IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H3 of 2016

BETWEEN:

ROBERT JAMES BROWN
First Plaintiff

10

JESSICA ANNE WILLIS HOYT
Second Plaintiff

AND

THE STATE OF TASMANIA
Defendant

20

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

Crown Solicitor for the State of South Australia
Level 9, 45 Pirie Street
ADELAIDE SA 5000

Tel: 08 8207 1760
Fax: 08 8207 2013
Email: fiona.mcdonald3@sa.gov.au
Ref: Fiona McDonald; 161560

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia accepts the statement by the plaintiffs of the applicable legislative provisions.

Part V: Submissions

5. South Australia intervenes to make submissions in relation to the second question stated for the opinion of the Full Court.[1]

6. South Australia confines its submissions to principles relevant to the "second limb" of the test stated in *Lange*;[2] the issue of "justification".[3] That issue arises only in the event that an impugned law is found to effectively burden political communication in its terms, operation or effect.[4]

7. In summary South Australia submits:

   i. the first stage of the second limb requires that the discernment of purpose or "end" of the impugned legislation be at the level of abstraction that is relevant to the constitutional task. The necessary inquiry looks to the mischief being addressed by the law and whether there is a rational connection between the law and the purpose so discerned;

   ii. the structured proportionality tool of analysis expounded by the majority in *McCloy* is amenable to some further explication:[5]

---

[1] Special Case at [78] (SCB 69).
[2] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567, see also 561-562 (the Court).
[3] In the broad sense of the term: see *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at [67] (French CJ, Kiefel, Bell and Keane JJ).
[4] *McCloy* (2015) 257 CLR 178 at [2] (French CJ, Kiefel, Bell and Keane JJ), [126] (Gageler J), [220] (Nettle J), [306] (Gordon J); *Coleman v Power* (2004) 220 CLR 1 at [26] (Gleeson CJ), [74] (McHugh J), [196] (Gummow and Hayne JJ), [210] (Kirby J), [288] (Callinan J), [320] (Heydon J) each citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (the Court).
[5] *McCloy* (2015) 257 CLR 178 at [141] (Gageler J)

a. the test of *suitability* is a test of rational connection previously expressed as an incident of the first stage of the second limb;

b. the test of *necessity* requires that careful regard be had to the breadth and extent of the legislature's pursuits, especially where multiple objects may be pursued. Comparison with hypothetical alternatives or other, extant legislation may be useful where the same composite legislative objects are pursued to a comparable extent; otherwise the risk of intrusion into matters properly the subject of legislative choice arises;

c. as to whether the measure is *adequate in its balance*, the development of the common law on the same or similar subject matter as the impugned law does not assist with the importance of a particular legislative purpose.

First Stage of the Second Limb: Legitimate Ends

8. Where the impugned law has been found to impose a meaningful burden on political communication, that law will only be consistent with the system of representative and responsible government provided for by Chs I and II, and s 128 of the Constitution where that burden is found to be relevantly justified. That task of justification necessarily commences with the identification of the purpose or purposes of the impugned law: identifying the purpose(s) frames the analysis, namely whether the law serves a legitimate end.[6] It also pervades the second stage of the second limb. A majority of this Court has adopted an analytical tool comprising a *"series of different inquiries"*[7] for the purpose of structuring a proportionality analysis to this end.[8]

9. This creates an imperative to discern carefully the purposes or "end" of the legislative prescription. Opinions can differ in a given case as to whether a purpose can be discerned beyond an equation with the immediate effect of the legislation and be expressed at a higher level of abstraction. These differences in characterisation of legislative purpose, and the appropriate (and possible) level of abstraction, underpinned the division of opinion in *Monis v The Queen*.[9]

---

[6] *Monis v The Queen* (2013) 249 CLR 92 at [74] (French CJ). To the extent that some authority appears to identify a further threshold requirement of compatibility of *means* (see *Tajjour v New South Wales* (2014) 254 CLR 508 at [112] (Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at [31], [67]-[68] (French CJ, Kiefel, Bell and Keane JJ)), it is difficult to see the work that such a threshold test might perform, which is not (more comprehensively) performed by the proportionality analysis conducted at the second stage of the second limb.

