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

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PLAINTIFFS' ANNOTATED REPLY SUBMISSIONS

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I INTERNET PUBLICATION

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

II REPLY SUBMISSIONS

The purpose of the Act

2. In the plaintiffs' submission, it is artificial to frame the Act's purpose in a way that excludes any reference to protest or political communication. Tasmania concedes that the Act targets political communications [**DS at [75]**]. According to the second reading speech, the Act "is about sending a strong message to disruptive extremist protest groups that action of that kind is not acceptable to the broader Tasmanian community".[1]

3. The submission that the Act is not "directed at" political communication because it attaches "no consequences to the mere fact that a person engages in an act of political communication" **[Vic at [37]]** ought be rejected. The Act's prohibitions and penalties operate by reference to whether or not a person is engaging in "protest activity",[2] and it thus does not "prohibit a class of communications regardless of whether they do or do not relate to political matters".[3] It is precisely because of their character as political communications that the Act applies. The fact that the Act requires the act of political communication to have an actual or possible effect on business activity highlights the point, because the fact that someone is expressing a view is irrelevant to stopping interruptions to business.[4] By focusing on political communication, the Act "operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained".[5] The "distinction drawn by the law is not appropriate and adapted to the attainment of a proper objective".[6]

4. Equally flawed is the argument that the statute is not "directed at" political communication because its purpose is other than to burden the freedom **[NSW at [21]]**. That begs the relevant question which is related to the disproportionate burden of the Act upon political communication.[7]

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1 House of Assembly, 26 June 2014, p 18 (Mr Gutwein).

2 Section 7(3) does not use the defined term "protest activity", but refers to a similar concept, though one that does not depend on the person being at a particular location (*cf* **NSW at [23]**).

3 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 77 (Deane and Toohey JJ). See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ).

4 By contrast, the fact that a person is a property developer is not irrelevant to the objective of eliminating certain kinds of political donations (*cf* **SA at [19], [21]**).

5 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 (Gaudron and McHugh JJ). See generally Melville Nimmer, "The Meaning of Symbolic Speech under the First Amendment" (1973) 21 *UCLA Law Review* 29 at 41-42.

6 *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 424 [89], 425 [94]; *Austin v The Commonwealth* (2003) 215 CLR 185 at 247 [118]; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510-511, 548, 571-573, 582.

7 *Cf Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143-144 (Mason CJ), 195 (Dawson J). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 57

5. If the purpose of the Act is to be understood without reference to protest, and the targeting of political communication is to be understood as a means to an end, then that means is not compatible with the maintenance of the constitutionally prescribed system of representative government,[8] or is not reasonably appropriate and adapted to the end.

The extent of the burden

6. *First*, the suggestion that protestors can convey their political message in other ways and in other places rings hollow particularly in so far as protests about environmental issues and forests in Tasmania are concerned. Protesting at or near the site of logging is the primary means of encouraging public debate on these issues, and the Act's prohibitions therefore distort the flow of communication by moving protestors away from such sites. At least where the objective of political communication is to show what is happening or about to happen at a particular site, that is most likely to be visible from a location that meets the definition of a "business premises" or a "business access area". The road which the plaintiffs used in this case was regarded by Tasmania not just as a business access area but as a business premises **[SCB, p 112]**. This impact cannot be ignored on the basis that the implied freedom does not confer rights on individuals. What is at stake is not how an individual idiosyncratically seeks to convey his or her message, but how, systemically, a particular viewpoint on a particular matter of political debate may be allowed to enter into the flow of communication within the system of representative and responsible government.[9]

7. *Second*, Victoria **[Vic at [28]-[29]]**, New South Wales [**NSW at [22]**] and the Commonwealth [**Cth at [57]**] deny that the Act discriminates between content and between viewpoints, but they are wrong for the reasons given in chief at **[41]-[42]** and at [8] and [9] below.

