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

SUBMISSIONS

I. Internet Publication

1. These submissions may be published on the internet.

II. Issues

2. Tasmania abandons its challenge to the plaintiffs' standing.

3. The issue for the Court is whether the *Workplace (Protection from Protesters) Act 2014* (Tas) is 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*?

III. s 78B of the Judiciary Act

4. Appropriate notices have been given.

IV. Material Facts

5. The material facts are set out in the Special Case.

Filed on behalf of the Defendant

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V. Applicable statutes

6. The applicable provisions are:

   a. *Constitution*, ss 7, 24, 64, 128

   b. *Workplace (Protection from Protesters) Act 2014* (Tas)

VI. Argument

Introduction

7. The implied freedom protects the system of representative and responsible government established under the Constitution. By imposing a restriction on legislative power, it operates to confer *pro tanto* immunities upon people who are the subject of legislation that infringes the freedom. However, it does not confer personal rights.

8. The *Workplace (Protection of Protesters) Act 2014* protects (amongst other things) business activity lawfully carried out on land in the lawful possession of a business operator. The plaintiffs seek to prevent, hinder or obstruct activity of that nature. They contend that certain provisions of the Act restrict their ability to conduct "on-site" protest activity. They do not explain what "on-site" means. Tasmania contends that it could not mean activity which amounts to a trespass to land, or to committing a nuisance against a lawful occupier of land, or engaging in other tortious conduct.

9. The Act does not restrict protest activity on land other than business premises or business access areas. It has a narrow operation and effect, it is compatible with the freedom and is in any event reasonably and appropriately adapted to the fulfilment of a legitimate purpose.

Granting leave to the Human Rights Law Centre to appear as Amicus

10. It is submitted that it would be inappropriate for the Court to grant leave to the HRLC to appear as *amicus curiae*. While leave for an amicus to be heard is a matter for the Court's discretion,[1] in this case the submissions of the HRLC will not significantly[2] assist the Court in a way in which it would not otherwise be assisted. The issues before the Court are capable of being fully addressed by the submissions of the parties and of the intervening States. The plaintiffs are represented by an experienced team of lawyers who are more than competent to address the relevant issues before the Court.

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1 *Levy v State of Victoria* (1997) 189 CLR 579 at 600-604 per Brennan CJ

2 *Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54; (2011) 248 CLR 37 at 39 [4] and [6]

The legislative scheme

11. The statement of claim fixes on ss 3, 5, 6, 8, 11, 13, 16 and 17 of the Act. However, in determining the Special Case, the Court is necessarily required to give consideration to the whole of the statutory scheme.

12. A convenient starting point is s 6(1). It does not create an offence. When the Act speaks of a contravention (as distinct from an offence)[3] it refers, amongst other provisions, to s 6(1). In broad terms, the purpose of s 6(1) is to stop a person described as a protester from entering, or remaining on business premises if doing so will prevent, hinder or obstruct the carrying out of business activities by a business occupier in relation to the premises. The Act requires that the protester must also know, or be reasonably expected to know that the conduct will have that effect. A number of definitions are essential to understanding the provision.

Business premises

13. *"Business premises"* are defined by s 5 of the Act. In this case, the relevant business premises are premises[4] that are *"forestry land"*. "Forestry land" is defined in s 3 to mean land on which forest operations are being carried out. However, there are many other classes of business premises identified by s 5.

14. A *"business activity"* is a lawful activity carried out for profit, or by a Government Business Enterprise, or a business occupier on or in relation to business premises[5]. Only *lawful* business activities are protected by the Act.

15. A *"business occupier"* in relation to business premises may be a business operator, or a business worker.[6] A *"business operator"* in relation to business premises may (amongst others) be a private owner, lessee, or lawful occupier, or a government entity in one of those capacities, or in which is vested the control or management of the premises.[7] Broadly speaking, the categories of business occupier are those who (or which) are in lawful possession of the relevant premises.

16. Section 3 defines a protester by reference to s 4. A protester is a person who engages in protest activity.[8] Protest activity must take place on business premises, or a business

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3 See for example, s 11(1)
4 The Act, s 3 defines *"premises"* inter alia as "an area of land"
5 See s 3 for the complete definition
6 For present purposes an employee under paragraph (a) of the definition of *"business worker"*. Paragraph (b) is not relevant. There is no prescribed class for the purpose of the definition
7 Paragraphs (a) and (b) of the definition of "business operator"
8 The Act, s 4(1)

access area in relation to business premises.[9] To qualify as protest activity it must be in furtherance of, or for the purposes of promoting public awareness or support for an opinion or belief in respect of a political, environmental, social, cultural or economic issue.[10]

17. The legal consequence of a protester entering or remaining on business premises in contravention of s 6(1) is that a police officer may give the protester a direction under s 11(1), which may include a further requirement under s 11(6).

18. Upon a direction given by a police officer under s 11(1) for contravention of s 6(1) there is no relevant offence in the Act for which the person can be convicted. It is only when the direction includes a requirement under s 11(6) that an offence may be committed under s 6(4). The requirement in s 11(6) is directed against the commission of further offences against, or contraventions of the Act. Thus, merely returning to the relevant area of land after it ceases to be business premises will not constitute an offence, or a contravention of the Act.