[7] *Monis v The Queen* (2013) 249 CLR 92 at [279] (Crennan, Kiefel and Bell JJ).

[8] *McCloy* (2015) 89 ALJR 857 at [2] (French CJ, Kiefel, Bell and Keane JJ).

[9] *Monis v The Queen* (2013) 249 CLR 92 at [20], [73] (French CJ); [95], [125], [214] (Hayne J); compare [317], [320], [348] (Crennan, Kiefel and Bell JJ). Compare further *Attorney General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [135] (Hayne J) and [203] Crennan and Kiefel JJ)

10. To this end, it is critical that the identification of purpose be at the level of abstraction that is relevant to the constitutional task.

11. That task of identification necessarily proceeds from a premise that a law's objects and its effects are distinct.[10] Certainly, at one level, it is an object of any law to achieve the practical effect it creates.[11]

12. Limiting the inquiry to an analysis of the effect of the legislation or the means employed is problematic. Were the analysis concerned simply with identifying the purpose of pursuing the practical effects the law creates, the question would devolve into identification of those effects and whether they impose a meaningful burden on political communication. If a practical effect of the law is that it imposes such a burden – which, for the analysis to have subsisted beyond the first limb of *Lange* and proceeded to this stage, it necessarily does – then, despite the presence at a higher level of abstraction of some legitimate object, the justification analysis would be foreclosed by identification of the law's object as one pursuing those burdening effects.[12] Such an approach would be self-fulfilling and contrary to authority.[13]

13. Equally, the legislative object which, if proportionately pursued, might relevantly justify the burden, cannot be the intermediate "objects"[14] which in truth amount simply to the means adopted for pursuing a broader end.[15] It is those means which fall to be adjudged as proportionate or otherwise, by reference to the broader end they seek to advance.

14. The level of abstraction at which the object of a law is to be identified for the purposes of the question of justification must, rather, lie at the level of identifying the **mischief** or mischiefs to which the law is directed:[16]

> *"The level of characterisation required by the constitutional criterion of object or purpose is closer to that employed when seeking to identify the mischief to redress of which a law is directed or when speaking of 'the objects of the legislation'."*

15. Focusing on the mischief is to focus on the objects at a high level of abstraction. That is

---

[10] That they are, see *McCloy* (2015) 257 CLR 178 at [40] (French CJ, Kiefel, Bell and Keane JJ).
[11] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [178] (Gummow J), [424]-[425] (Hayne J).
[12] See PS at [36], [42].
[13] See, e.g., *Levy v Victoria* (1997) 189 CLR 579; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1; *Tajjour v New South Wales* (2014) 254 CLR 508.
[14] Cf PS at [36].
[15] Eg, the offences created and prohibitions available under the impugned provisions of the *Workplaces (Protection from Protesters) Act 2014* (Tas). See *Tajjour v New South Wales* (2014) 254 CLR 508 at [163] (Gageler J).
[16] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [178] (Gummow J); see also *McCloy* (2015) 257 CLR 178 at [132], [186] (Gageler J), [227], [232] (Nettle J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 301 (Mason CJ). As to the origin of the concept of "mischief" see *Heydon's Case* (1584) 3 Co Rep 7a at 7b.

not at odds with, or indeed related to, the complaint that the defendant makes of the plaintiffs' expression of legislative purpose at a *"high level"* of generality.[17]

16. This legislative object is discerned objectively by ordinary methods of statutory construction.[18] Plainly, it may emerge that the law pursues multiple objects.[19] Further, an object disclosed by orthodox methods of construction cannot be denied even though the law's practical operation suggests it is deficient or not exhaustively comprehensive in achieving that object.[20]

17. This is not to say that there is no relevant connection between a law's purpose and its practical operation. Where a legislative measure is so ill-suited to its purpose, so deficient in achieving its object, that there in fact exists *no rational connection* between the law's object and its practical operation, then the law's connection to its purpose may be severed.[21]