8. According to the United States authorities to which New South Wales [**NSW at [22]**] and the Commonwealth refer [**Cth at [55]-[57]**], the Act is a classic content based law because it requires the police "to 'examine the content of the message that is conveyed to determine whether" a violation has occurred".[10] A person is regulated by the Act not only because of where he or she stands but based on "what they say".[11] While a person can obstruct ingress or egress by loitering as much as by protesting, it is only the latter

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(Brennan J), 93-94 (Gaudron J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 355 (Dawson J); *Leask v The Commonwealth* (1996) 187 CLR 579 at 605 (Dawson J), 616 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1 at 52 [98] (McHugh J); *Unions NSW v New South Wales* (2013) 252 CLR 530 at 577 [133] (Keane J); *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 at [46] (Gaudron J).

8 *McCloy v New South Wales* (2015) 257 CLR 178 at 194 [2] (proposition B(2)).

9 Cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 145 (Mason CJ), 173-175 (Deane and Toohey JJ).

10 *McCullen v Coakley*, 134 S.Ct. 2518 at 2531 (2014), quoting *League of Women Voters of California*, 468 US 364 at 383 (1984).

11 *McCullen v Coakley*, 134 S.Ct. 2518 at 2523 (2014), quoting *Holder v Humanitarian Law Project*, 561 US 1 at 27 (2010).

which falls foul of the Act.[12] The decision of the District Court for the District of Colorado in *United States v Fee* upon which the Commonwealth relies emphasises the point (and involved an instructively different factual context).[13] Whereas "no one was permitted to enter the closed area" in that case after the challenged order was made, and "[t]he Forest Supervisor did not judge the content of the expressive activities that were restricted",[14] the Act will only operate on those protesting on particular topics and only if the person does not have express or implied consent of the owner.

9. In so far as environmental protest about logging is concerned, it is artificial to suggest that protesting of all kinds (pro and anti-logging) is prohibited by the Act neutrally. As Scalia J observed in his concurring opinion in *McCullen v Coakley*, "it blinks reality to say ... that a blanket prohibition on the use of [locations] where speech on only one politically controversial topic is likely to occur – and where that speech can most effectively be communicated – is not content based".[15] A person protesting in favour of a business activity is likely to have the business occupier's express or implied consent, and can thus engage in the protest activity free from the Act's constraints. According to United States authorities, "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people'".[16]

10. *Third*, Victoria [**Vic at [10]-[14]**] and New South Wales [**NSW at [10]-[14]**] seek to limit the operation of Tasmania's Act by submitting that "prevent, hinder or obstruct" must be read narrowly, even though Tasmania does not endorse, and the plaintiffs' circumstances do not reflect, a narrow construction. A narrow construction may be appropriate if it can fairly be adopted (a matter addressed in chief), but it does not avoid invalidity.

11. A narrow construction does not materially diminish the corrosive impact of the Act upon political communication, because the Act does more than inhibit speech that in fact seriously inhibits, obstructs or prevents business activities. First, it singles out those engaged in political communication. Second, because the Act vests powers in the police to stop protests, the true burden that calls for justification is the prevention of political communication which a police officer reasonably believes may be about to have the serious impact postulated. The scope of political communication inhibited is thus far wider than the narrow construction suggests. The burden is not lessened – if anything, it is exacerbated – by leaving it to the police to assess, prospectively and

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12 Cf *McCullen v Coakley*, 134 S.Ct. 2518 at 2531 (2014).

13 787 F Supp 963 (D Colo, 1992). *United States v Fee* is of dubious precedential value even in the United States. In about 25 years, it has only been cited (and then distinguished) in *Murphy v Kenops*, 99 F.Supp.2d 1255 (D Oregon, 1999).

14 787 F Supp 963 at 969 (D Colo, 1992).

15 *McCullen v Coakley*, 134 S.Ct. 2518 at 2543 (2014).

16 *McCullen v Coakley*, 134 S.Ct. 2518 at 2533 (2014), quoting *City of Ladue v Gilleo*, 512 US 43 at 51 (1994). See also *Chicago Police Department v Mosley*, 408 US 92 (1972).

without necessarily having any knowledge of the intended protest or the business activities being carried out, whether a person is about to engage in an activity which may have a "substantial" or "serious" impact on business activities. A court may perhaps have occasion to review the police's judgment after the fact,[17] but by then the protest will have been quelled and the time for the protest may well have passed.