Business Access Areas

19. The path through the provisions relating to business access areas does not differ markedly from those relating to business premises, although there are some differences in the consequences. By s 3, a *"business access area"* must relate to business premises. It is limited to "so much of an area of land...that is outside the business premises, as is reasonably necessary to enable access to an entrance to, or to an exit from, the business premises."[11]

20. The purpose of the prohibition in s 6(2) is to stop a person described as a protester from doing an act on a business access area in relation to business premises if that action will prevent, hinder or obstruct the carrying out of business activities by a business occupier in relation to the premises. The protester must also know, or be reasonably expected to know that the conduct will have that effect. A direction may be given to a person to leave a business access area by a police officer who reasonably believes that a person has committed, is committing, or is about to commit a contravention under s 6(1), (2) or (3). The direction may include a requirement under s 11(6).

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9 The Act, s 4(2)(a)

10 The Act, s 4(2)(b)

11 *"business access area"* as defined in paragraph (a) of the definition. Paragraph (b) is not presently relevant

21. A person who remains on a business access area or re-enters it (or its related business premises) within 4 days of the direction commits an offence under s 8(1).

22. Unlike the case of business premises, it is not necessary for the commission of an offence under s 8(1) that a requirement has been made under s 11(6) where the person enters, or remains on a business access area after a direction under s 11(1) is given. If a requirement has been made under s 11(6) a person who remains on or returns to a business access area, or business premises, may also be liable for an offence under s 6(4).

Powers of Arrest

23. Section 13 provides for powers of arrest. The powers of arrest without warrant relate to business premises (s 13(1)) and business access areas (s 13(2)). They may only be exercised where a police officer reasonably believes that the person to be arrested is committing, or has committed within the previous 3 months, an offence against the Act in relation to the business premises, or business access area where the power is to be exercised.

24. The power of arrest is to be contrasted with the power of removal, in cases where an offence has been committed, or there has been a contravention of s 6(1), (2) or (3). The power of removal may, therefore, be used where a direction to leave has been given under s 11(1) or (2), but there has been no requirement made to not return under s 11(6). In that case the power of removal may be used to preserve public order, or for the safety, or welfare of members of the public, or the person removed.

Indictable offences

25. The proceedings also challenge ss 16 and 17 of the Act. By s 16(1) an offence against the Act, other than s 10(2), which relates to a refusal to provide a police officer with personal details, is indictable. Section 16(2) however permits "the prosecutor" to consent to an offence under the Act to be heard in a court of summary jurisdiction[12].

Other provisions

26. Section 7(1) provides that a protester must not do an act that causes damage to business premises, if the protester knows, or ought reasonably be expected to know that it is likely to cause damage. Section 7(2) provides for a similar offence in relation to a business-related object on business premises, or a business access area. Section 7(3) provides that a person (ie. not just a protester) must not issue a threat of damage in relation to business

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[12] It is recognised that Parliament can determine whether any class of offence can be tried summarily or on indictment. See for instance *Alqudsi v The Queen* [2016] HCA 24; (2016) 90 ALJR 711 at 721 [27]-[28]

premises in furtherance of, or for the purpose of promoting awareness of or support for an opinion, or belief in respect of a political, environmental, social, cultural, or economic issue. Section 7(4) categorises the kinds of threats that may issue. Importantly, it includes in s 7(4)(e) a threat to the effect that there is, or will be a risk to the safety of a business occupier on business premises, or a business access area.

27. Section 9 prohibits a person from preventing, hindering or obstructing a police officer from taking action under s 12. That section, in turn, empowers a police officer to remove, or cause to be removed from an area of land objects that have been placed there in contravention of a provision of Part 2 of the Act.

10 The implied freedom

28. The implied freedom of political communication does not confer a private or personal right[13]. It is a *pro tanto* immunity that arises as an incident of the representative system of government enshrined in ss 7 and 24 of the Constitution. It is to be understood as a constitutional restriction on legislative power to the extent that any exercise of power is incompatible with the effective operation of the system of representative government enshrined in the Constitution.

29. Because it is a *pro tanto* immunity, the implied freedom is not absolute[14]. The test as to whether a law impermissibly burdens the implied freedom as settled in *Lange v Australian Broadcasting Corporation*[15] (*Lange*) and as modified in *Coleman v Power*[16]
20 was confirmed as authoritative by this Court in the joint judgment of French CJ, Kiefel, Bell and Keane J in *McCloy v New South Wales* (*McCloy*).[17] The joint judgment confirmed that the *Lange* test, as it was restated in *Coleman v Power*, remains authoritative.[18] However, the reference in it to a legislative measure being "appropriate and adapted" was not to be understood as a "complete statement of what is involved".[19]

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13 *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at 554 [36],571-572 [109]-[112]; *Monis v The Queen* (2013) 249 CLR 92 at 192 [273]; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567

14 *Levy v State of Victoria* (1997) 189 CLR 579 at 610, 617

15 (1997) 189 CLR 520

16 (2004) 220 CLR 1

17 (2015) 257 CLR 178

18 *McCloy v New South Wales* (2015) 257 CLR 178. 200 at 214 to 215 [71] (French CJ, Kiefel, Bell and Keane JJ). See also Gageler J at [101], Nettle J at [220] and Gordon J at [306]-[307]

19 (2015) 257 CLR 178, 214 – 215 [71]. There had been some criticisms of the reasons given in *Monis v The Queen* (2013) 249 CLR 92 and *Tajjour v New South Wales* (2014) 254 CLR 508 about the nature and extent of proportionality analysis. See for example, Murray Wesson, *'Tajjour v New South Wales, Freedom of Association, and the High Court's Uneven Embrace of Proportionality Review'* (2015) 40(1) UWALR 102; Anne Carter, *'Political Donations, Political Communication and the Place of Proportionality Analysis'* (2015) 26 PLR 245

30. The test was expressed by the majority in *McCloy* in the form of three questions that were designed to break down the elements of the *Lange* test into a number of smaller and more precise tests:[20]

    a. does the law effectively burden the freedom in its terms, operation or effect;

    b. if yes to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the constitutionally prescribed system of representative government (the majority referred to this as "compatibility testing");

    c. if yes to question 2, is the law reasonably appropriate and adapted to advance that legitimate object (the majority referred to this as "proportionality testing").