18. The plaintiffs complain that by harnessing the Act's prohibitions and penalties to the concept of a "protester" – attended by all the features that defined term entails[22] – the impugned provisions single out that category of persons without relevant justification. This is said to deny the existence of any rational connection between the provisions and their pleaded purposes of safety, public order and maintenance of economic opportunities.[23]

19. The contention is reminiscent of that advanced by the plaintiffs in *McCloy*. There it was contended that, because all members of the community are subject to various forms of regulation (not just those within the class of "prohibited donors"), a legislative object of safeguarding the integrity of the political process and reducing corruption could not be discerned from provisions prohibiting only certain groups from making political donations.[24] That contention was unanimously rejected.[25] So it must be here.

---

[17] Defendant's Submissions (**DS**) [47].
[18] *Unions NSW v New South Wales* (2013) 252 CLR 530 at [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at [67] (French CJ, Kiefel, Bell and Keane JJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [178] (Gummow J).
[19] See Defendant's Defence at [44] (SCB 127); cf PS at [35](a).
[20] Cf PS at [35](c).
[21] *McCloy* (2015) 257 CLR 178 at [56] (French CJ, Kiefel, Bell and Keane JJ), [132], [196] (Gageler J), [320] (Gordon J); see also *Tajjour v New South Wales* (2014) 254 CLR 508 at [78] (Hayne J); *Unions NSW v New South Wales* (2013) 252 CLR 530 at [50]-[55], [64] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [140], [168] (Keane J).
[22] See, in particular, the further definition of "protest activity" in s 4(2), *Workplaces (Protection from Protesters) Act 2014* (Tas).
[23] PS at [35](c).
[24] For a summary of the argument advanced by the plaintiffs in that case, see *McCloy* (2015) 257 CLR 178 at [48], [54] (French CJ, Kiefel, Bell and Keane JJ), [197] (Gageler J), [231] (Nettle J), [354] (Gordon J).
[25] *McCloy* (2015) 257 CLR 178 at [54]-[56] (French CJ, Kiefel, Bell and Keane JJ), [196]-[197] (Gageler J), [232], [234] (Nettle J), [353] (Gordon J)).

20. The necessity for some rational connection between a law and its identified purposes imposes no threshold greater than that demanded by logic.[26] It does not invite a value judgment of the impugned law or its efficacy.[27] It is only where it is *"...not possible to discern how* [the] *provisions could further the* [purpose identified]"[28] – where the measure does not *"make a material contribution"*[29] to the realisation of the purpose – that the connection necessary to sustain acceptance of the identified purpose will be severed.[30]

21. To observe that persons other than those within the category of "protesters" may also adversely impact upon safety, public order or economic opportunities by actions which, say, prevent, hinder or obstruct the carrying out of a business activity,[31] does not prevent the conclusion that a law targeting such conduct by "protesters" is capable of furthering the pleaded objects. As observed by Gageler J:

> *"The Parliament is not relegated by the implied freedom to resolving all problems ...* [of a certain type] *if it resolves any. The Parliament can respond to felt necessities."*[32]

Second Stage of the Second Limb: Proportionality

22. Having identified the relevant object or objects of a law, and assuming such objects have been found to be *"legitimate"*, attention turns to the relationship between the legitimate legislative objects and the means employed to achieve them. This second stage of the justification analysis is concerned to examine whether the law, in serving its legitimate ends, does so *"in a manner compatible with the maintenance of the constitutionally prescribed system of representative government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people"*.[33]

23. This proportionality stage of the justification analysis, as an analysis of the means employed, directs attention to the extent and nature of the burden on political communication relative to the extent and nature of the mischief, the redress of which the law legitimately pursues.[34] The three-pronged proportionality mode of analysis undertaken

