 [39] (French CJ and Bell J), 1080 [303] (Gordon J).

70 *Monis* (2013) 249 CLR 92 at 214 [347] (Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at 285-286 [328] (Gordon J).

71 See *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

72 See *Murphy* (2016) 90 ALJR 1027 at 1045 [72]-[73] (Kiefel J).

73 *Murphy* (2016) 90 ALJR 1027 at 1064 [216] (Keane J).

74 *Monis* (2013) 249 CLR 92 at 214 [347] (Crennan, Kiefel and Bell JJ); *Tajjour* (2014) 254 CLR 508 at 571-572 [113]-[116] (Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at 285-286 [328] (Gordon J).

75 *McCloy* (2015) 257 CLR 178 at 211 [61] (French CJ, Kiefel, Bell and Keane JJ).

76 *McCloy* (2015) 257 CLR 178 at 211 [62] (French CJ, Kiefel, Bell and Keane JJ). See also *Tajjour* (2014) 254 CLR 508 at 555-556 [90] (Hayne J).

77 *Murphy* (2016) 90 ALJR 1027 at 1044 [65], 1045 [72]-[73] (Kiefel J).

78 *Tajjour* (2014) 254 CLR 508 at 572 [115] (Crennan, Kiefel and Bell JJ).

65. Third, any alternative means must be "equally ... available".[79] Alternative means will not be equally available if they require "not insignificant government funding",[80] or if the achievement of the desired end through those means would involve the application of additional personnel and resources.[81] This recognises that proportionality analysis does not involve courts determining policy or fiscal choices, which are the province of the legislature.[82]

66. What follows from these limits is that a law will not be invalid merely because it is possible to identify a way in which the impugned law might impose a lesser burden on freedom of political communication.[83] For an alternative measure to be a relevant comparator for the purposes of this analysis, it must meet each of the requirements outlined above. Any departure from these requirements would, in effect, involve the Court in a process of redesigning legislation to minimise its burden on political communication.[84]

67. The plaintiffs propose a number of alternatives,[85] but none of these are relevant comparators for the purpose of this tool of analysis.

(a) The FMA is not as effective as the Act at protecting businesses generally, as it applies only to forest roads and permanent timber production zone land. Further, as the provisions of the FMA are not limited to conduct that interferes with business activity or causes damage to business premises, it is not clear that they impose a lesser burden on the freedom.

(b) Section 15B(1) of the *Police Offences Act 1935* (Tas) applies only to a person who is "in a public place", and would not apply to private business premises.

(c) The Western Australian example is not yet law. Rather, it is an example of a hypothetical legislative design. The *Inclosed Lands Protection Act 1901* (NSW) applies only to "inclosed lands", and would not be as effective as the Act in preventing interference with access to business premises, or protecting businesses on lands that are not enclosed, such as forestry operations. Further, it proscribes a broader range of conduct than the Act, including merely entering into "inclosed lands" without the consent of the occupier (s 4(1)).

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79 *Monis* (2013) 249 CLR 92 at 214 [347] (Crennan, Kiefel and Bell JJ).
80 *Murphy* (2016) 90 ALJR 1027 at 1044 [65], 1045 [72]-[73] (Kiefel J).
81 *Murphy* (2016) 90 ALJR 1027 at 1072 [253] (Nettle J).
82 *Murphy* (2016) 90 ALJR 1027 at 1045 [72]-[73] (Kiefel J), 1072 [253]-[254] (Nettle J).
83 *Murphy* (2016) 90 ALJR 1027 at 1040 [42] (French CJ and Bell J).
84 *McCloy* (2015) 257 CLR 178 at 217 [82] (French CJ, Kiefel, Bell and Keane JJ); *Murphy* (2016) 90 ALJR 1027 at 1051 [109] (Gageler J), 1079 [299] (Gordon J).
85 Plaintiffs' submissions at [64]-[68].