31. The first question remained whether the law effectively burdens the freedom in its terms operation and effect. The second question requires the identification of the purpose of the law and the means adopted to achieving that purpose to be compatible with (in the sense that the purpose and the means adopted to achieving that purpose, do not 'adversely impinge upon') the constitutionally prescribed system of representative government. This reformulation of the question from Lange clarifies previous uncertainty as to what amounts to a 'legitimate end'.

32. The third question, which assumes the second question to be answered in the affirmative, introduces a three state proportionality test that asks whether the impugned law was: "suitable, "necessary" and "adequate in its balance", in order to determine whether the otherwise compatible means adopted by the law to achieve what is a legitimate purpose, are 'proportionate' in their pursuit of attaining that purpose.

On site protesting

33. An element of the plaintiffs' case is that the Act curtails "onsite" protesting.[21] PS[60] refers to activity "at or near the site of alleged environmental harm". The content of the term "onsite" and, therefore, the plaintiffs' argument is, however, elusive.

34. Because the freedom does not confer a personal right on an individual, it cannot be set up to authorise a person to trespass on the property of another, [22] even if the property belongs to the government.[23] It is submitted that likewise, the freedom does not operate to permit

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20 *McCloy v New South Wales* (2015) 257 CLR 178 at 194-5 [3]

21 PS [11], [12], [13], [14], [16]

22 *Gunns Ltd v Alishah* [2009] TASSC 45 at [15]-[16]; *Meyerhoff v Darwin City Council* [2005] NTCA 8 at [17] & [23]; *Levy v State of Victoria* (1997) 189 CLR 579 at 622, 625-626; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at 532 [96]; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223-224 [107]-[109]; 245 [180]-[182] & 298 [337]

23 *Meyerhoff v Darwin City Council* [2005] NTCA 8 at [17] & [23]; *Waverley Municipal Council v Attorney General* (1979) 40 LGRA 419 at 426

protest activity that amounts to a private nuisance, or constitutes another economic tort. Contrary to the plaintiffs' contentions relating to "besetting"[24] Tasmania submits that the Act will in many, if not the majority of cases, operate in business access areas in circumstances which engage the law and remedies relating to "besetting" premises, to deter lawful activity.[25] Nuisance, like trespass, is a tort available against the interference with a right of a person in lawful possession of land.[26] The Act is aimed at the protection of rights of certain business operators, who are in lawful possession of land.

35. Tasmania does not contend that either Ms Hoyt, or Dr Brown were given a valid direction under s 11, or that either of them was liable for an offence under the Act. Yet both Dr Brown and Ms Hoyt were present in, or immediately adjacent to the Lapoinya Forest, having entered in furtherance of, or for the purposes of promoting public awareness or support for an opinion or belief in respect of a political or environmental issue. In Dr Brown's case, at the time the direction was purportedly given he was standing in the adjacent Flowerdale Rivulet Forest Reserve, which was not business premises, or a business access area.[27]

36. It is at this point that the plaintiffs need to identify, with precision, what they mean by on-site protesting. If they mean protesting on the site of business activity lawfully being carried out by a business occupier in lawful possession of the site who does not consent to their presence, they must fail, for they would be trespassers. If they mean protesting which obstructs the lawful access or egress of a business operator to or from the site of a business activity lawfully being carried out by a business occupier in lawful possession of the site, then they must also fail, for they would be committing a nuisance.[28]

37. If the plaintiffs contend that on-site protesting involves a person who harbours political opinions or beliefs (such as Dr Brown) protesting on public land immediately adjacent to a site on which a business activity is being undertaken (including that part of the site over which access or egress is made), then the Act has no relevant operation. That is this case.

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24 PS [53]

25 Some of the Australian authorities for this kind of nuisance are: *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia (Dollar Sweets Case)* [1986] VR 383; *Broderick Motors Pty Ltd v Rothe* [1986] Aust Torts Reports 80-059; *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51; *Sid Ross Agency Pty Ltd v Actors & Announcers Equity Association of Australia* [1971] 1 NSWLR 760 (CA), Mason JA at 767; *Boral Bricks NSW Pty Ltd v Frost* (1987) 20 IR 70 (NSWSC) (pickets forcibly attempting to stop people and vehicles entering and leaving plaintiff's factory)

26 *Fleming's The Law of Torts*, Sappideen, C and Vines, P (Eds), 10th Ed., Lawbook Co (2011) pp506-7 [21.140]

27 Amended Statement of Claim [28] SCB 21; Amended Defence to Amended Statement of Claim [28] SCB 119

28 *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760 at 767 (NSWSC)

38. It may be suggested that the Act has a particular operation in a business access area, which would apply to a protester who impedes neither access, nor egress from business premises, but by overt conduct such as waving placards, distracts people carrying out business activities on the site. This example gives rise to a useful analysis of the operation of the Act.