---

[26] See *McCloy* (2015) 257 CLR 178 at [80] (French CJ, Kiefel, Bell and Keane JJ).
[27] *McCloy* (2015) 257 CLR 178 at [80] (French CJ, Kiefel, Bell and Keane JJ), [234] (Nettle J).
[28] *McCloy* (2015) 257 CLR 178 at [55], see also at [80] (French CJ, Kiefel, Bell and Keane JJ), [232], [234] (Nettle J).
[29] *McCloy* (2015) 257 CLR 178 at [196] (Gageler J).
[30] *McCloy* (2015) 257 CLR 178 at [56] (French CJ, Kiefel, Bell and Keane JJ), [132], [196] (Gageler J), [320] (Gordon J); see also *Tajjour v New South Wales* (2014) 254 CLR 508 at [78] (Hayne J); *Unions NSW v New South Wales* (2013) 252 CLR 530 at [50]-[55], [64] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [140], [168] (Keane J).
[31] See s 6, *Workplaces (Protection from Protesters) Act 2014* (Tas).
[32] *McCloy* (2015) 257 CLR 178 at [197] (Gageler J).
[33] *Monis v The Queen* (2013) 249 CLR 92 at [74] (French CJ).
[34] *McCloy* (2015) 257 CLR 178 at [2] (French CJ, Kiefel, Bell and Keane JJ), [155]-[156] (Gageler J), [255] (Nettle J).

in *McCloy* provides a structured tool for this second stage of the second limb of the *Lange* analysis. Aspects of this tool are amenable to some explication.

24. The need for a rational connection between the law and the identified legitimate end,[35] previously identified as an inquiry mandated by the first stage of the second limb, is now expressed as the question of the **suitability** of the law for its purpose, supporting it as a reasonably necessary means of achieving the end identified.[36] The test has been described in the same way in each expression: the inquiry remains one of rational connection.[37]

25. With respect to the **necessity** of the chosen means, consideration of other obvious and compelling, equally effective means of achieving the same legitimate legislative objects may provide a tool for assessing whether the law is relevantly proportionate.[38] However, any consideration of alternative means available to a legislature to achieve its objective(s) must have careful regard to the breadth and extent of that legislature's pursuits. There is a risk that mooted alternative measures are not capable of informing the justification enquiry. For example, to identify a legislative scheme which would fail to pursue Parliament's legitimate object to a comparable extent as the impugned scheme, or which would demand additional, or alternative, resources, does little to assist a determination of whether the impugned scheme is one which is reasonably necessary to achieve its objective(s).[39] It is the province of the legislature to determine which policy objectives it pursues and to what extent[40] (subject at all times to any limitations imposed by the Constitution).

26. Any consideration of alternative means designed to assist in assessing whether a particular measure is proportionate or "justified" will take on increasing complexity where, as here, the impugned law or scheme pursues multiple objects. If it pursues two legitimate objects, and analysis reveals that either of those objects justifies the relevant burden effected by the law, the law will not offend the freedom. However, if neither object alone provides the requisite justification, that does not conclude the enquiry. The simultaneous furtherance of *both* legitimate objects may supply the justification. Only comparisons with hypothetical alternative legislative schemes which would also further *both* objectives (to an extent comparable with that of the impugned law and by a means which is equally practicable)

---

[35] *Tajjour v New South Wales* (2014) 254 CLR 508 at [110] (Crennan, Kiefel and Bell JJ).
[36] *McCloy* (2015) 257 CLR 178 at [80] (French CJ, Kiefel, Bell and Keane JJ); see also at [197] (Gageler J).
[37] *McCloy* (2015) 257 CLR 178 at [54] (French CJ, Kiefel, Bell and Keane JJ).
[38] *McCloy* (2015) 257 CLR 178 at [81] (French CJ, Kiefel, Bell and Keane JJ), [135] (Gageler J).
[39] See *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 (***Murphy***) at [72]-[73] (Kiefel J); *Tajjour v New South Wales* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ).
[40] *McCloy* (2015) 257 CLR 178 at [90] (French CJ, Kiefel, Bell and Keane JJ); *Murphy* (2016) 90 ALJR 1027 at [65] (Kiefel J).