68. It follows that no alternative means has been identified which meets each of the requirements outlined above.

Adequate in its balance

69. In *McCloy*, a majority of the Court identified a further relevant inquiry as being whether the burden that the impugned law imposes on freedom of political communication is undue, having regard "not only … to the extent of the effect on the freedom, but also … to the public importance of the purpose sought to be achieved".[86] It was said that "the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate".[87]

10 70. It was recognised that this tool of analysis requires the Court to make a "value judgment", and that, in doing so, the Court must act consistently with the limits of the judicial function.[88] In particular, it was said that the Court must not substitute its own assessment of the balance struck between the importance of the purpose and the extent of the restriction on the freedom for that of the legislative decision-maker.[89] However, a finding that a law is not adequate in its balance would seem inevitably to involve that substitution. This tool of analysis would seem to go further than discerning the public benefits in legislation, instead ranking those benefits according to some undisclosed scale.[90]

71. It is submitted that, in most cases concerning the application of the implied freedom,
20 it will not be necessary for the Court to employ this tool of analysis. While the Court must consider the extent of the burden imposed by the impugned law, an "[i]nquiry 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".[91]

72. It may be appropriate for the Court to have regard to the importance of a law's purpose in circumstances where, for example, the law imposes a content-based restriction on political communication, or directly restricts political communication in the context of elections for political office. This is consistent with the requirement, expressed in earlier cases, that some forms of burden will call for a "compelling justification".[92] Some burdens on political communication may be of such a nature or

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86 *McCloy* (2015) 257 CLR 178 at 218 [86] (French CJ, Kiefel, Bell and Keane JJ).
87 *McCloy* (2015) 257 CLR 178 at 219 [87] (French CJ, Kiefel, Bell and Keane JJ).
88 *McCloy* (2015) 257 CLR 178 at 195 [2] (French CJ, Kiefel, Bell and Keane JJ).
89 *McCloy* (2015) 257 CLR 178 at 219 [89] (French CJ, Kiefel, Bell and Keane JJ).
90 *McCloy* (2015) 257 CLR 178 at 219 [90] (French CJ, Kiefel, Bell and Keane JJ).
91 *Tajjour* (2014) 254 CLR 508 at 575 [133] (Crennan, Kiefel and Bell JJ).
92 See *ACTV* (1992) 177 CLR 106 at 143 (Mason CJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] (Gleeson CJ). See also *Levy v Victoria* (1997) 189 CLR 579 at 618-

extent that the tools of analysis described above may not be sufficient to preserve the constitutionally prescribed system that the implied freedom protects. It is only in these cases that the Court should determine whether it is appropriate or open to venture into "the borderlands of the judicial power",[93] and seek to weigh the burden imposed by a law against the perceived importance of the ends that the law seeks to achieve.

73. In most cases, however, the nature and extent of the burden will be such that the following will be sufficient to establish the law's validity: the burden is imposed in pursuit of a legislative purpose that is compatible with the maintenance of the constitutionally prescribed system; the means adopted by the law are rationally connected to that purpose; and no alternative, reasonably practicable and less restrictive means are available for the achievement of that purpose. If these requirements are satisfied, a finding that a law is nevertheless invalid by reason that it imposes an "undue" burden amounts to a curial finding that the legislature must seek to achieve its purpose in a way that is less effective, or more costly. That is not a finding that can be justified unless a serious risk to the system of representative and responsible government established by the Constitution is identified.

74. Here, the burden that the Act imposes on political communication is not such as to warrant the application of this tool of analysis. The nature and extent of that burden is discussed in paragraphs 18 to 30 above. As noted there, although ss 6(1), (2) and (3) and 7(1) and (2) of the Act operate in relation to serious interference and damage caused by persons engaging in "protest activity", the burden that the Act imposes on political communication is limited in several important respects:

(a) it has no effect on political communication that does not involve the physical presence of participants, or on protests that take place on land that other than business premises or a business access area;

(b) it has no effect on protests that take place on business premises or a business access area that cause no interference, or only minor or transient interference, with the carrying out of business activity or access to business premises;

(c) it reflects existing limitations on the rights of persons to enter and remain on business premises or business access areas, which are not challenged by the plaintiffs in this proceeding; and

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619 (Gaudron J). The reference to "compelling justification" should not be taken to suggest that this Court should apply a standard of strict scrutiny of the kind adopted by the United States Supreme Court, or otherwise develop a hierarchy of standards of scrutiny: see *Tajjour* (2014) 254 CLR 508 at 575 [131]-[132] (Crennan, Kiefel and Bell JJ).