12. *Fourth*, Tasmania [**DS at [34]**], Victoria [**Vic at [24], [27]**], the Commonwealth [**Cth at [13]-[16], [62]**] and NSW [**NSW at [31]**] submit that the Act has a small burden on the freedom because it prohibits conduct already "prohibited" by statute as well as by the torts of trespass and nuisance. But, as explained in chief, the balance struck by the Act between competing interests is different to that struck by the statutes and the common law. There is no overlap between the statutes and common law relied upon and the police powers conferred by Act. Also, the criteria employed under the Act are not those employed under the statutes or the common law. Moreover, a person wishing to engage in political communication is much more likely to desist from doing so by reason of directions to leave, by the possibility of arrest and the harsh criminal sanctions under the Act.

13. To the extent that the argument depends on the proposition that persons caught by the Act would be likely to be trespassers, that must be approached with caution. Trespass is not a criterion employed under the Act. Also, in *Levy*, only McHugh J regarded the possibility that the plaintiff was a trespasser as significant, and Brennan CJ disagreed.[18] The common law, as well as the exercise of statutory powers, must also accommodate the implied freedom.[19] The passages relied upon by the Commonwealth [**Cth at [14]**] in *Mulholland v Australian Electoral Commission* are distinguishable.[20] Whether legislation granting or establishing a means of communication (namely ballot papers) can do so while imposing limitations upon using that means of communication is far removed from the present case.

14. Further, the law of trespass has no clear application to many places to which the Act applies, including forests, as illustrated by the facts of the plaintiffs' arrests. To the extent that they were within the coupe, they were on crown land, to which Forestry Tasmania is obliged by statute to allow access in accordance with the terms of s 13 of the *Forest Management Act 2013* (Tas). Dr Brown obtained access to the area which he wished to film by means of a road habitually used by the local community as a bridle path, and closed only recently by Forestry Tasmania. Ms Hoyt was for the most part in

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17 See generally *Prior v Mole* [2017] HCA 10, where the scope of the judgment required of the police officer was very different to that required under this Act.

18 *Levy v Victoria* (1997) 189 CLR 579 at 595 fn 55.

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

20 (2004) 220 CLR 181.

areas of the forest in respect of which Forestry Tasmania had not exercised any power to prevent public access.

15. If and to the extent that the Act replicates existing common law and statutory prohibitions, a real question arises as to how the Act could be reasonably regarded as addressed to any real mischief or social need. The addition of further regulation to the existing panoply is itself a burden which the citizen must bear.

16. Tasmania [**Tas at [77]**], Victoria [**Vic at [22]**] and New South Wales [**NSW at [5(a), (c)], [7]-[8]**] seek to emphasise that the Act operates in limited places geographically, i.e. where forest operations are occurring. The submission is unrealistic as environmental protest is only likely to capture public attention at or near the site of forest operations. The definition of "forest operations" is very broad.

17. **The test to be applied**

18. Leave to reopen *McCloy* should be refused. It is a very recent decision of this Court and the approach adopted reflected the questions propounded in *Lange* and *Coleman*. In particular, each of the three stages of the structured approach reflects questions which this Court has long asked in considering whether a law that burdens the implied freedom is nevertheless justified because of its pursuit of another end.[21] Those stages need not be approached in a way – or with an intensity of scrutiny – that oversteps the boundary of the judicial function and the plaintiffs do not advocate such an approach.

19. *McCloy* should not be understood as affecting the propositions that a direct or severe burden on the implied freedom requires a strong justification or that a burden that discriminates between segments of the electorate, political parties, candidates or political viewpoints requires no less as strong a justification.[22]

20. The central vice of the Act, which is problematic no matter the test, is that it is directed at political communication and imposes a direct and discriminatory burden on political communication without any, or any adequate, justification.

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21 As to balance, see references in n 8 above. As to necessity, see, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568. See also, in the s 92 context, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [110].

22 *McCloy v New South Wales* (2015) 257 CLR 178 at 219 [87], 269-270 [255].