could supply a relevant comparison.[41]

27. Approaches taken in other jurisdictions to similar subject matter or issues may often appear to supply an instantly accessible illustration of a relevant "alternative" approach.[42] However, reference to other statutory schemes carries the same limitations as any hypothesised alternative means. They will only provide a useful source for comparison where the same composite legislative objects are pursued to a comparable extent.[43]

28. Absent that recognition, reference to alternative means moves from an analytical tool to an evaluation of competing policy objectives and resource-allocations between different polities.[44] That would *"invite the Court to depart from the borderlands of the judicial power and enter into the realm of the legislature"*.[45] Where one polity has pursued or prioritised certain legitimate objects, the failure of other jurisdictions to pursue those same objects,[46] those objects to the same extent, or those objects in that same hierarchy[47] should not be mistaken for the adoption by those other polities of alternative means that are relevantly comparable for the purposes of assessing the proportionality of the subject measures. If the schemes enacted in other jurisdictions value, prioritise, or pursue different objects, then those schemes do not supply alternatives of the relevant kind.[48]

29. As to whether the measure is **adequate in its balance**, the development of the common law on the same or similar subject matter as the impugned law does not assist with the *"importance"*[49] of a particular legislative purpose[50] which the legislature of the day has resolved to pursue.[51] The progression of the common law and legislative interventions respectively are fundamentally different. Legislative intervention (and innovation) is prompted where a matter has *not* hitherto been addressed, or adequately addressed, by the incrementally developed common law. Legislative amendments inherently value their subject purposes differently from the common law.

30. If comparison with the common law is profitable at all in assessing the "importance" of a legitimate legislative end, it could only be via the possible inference that, accepting that the common law will not always have addressed matters to the extent considered adequate by

---

[41] *McCloy* (2015) 257 CLR 178 at [328] (Gordon J).
[42] See PS at [67]-[68].
[43] *Murphy* (2016) 90 ALJR 1027 at [72]-[73] (Kiefel J); see also *Tajjour v New South Wales* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ).
[44] *Tajjour v New South Wales* (2014) 254 CLR 508 at [115] (Crennan, Kiefel and Bell JJ).
[45] *Murphy* (2016) 90 ALJR 1027 at [39] (French CJ and Bell J), see also at [245] (Nettle J).
[46] See, eg, *McCloy* (2015) 257 CLR 178 at [50] (French CJ, Kiefel, Bell and Keane JJ).
[47] See, eg, *Murphy* (2016) 90 ALJR 1027 at [72]-[73] (Kiefel J).
[48] See *Murphy* (2016) 90 ALJR 1027 at [72]-[73] (Kiefel J).
[49] *McCloy* (2015) 257 CLR 178 at [87]-[89] (French CJ, Kiefel, Bell and Keane JJ); *Tajjour v New South Wales* (2014) 254 CLR 508 at [151] (Gageler J)
[50] Assessed by reference to the mischief sought to be addressed.
[51] Cf PS at [51], see also [52]-[55].

the legislature of the day, it is only those matters of such importance as to warrant legislative redress which find expression in legislative intervention.

31. The extent to which the benefit to the legitimate end may be achieved by other legislation on the statute books is irrelevant.[52] Whether a legislative scheme is proportionate (and thereby constitutionally valid) does not turn upon the extent to which legislative schemes have pursued related ends or whether such schemes are repealed or enacted.

Part VI: Estimate of time for oral argument

32. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

10

Dated: 27 March 2017

C D Bleby SC
Solicitor-General for South Australia
T: 08 8207 1616
F: 08 8207 2013
20 E: chris.bleby@sa.gov.au

T N Golding
Counsel
T: (08) 8207 2565
F: (08) 8212 6161
E: todd.golding@sa.gov.au

[52] *McCloy* (2015) 257 CLR 178 at [265] (Nettle J), citing *Tajjour v New South Wales* (2014) 254 CLR 508 at [82] (Hayne J).