39. The question of whether an action on a business access area prevents, hinders or obstructs the carrying out of a business activity is one of fact. However, even if the action has that effect, the contravention is not complete until the mental element under s 6(2)(b) is satisfied. In a case where the protester knows that the action being taken on the business access area has the effect required by s 6(2)(a), no further step is required to conclude that the protester intends to disrupt lawful business activity on the business premises. Why should the prohibition on protest activity on a business access area which disrupts and is calculated to disrupt the lawful activity of a business occupier be limited to the prevention of access and egress?

40. In a case where a protester on a business access area does not know, but ought reasonably be expected to know that the activity being carried out is disruptive to business activity, the most that could happen is that the protester could be given direction under s 11(2) (with or without a requirement under s 11(6))). At that point, the protester may have a number of choices, but will at least know that the police officer claims to have formed a reasonable belief about the conduct. If the protester elects to continue the activity, it may be reasonably inferred that he or she does so in the knowledge of the contestable possibility that he or she may be committing an offence (subject to elements of the contravention *and* the offence being proved and there being no lawful excuse).[29]

41. A requirement under s 11(6) is merely one intended to prevent an offence or further contravention against the Act. That is to say, subject to s 8(1), it does not prevent a person to whom it applies from returning to a business access area during its operation. It does, however, prevent a person from returning to a business access area if the activity there conducted by the person constitutes them a protester, has the relevant effect on business activity and the person either knows, or ought reasonably be expected to know that the activity has that effect.

42. Section 8(1)(b) prohibits a person from re-entering the business access area, or its related business premises for a period of 4 days after a direction is given. In a case where a

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[29] The Act, s 8(2)

person has been required to move on, the imposition of reasonable time for that person's return to the area could not be said to be an unreasonable restriction. If the person has good reason to return within the period, he or she may have a good defence under s 8(2).[30]

43. The offence created under s 6(4) is in a similar category. It is aimed at preventing further contraventions of the Act. It does not make an initial contravention of the Act an offence. It applies only where a protester has contravened a requirement made under s 11(6) on a direction given under s11(1) or (2). It is subject to the defence of lawful excuse.[31]

Is there a burden?

44. The first question in determining the constitutional validity of the Act is whether the Act burdens the implied freedom of political communication. The burden arises in the context of the need, in the Australian system of representative government, for an unfettered exchange of political ideas between the people.[32] This ensures that even small minorities are free to be heard in the political process.[33] Therefore any legislation that tends to impose a fetter will burden the freedom. The burden need only be little.[34]

45. Tasmania accepts that the Act may impose a burden in some circumstances.

46. However, merely because the Act expressly uses the term "political" does not make it any more or less subject to the implied freedom. The question relates to the circumstances in which the exchange of political ideas may be affected by the provisions of the Act.

Compatibility

> "A legitimate purpose is one which is compatible with the system of representative government provided for by the Constitution; which is to say that the purpose does not impede the functioning of the system all that it entails. So too must the means chosen to achieve the statutory object be compatible with the system."[35]

47. The plaintiffs' case asserts the purpose of the Act is to "prevent and/or punish the expression of opinions and beliefs that might affect a business activity at or near a particular business premises".[36] However, stating the purpose at such a high level is

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30 The law relating to lawful excuse has recently been surveyed in *Wilson v McDonald* (2009) 193 A Crim R 63

31 The Act, s6(6)

32 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 139; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [29]; *McCloy v New South Wales* (2015) 257 CLR 178 at 201-292 [26]

33 *Tajjour v New South Wales* (2014) 254 CLR 508 at 578 [145]

34 *Monis v R* (2013) 249 CLR 92 at 139 [93]

35 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567; *Coleman v Power* (2004) 220 CLR 1 at 50-51 [92]-[96]; *McCloy* at [31]

36 PS [36]

unhelpful.[37] Legislation rarely pursues a single purpose at all costs.[38] In this case, stating the purpose at the level at which the plaintiffs contend adds further confusion to the plaintiffs' case about "on-site" protesting.

48. Leaving aside the question of punishment, the prohibition of protest activity in the context of the Act, s 6, is directed to preventing (lawful) business activities carried out on land lawfully possessed by a business operator from being prevented, hindered or obstructed by the activity of another in furtherance of, or for the purposes of promoting awareness of or support for an opinion, or belief, in respect of political, environmental, social, cultural, or economic issue.[39] Other sections may pursue other purposes. A reading of the provisions of the whole of the Act, in context, may, reveal purposes not expressly stated.[40] The process is one of deduction,[41] by ordinary principles of statutory construction.[42]

49. Tasmania identifies that the purposes of the Act are to:

    a. ensure that the people do not damage, or threaten to damage business premises or business related objects in furtherance of, or for the purposes of promoting awareness of or support for an opinion, or belief, in respect of political, environmental, social, cultural, or economic issue;[43]

    b. ensure that protesters do not prevent impede, hinder or obstruct the carrying out of business activities on business premises or business access areas;[44]

    c. provide for the safety of business operators in business premises;[45]

    d. maintain economic opportunities for business operators of certain businesses[46] carried out within the State;[47]

    e. protect business operators going about business activities safely and without disruption;[48] and

    f. preserve public order.[49]

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37 Pearce, D C, & Geddes, R S *Statutory Interpretation in Australia*, 8th Ed., Lexis Nexis, para [2.11] and the cases there cited

38 *Carr v Western Australia* (2997) 232 CLR 138 at 142 -3 [5] per Gleeson CJ

39 The Act, s 4(2), s 7(3)

40 cf., PS [36]

41 Pearce et al., *op.cit* [2.12]

42 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50]