93 *Murphy* (2016) 90 ALJR 1027 at 1037 [31] (French CJ and Bell J). See also *McCloy* (2015) 257 CLR 178 at 211 [58], 217 [82], 219-220 [89]-[90] (French CJ, Kiefel, Bell and Keane JJ).

(d) it is not discriminatory, in the sense that the Act does not select particular ideas or points of view for regulation.

75. The conduct that the provisions of the Act are apt to prevent or terminate is conduct that seriously interferes with the carrying out of business activity, or access to business premises, or causes damage to business premises or business-related objects. Unlike "insult and emotion, calumny and invective",[94] conduct of that kind is not a legitimate part of political communication in Australia. Citizens do not have a right or privilege to engage in conduct of that kind on private business premises or, in Tasmania, on forestry land that has been closed to the public under the FMA.

76. The limited burden that the Act imposes on political communication is justified by the legitimate purpose that the Act serves. The purpose of the relevant provisions of the Act is to protect businesses from conduct of the kind described above. In light of the history of interference with business activity caused by protests [SCB 65-66 [64]-[66]], Tasmania has decided that it is a purpose that warrants the imposition of some burden on political communication.

77. The Act could not effectively achieve its purpose without imposing a burden on a particular form of political communication: conduct that takes places on business premises or a business access area, and seriously interferes with the carrying out of business activity, or access to business premises, or causes damage to those premises. That is a form of conduct that may be attractive to protesters, but it is also a legitimate target for regulation.

78. Any law that protects businesses from serious interference with the carrying out of business activity, or access to business premises, must necessarily impose a burden on protest activity that creates such interference, whether the law expressly refers to protest activity or not. Acceptance of the plaintiffs' argument that the burden imposed on that activity cannot be justified by the purpose of protecting businesses from serious interference and damage would, in effect, entail acceptance of the proposition that protesters may engage in conduct of the kind described above with impunity. It would, in effect, create a right to be physically present on business premises for the purpose of engaging in political communication.

79. The circumstance that the Act imposes criminal sanctions rather than civil ones does not render the burden undue. The fact that a law imposes criminal sanctions may be relevant to its interpretation, as in paragraph 13 above, and to the standard of proof

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94 *Coleman v Power* (2004) 220 CLR 1 at 91 [239] (Kirby J). See also *Levy v Victoria* (1997) 189 CLR 579 at 623 (McHugh J).

that will apply in determining whether a person has contravened the law. However, the extent to which a law imposes a burden on political communication must be assessed by reference to the conduct that the law proscribes, not the sanctions it imposes. Once conduct is made unlawful, it must be assumed that persons will not engage in that conduct, and the extent of the burden must be assessed accordingly.

80. As was the case in *McCloy*,[95] it is not necessary in this case for the Court to ascribe a particular weight to the importance of the purpose of the Act, in order to balance it against the extent of the burden that the Act imposes on the freedom. Here, the limited restriction on political communication imposed by the Act is balanced by the benefits sought to be achieved. The Act does not go further than is reasonably necessary to achieve its purpose.

81. For the reasons given above, the Act is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative government, and the plaintiffs should be denied the relief that they seek.

PART VI: ESTIMATE

82. Victoria estimates that it will require approximately 15 minutes for the presentation of its oral submissions.

Dated: 28 March 2017

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95 (2015) 257 CLR 178 at 219 [88] (French CJ, Kiefel, Bell and Keane JJ).