43 The Act, s7

44 The Act, ss 6, 8, 11, 12, 13

45 The Act, ss 6(7), 7(4)(e), 7(7)

46 Those carried out in business premise identified in the Act, s 5

47 Second reading speech, Legislative Council, Hansard, 29 October 2014

48 Long title and ss 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 15, 16 and 17

49 The Act, s 13(4)(c), Long title and ss 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 15, 16 and 17; the second reading speech for the *Workplaces (Protection from Protesters) Bill 2014* in the Legislative Council: Hansard 29 October 2014

50. It would be strange if the maintenance of the system of responsible and representative government required a parliament to refrain from legislating to prevent damage to a citizen's property in the name of political protest. The same can be said of preventing the making of threats of damage to property, or the safety of a person. Although the plaintiffs make no attack on s 7, it may be observed that there is no reason to think that the safety of the property of a business occupier (both operators and workers) is any different.

51. The encouragement of investment in a State's economy is a legitimate political interest of the State. The economic interests of businesses carried on within a State are legitimate political concerns warranting the protection of the State, particularly where those interests are vulnerable to activities that may impede business operations which are lawfully being carried out.

52. The plaintiffs rely on *Australian Capital Television Pty Ltd v Commonwealth*[50]("ACTV") for the proposition that a law will not be legitimate if it is "directed to the freedom" unless it seeks to preserve, benefit or enhance the freedom[51]. However, it is submitted that this test is not correct. The correct analysis is that regulations that enhance or protect political communication do not detract from the freedom[52] and that a law which incidentally restricts the freedom is easier to justify as consistent with the freedom than a law that directly restricts the freedom[53]. In any event, the test is not apposite to the Act. The Act is not directed to the freedom in the sense that the law in ACTV was directed. The Act is appropriately directed at protecting business activity from protest activity which may be (but not in all cases) generated by political beliefs, or opinions. Hence, the law might incidentally affect the freedom but it is not directed to it.

53. In conclusion, it is submitted that the purposes of the Act identified above and the means employed to achieve those purposes are compatible with the maintenance of the constitutionally prescribed system of representative government.

Proportionality analysis

Re-examining McCloy

54. Tasmania respectfully submits that *McCloy* should be re-opened to examine the majority formulation of proportionality testing.

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50 *ACTV* (1992) 177 CLR 106: see PS [38]ff
51 PS[38]
52 *Coleman v Power* (2004) 220 CLR 1at 51 [97]
53 *Coleman v Power* (2004) 220 CLR 1 at 123, [326]

55. First, the formulation of proportionality testing by the majority in *McCloy* was not the subject of full argument.[54]

56. Secondly, there is some doubt about whether or not the mode of analysis in proportionality testing adopted by the majority is to be applied as a set template in each case concerning the implied freedom described in *Lange*. There have been divergent views expressed in the Court in relation to whether proportionality testing should be accepted. In *McCloy*, Gageler J reserved his views about the majority approach. His Honour noted that:[55]

    a. the content and consequences of the approach must await consideration in future cases;[56]

    b. he was not convinced that "one size fits all", particularly that:

> 'standardised criteria, expressed in unqualified terms of "suitability" and "necessity", are appropriate to be applied to every law which imposes a legal or practical restriction on political communication irrespective of the subject-matter of the law and no matter how large or small, focussed or incidental, that restriction on political communication might be.'[57]

    or that

    c. the adoption of the criterion "adequate in its balance" to test a law sufficiently reflected the reasons for the implication of the constitutional freedom, or captured considerations relevant to making judicial determinations as to whether or not the freedom had been infringed.[58]

57. His Honour concluded[59] that whatever analytical tools used it was imperative that "the entirety of the *Lange* analysis is undertaken in a manner which cleaves to the reasons for the implication of the constitutional freedom which it is the sole function of the *Lange* analysis to protect" and that this was best achieved by ensuring that the standard of justification and the concomitant level or intensity of judicial scrutiny is articulated at the outset and calibrated for that purpose.[60]

58. In *Murphy v Electoral Commissioner*[61] French CJ and Bell J (both of whom were members of the majority in *McCloy*) accepted in *obiter* that the adoption of the approach of the European, and in particular, German Courts in *McCloy* was but a "mode of analysis applicable to some cases involving the general proportionality criterion, but not

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54 *McCloy v New South Wales* (2015) 257 CLR 178 at 235-236 [141] per Gageler J; and 281 [308] per Gordon J

55 *McCloy v New South Wales* (2015) 257 CLR 178, 235-236 [141]-[144]

56 *McCloy v New South Wales* (2015) 257 CLR 178 at 235 [141]

57 *McCloy v New South Wales* (2015) 257 CLR 178 at 235 [142]

58 *McCloy v New South Wales* (2015) 257 CLR 178 at 236[145]

59 *McCloy v New South Wales* (2015) 257 CLR 178, 238-9 at [150]

60 Tasmania refers generally to the judgment of Gageler J in *McCloy v New South Wales* (2015) 257 CLR 178 at 235-239 [141] to [152]

61 [2016] HCA 36

necessarily all".[62] A similar point was made by Kiefel J, as Her Honour then was, in *Rowe v Electoral Commissioner.*[63] It was also seemingly accepted by French CJ and Bell J that, save for the "suitability" requirement in *McCloy*, the requirements of "necessity" and "adequacy in the law's balance" do not have universal application in determining whether, relevantly, a law is a "valid exercise of the grant of power, being reasonably appropriate and adapted to serve the purpose of the grant".[64] This dicta is consonant with some aspects of what Gageler J said in *McCloy* about there being "no refinement of the formulation of the second step in the *Lange* analysis [that can be expected] to remove the element of judgment required in the exercise of supervisory jurisdiction by a court".[65]

10 Nettle and Gordon JJ in *McCloy* were, for their Honours' own reasons, of similar views.[66] It is submitted, therefore, that, "no unitary standard of justification can or should be applied across all categories of cases".[67]

59. Finally, there has been academic concerns have been raised in relation to approach adopted by the majority in *McCloy.*[68]

> The rules themselves take over, ceasing to be a means to an end and becoming the end itself. They become disconnected from the constitutional principle that the implied freedom is intended to support... The tests must not become an end in themselves, being ticked off a list without any regard to the constitutionally required end of Houses of Parliament directly chosen by the people.[69]

20 60. Although it is a step not to be undertaken lightly,[70] it is submitted that it is open to, and appropriate for the Court to re-examine questions relating to proportionality analysis. The Court is justified in doing so in furtherance of its evolving understanding of the Constitution,[71] particularly where it is necessary for the Court to clarify points of uncertainty in, or to deal with emerging issues brought to the surface by its teachings concerning constitutional issues of vital importance, such as the implied freedom.[72]

61. However, in so far as it is necessary to proceed according to the formula set down by the majority in *McCloy*, the following submissions are made.

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62 *Murphy v Electoral Commissioner* [2016] HCA 36 at [37] (French CJ and Bell J)

63 (2010) 243 CLR 1 at 136 [445]

64 *Murphy v Electoral Commissioner* [2016] HCA 36, [37] – [38] (French CJ and Bell J)

65 *McCloy v New South Wales* (2015) 257 CLR 178 at 238 [151] [(Gageler J)

66 *McCloy v New South Wales* (2015) 257 CLR 178 at 269 [254]-[255] (Nettle J), 281[308]-[309] (Gordon J)

67 *McCloy v New South Wales* (2015) 257 CLR 178 at 238 [152] (Gageler J)

68 Anne Twomey, '*Proportionality and the Constitution*' , *ALRC Freedoms Symposium*: <https://www.alrc.gov.au/proportionality-constitution-anne-twomey> (accessed 14 March 2017)

69 See also the questions posed by the Hon. Sir Anthony Mason , *The use of proportionality in Australian constitutional law* (2016) 27 PLR 109 at p 123

70 *Queensland v The Commonwealth* (1977) 139 CLR 585, 630 at (Aikin J)

71 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 353 [71] (French CJ)

72 *Queensland v Commonwealth* (1977) 139 CLR 585 at 630; *Lange v Australian Broadcasting Corporation* (1997)] 189 CLR 520 at 554

Rational connection to purpose – suitability

62. The plaintiffs do not contend that the impugned provisions have no rational connection to their purpose. It would be difficult for them to do so, given that they deny that there is legitimate purpose in the first place.

63. If the State's contentions about purpose are accepted, however, the argument is whether they are rationally connected. The argument is relatively simple. The provisions are targeted towards facilitating lawful activity being carried out for business purposes, without interference from protest activity. Once it is accepted that the impugned provisions have a legitimate object, it is clear that the measures contained in the provisions are capable of contributing to the realisation of that legitimate object. The provisions of the Act which allow for directions to be given to persons who interfere with or are likely to interfere with business activities, allow for the removal or arrest of protesters and quite plainly have a rational connection to the purposes of the Act. Thus, it is submitted that the provisions are designed to promote and facilitate the achievement of the legitimate purposes of the Act. They serve the legitimate end of protecting the conduct of business interests from undue interference from persons engaging in protest activity by prohibiting such conduct and providing for enforcement mechanisms. In short, the Act advances the purpose of protecting the carrying out of lawful business activities against undue interference from protesters.

Practicable alternatives - necessity

64. The plaintiffs plead that there are obvious and compelling reasonably practicable alternatives. They cite the following examples.

65. Section 4B(1) of the *Inclosed Lands, Crimes and Law Enforcement Amendment (Interference) Act 2016* (NSW) provides:

> A person is guilty of an offence under this section if the person commits an offence under s 4 in relation to inclosed lands on which any business or undertaking is conducted and, while on those lands:
>
> (a) interferes with, or attempts or intends to interfere with, the conduct of the business or undertaking; or
>
> (b) does anything that gives rise to a serious risk to the safety of the person or any other person on those lands.

66. The *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2016* (WA) will introduce (amongst other things) s 68AA(2) into the Criminal Code to provide:

> (2) A person must not, with the intention of preventing a lawful activity that is being, or is about to be, carried on by another person, physically prevent that activity.

67. Section 14B of *Police Offences Act 1935* (Tas) provides:

(1) A person, without reasonable or lawful excuse (proof of which lies on the person), must not enter into, or remain on, any land, building, structure, premises, aircraft, vehicle or vessel without the consent of the owner, occupier or person in charge of the land, building, structure, premises, aircraft, vehicle or vessel.

68. Related to that provision is the following power of arrest, under section 55(2B) and (2C):

(2B) Subject to subsection (2C), a police officer may arrest, without warrant, any person whom he believes on reasonable grounds to be on any land, building, structure, premises, aircraft, vehicle or vessel without the consent of the owner, occupier or person in charge of the land, building, structure, premises, aircraft, vehicle or vessel.

(2C) The power of arrest conferred by subsection (2B) is not exercisable –

(a) unless the police officer has previously requested the person in relation to whom he seeks to exercise the power to leave the land, building, structure, premises, aircraft, vehicle or vessel concerned and that person has refused or failed to comply with the request or, having complied with the request, returns to the land, building, structure, premises, aircraft, vehicle or vessel concerned within 14 days after so complying without the consent of the owner or occupier; or

(b) if the police officer has reasonable grounds for believing that that person has some reasonable or lawful excuse for being on that land, building, structure, premises, aircraft, vehicle or vessel.

69. Section 15B of the *Police Offences Act* provides:

(1) A police officer may direct a person in a public place to leave that place and not return for a specified period of not less than 4 hours if the police officer believes on reasonable grounds that the person –

(a) has committed or is likely to commit an offence; or

(b) is obstructing or is likely to obstruct the movement of pedestrians or vehicles; or

(c) is endangering or likely to endanger the safety of any other person; or

(d) has committed or is likely to commit a breach of the peace.

(2) A person must comply with a direction under subsection (1).

Penalty:

Fine not exceeding 2 penalty units.

70. Section 22 of the *Forest Management Act 2013* (Tas) provides:

(1) In this section –

authorised officer means a person appointed as an authorised officer under subsection (2).

(2) The Forest Manager may appoint any of its employees to be an authorised officer for the purpose of this section.

(3) An authorised officer may request a person –

(a) not to enter permanent timber production zone land or a forest road; or

(b) to leave permanent timber production zone land or a forest road; or

(c) to cease to undertake an activity conducted, or to cease to engage in conduct, on that land or road –

if the authorised officer is of the opinion that the entry or presence of that person, or the activity conducted, or the conduct engaged in, by that person on the land or road is preventing, has prevented or is about to prevent the Forest Manager from effectively or efficiently performing its functions.

(4) An authorised officer may prohibit a person from entering, or remaining in, an area of permanent timber production zone land –

(a) that has been declared under section 68 of the Fire Service Act 1979 to be an area of extreme fire hazard; or

(b) that is an area in respect of which another person has a right of exclusive possession; or

(c) in the interests of a person's safety.

(5) A person who fails to comply with a request from an authorised officer under subsection (3) or (4) is guilty of an offence.

Penalty:

Fine not exceeding 20 penalty units.

(6) A person must not, without lawful excuse, undertake an activity or engage in conduct on permanent timber production zone land or a forest road contrary to the directions of a police officer.

Penalty:

Fine not exceeding 20 penalty units.

(7) A police officer may arrest, without warrant, any person who fails to comply with a direction under subsection (6).

71. The question of whether these are practicable alternatives depends on whether they are equally appropriate means.[73] They must be *"obvious and compelling"*[74]and must be as effective in achieving the relevant purpose in order to qualify as a true alternative[75]. It is submitted that none of the alternatives posited by the plaintiffs are capable of being characterised as true alternatives. In any event, the consideration of them as obvious and compelling alternative means is *"merely a tool"* of proportionality analysis.[76] As the majority observed in *McCloy* "[c]ourts must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments".[77]

72. Having regard to their purposes and the means of achieving those purposes, each of these provisions can be distinguished from the Act. Under the New South Wales legislation, the definition of business premises is more restrictive than the definition under the Tasmanian Act. Under the Western Australia legislation the provision is targeted only at lawful activity and not business premises. Section 14B of the *Police Offences Act* applies only to private land, which is not coextensive with business premises under the Act. Section 15B applies only to public land. Section 22 of the *Forest Management Act 2013* and applies only to permanent timber production zone land and forestry roads. The Act,

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73 *McCloy v New South Wales* (2015) 257 CLR 178 at 210 [57]

74 *Monis v R* (2013) 249 CLR 92 at 214[347]

75 *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [114]

76 *Tajjour v New South Wales* (2014) 254 CLR 508 at [36]; *McCloy v New South Wales* (2015) 257 CLR 178 at 211 [58] and 217[82]

77 *McCloy v New South Wales* (2015) 257 CLR 178 at 211[58]

on the other hand, is aimed at a wider class of premises and a range of conduct that may affect the carrying out of lawful business activity.

73. Although the common theme in the alternative legislation is that it applies to people who act to prevent, hinder, obstruct or disobey an activity, the legislation does not focus on protest activity or the protection of legitimate business interests. Thus, it is not possible to say that such laws would achieve the legitimate end to which the Act is directed to the same extent or at all[78]. Apart from the fact that the alternatives do not seek to achieve the same purpose, it is far from apparent that the alternatives have a less restrictive effect on the freedom. In certain cases it is conceivable that they may prove to be more restrictive. Quite simply, none of the alternatives, alone or in combination provide a less drastic means of achieving the objects of the Act.

Adequacy of Balance

74. The question whether the Act is adequate in its balance involves a comparison between *"the positive effect of realising the law's proper purpose with the negative effect of the limits on constitutional rights and freedoms."* [79] The greater the restriction of the legislation on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate. This assessment necessarily involves a value judgment, but not to the extent that the Courts are permitted to substitute their own assessment for that of the legislature.[80]

75. The plaintiffs plead a number of matters here. The first is that the Act expressly targets political communications. That is correct[81], but answerable on the basis that political communication is not a necessary condition for every offence under the Act. Instead the Act is targeted at the protection of lawful business activity and to a degree which is reasonable in an orderly society[82]. The Act does not prevent "peaceful protest" which does not disturb business activity. Further, the extent of the burden the Act imposes on the implied freedom is minimal having regard to the manner in which the provisions operate[83].

76. Secondly, in relation to forestry land in particular, the Act is said to prohibit protest as the only means of effective communication of political opposition to forestry. In *McCloy*,

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78 *Tajjour v New South Wales* (2014) 254 CLR 508 at 565 [90] per Hayne J
79 ibid at [87]
80 ibid at [89]
81 Although its purpose is not to limit political communication
82 *Levy v State of Victoria* (1997) 189 CLR 579 at 609 per Dawson J
83 See paragraphs [33]-[43] of these submissions

Nettle J suggested that a law which imposes a discriminatory burden will require strong justification that it is appropriate and adapted to the burden it imposes.[84] The question involves complex matters of degree. It may be true that daring protest activity excites the attention of the media and therefore promotes public discourse. However, other protest activity that does not involve unlawful incursions or the disruption of lawful activity is equally available. For example, in the present case, Dr Brown stepped back over the verge of Broxham's Road, beyond the surveyed line of the forestry coupe into the Flowerdale River Regional Reserve and there continued to observe and record the activities that were occurring within the coupe. Thirdly, it is said that the Act punishes activity that has only a slight or transient effect on business activity. It is submitted that the provisions of the Act set up offences and contraventions which require both action and intention to bring about adverse consequences to businesses. It is unlikely that they would apply to minor transgressions, but even so, those consequences would be reflected in the penalty.

77. Fourthly, it is suggested that the Act is too broad in its application. It applies to business premises, business access areas and entrances to and exits from business access areas. However, the point of the Act is to allow the use of those areas and only those areas for business activities free from obstruction. Its application to entrances to and exits from business access areas is also consistent with conduct amounting to besetting in tort.

78. Fifthly, in the context of forestry land, which potentially includes all of the permanent timber production zone land under the *Forest Management Act 2013*, it is said that there is a difficulty of ascertaining business premises or business access areas in the field, which gives the Act an uncertain operation. It is for the State to establish boundaries which are capable of being proved beyond reasonable doubt in order to ensure the Act's operation. There is no basis for constitutional challenge on this ground.

79. Finally, the plaintiffs point to the powers of arrest and removal. They point out that a police officer can arrest or remove a person on the erroneous (albeit reasonable) belief that the person has committed an offence or contravention of the Act. There are many examples of Acts which permit a police officer to act on a reasonable belief that an offence has been committed.[85] The powers of arrest only arise where a person is on business premises, or a business access area and a police officer reasonably believes in relation to those areas is committing, or has committed an offence within the previous 3

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84 *McCloy v New South Wales* (2015) 257 CLR 178 at 258-259 [220] to [222]

85 See for example, ss 15B(1) and 55(2B) of the *Police Offences Act* above

months.[86] Business premises, and therefore business access area in relation to business premises all depend on the use to which they are put. For example, business premises, which are forestry land, depend (amongst other things) on forest operations being carried out. If the operations have ceased, the land will no longer constitute business premises and the power of arrest will no longer apply.

80. Legislative control of protest action is not a new phenomenon and it is, at least sometimes, necessary to augment the common law of nuisance, which may provide an otherwise cumbersome process to enjoin unlawful action. Lawful activity in forests, mines, marine farms and the like are all things that might attract protest action, which may impede a business for some considerable time and at considerable expense. It is in the State's economic interest that lawfully operating businesses should be allowed to conduct their activities without undue or excessive disruption from protest activity and that business activity is only impeded by lawful means. The cost and delay of pursuing civil remedies and the onus placed on individual business operators to prevent unlawful activity at common law provides a good reason for the State's legislative intervention.

81. The plaintiffs point to the fact that the Act targets protest activity at specific premises and not to business premises generally.[87] The answer to this contention is that parliament has identified a broad class of business premises which may be susceptible to the kind of protest activity that the Act proscribes and which is in need of State protection in the State's economic interests.

82. Further the plaintiffs contend that police officers are permitted to give directions which limit political protests.[88] The answer to this contention is that the power to give directions only arises where a police officer reasonably believes that an offence or contravention of the Act is being committed, has been committed, or is about to be committed.[89] Provisions requiring a police officer to form a reasonable belief as a condition of a valid direction are not uncommon where it is necessary to preserve public order or safety.

83. The Act does not prescribe an offence or contravention unless the protester or person is, has been or is about to either prevent hinder or obstruct business activity, or to cause damage to business premises or business related objects, or to threaten to damage business premises, or to obstruct a police officer.

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86 The Act ss 13(1) and (2)
87 Business premises are defined by s 5
88 The Act s 11(1) and (2); proposed amended statement of claim par 44 (d)
89 See *George v Rockett* (1990) 170 CLR 104

84. It may also be suggested that the corollary of the freedom is the freedom of peaceful assembly. But this it to assert a personal right, which has never formed part of the jurisprudence about the freedom. The protection that the freedom offers is to the system of representative and responsible government. The *pro tanto* immunity arises as a function of that protection.

85. Ultimately, the Act does not prevent a person from protesting, or harbouring, or communicating political and related beliefs and opinions. It is limited to controlling, or regulating the adverse results of a particular form of protest as it affects business activity. On balance, the extent of the restrictions the Act imposes upon the implied freedom are reasonable in light of the importance of the purposes and benefits sought to be achieved[90]. To the extent to which the Act might be said to restrict the implied freedom, it does so in a manner which is ultimately compatible with the constitutionally prescribed system of representative and responsible government.

VII. Estimate Time for Argument

86. The Defendant estimates that it will require 90 minutes to present its oral argument.

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90 *McCloy v New South Wales* (2015) 257 CLR 178 at 219 [87]