



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

**ANNOTATED**

**THE STATE OF TASMANIA**  
Defendant

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**PLAINTIFFS' SUBMISSIONS**

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**I INTERNET PUBLICATION**

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

**II ISSUES**

2. The issues are identified in the questions stated in the special case.

**III SECTION 78B NOTICES**

3. The plaintiffs have served notices under s 78B of the *Judiciary Act 1903* (Cth).

**IV NO JUDGMENTS BELOW**

4. This proceeding is brought in the original jurisdiction of the Court conferred by s 76(i) of the Constitution and s 30(a) of the *Judiciary Act 1903* (Cth).

10 **V MATERIAL FACTS**

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

**VI ARGUMENT**

**Introduction**

6. The *Workplace (Protection from Protesters) Act 2014* (Tas) (the Act) is intended to, and has the legal and practical effect of, not only punishing, but also preventing, onsite political protests throughout Tasmania if the protests might affect a business activity at the site.

7. The plaintiffs were each arrested and charged, purportedly under the Act, in early 2016 as a result of their onsite political protest against the proposed logging of the Lapoinya Forest. The respective criminal proceedings against them were abandoned by the police after the commencement of this proceeding.

8. The issues in this proceeding are whether the plaintiffs have standing in respect of the relief they seek and, if so, whether the Act, in whole or in part, contravenes the implied freedom of political communication.

9. The plaintiffs contend that they have the requisite standing and that the Act is either wholly invalid or, at the least, is invalid in so far as it applies to forestry operations on forestry land as defined in s 3 of the Act.

10. The key provisions in the legislative scheme are those that provide for police officers to prevent the commencement or continuation of an onsite political protest that they reasonably believe is preventing, hindering or obstructing or is about to prevent, hinder or obstruct a “business activity” at any “business premises” or “business access area” as defined in s 3 of the Act anywhere in Tasmania.

11. The broad definitions in Pt 1 of the Act ensure that the legal and practical effect of the Act is to prevent onsite political protests against the activities of both private and

governmental entities (particularly those that have been the subject of environmental protests) throughout Tasmania. The legislature has given guidance to police officers of its intent about the scope of their powers in relation to s 6(1), (2) and (3) by providing in s 6(5) that a procession etc passing business premises or a business access area “at a reasonable speed, once on any day” is not a contravention of those subsections.

12. The key provisions empower police officers to prevent the commencement or continuation of onsite political protests by directing the protesters to leave and stay away from business premises and business access areas for up to three months under pain of arrest and of criminal penalties if they do not do so.
- 10 13. The prevention of onsite political protests that the Act provides for has profound implications because not only is the protest itself able to be “nipped in the bud” but so is the capacity of the protesters to effectively communicate their onsite political protest to others by means of electronic and social media.
14. The Act in both ss 6 and 7 targets and singles out for prevention and punishment onsite political protest and protesters without any broader purpose of preserving, enhancing or protecting political communication. Further, no reasonable provision has been made in the Act to preserve or protect political communication.

#### **Legislative scheme**

- 20 15. Sections 6 and 7 are key provisions of the Act. Broadly speaking, s 6 is concerned with the interruption of business activity whereas s 7 is concerned with property damage and threats of damage (as defined) to business premises and things used at the premises.
16. The trigger for the exercise of police powers under Pt 3 to prevent onsite protests is to be found in ss 6(1), (2) and (3) and 7(3) and (4). Section 6(1), (2) and (3) prohibit conduct by “protesters” on or near “business premises” and “business access areas” that “prevents, hinders or obstructs” access or the carrying out of a “business activity” or the use of objects in the course of that activity. For example, s 6(2) – being the provision giving rise to the charges against the plaintiffs – provides that a protester must not do an act on business premises, or on a business access area in relation to business premises, if –
  - 30 (a) the act prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier in relation to the premises; and
  - (b) the protester knows, or ought reasonably to be expected to know, that the act is likely to prevent, hinder or obstruct the carrying out of a business activity on the premises by a business occupier in relation to the premises.
17. Section 7(3) prohibits people from issuing of threats of damage by persons acting in furtherance of or for the purposes of promoting awareness or support for an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue.

Pursuant to s 7(4), a threat of damage includes, for example, a threat to the effect that the use of a business-related object that is on business premises has been, or is being, or is to be, prevented, hindered or obstructed by a person: s 7(4)(c). Section 7(4)(d) provides that a threat of damage in relation to business premises is a threat to the effect that the use of a business-related object that is on a business access area in relation to business premises and is being taken to or from the business premises “has been, is being, or is to be, prevented, hindered or obstructed by a person”. The maximum penalty applicable to an individual for breach of s 7 is “a fine not exceeding \$50 000 or imprisonment for a term not exceeding 5 years, or both”.

10 18. Key definitions are as follows:

a. A person is a **protester** if the person is engaging in a protest activity: s 4(1).

b. “Protest activity” is defined in s 4(2) as an activity that –

(a) takes place on business premises or a business access area in relation to business premises; and

(b) is –

(i) in furtherance of; or

(ii) for the purpose of promoting awareness or support of –  
an opinion, or belief, in respect of a political, environmental social  
cultural or economic issue.

20 c. “**Business premises**” is defined in s 5 by reference to particular industries (eg, mining, forestry, manufacturing) and to exclude particular kinds of organisations (eg, hospitals, schools, charitable organisations). One kind of business premises is “premises that are forestry land” (s 5(b)). The related expressions “forestry land”, “forestry operations” and “forest products” are defined in s 3.<sup>1</sup>

d. “**Business access area**” is relevantly defined, “in relation to business premises”, as “so much of an area of land (including but not limited to any road, footpath or public place), 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”.

30 e. “**Business activity**” means a lawful activity carried out –

(a) for the purposes of profit or in the course of, or in relation to, carrying out an activity undertaken for the purposes of profit; or

(b) by a Government Business Enterprise; or

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<sup>1</sup> Forestry Tasmania is a Government Business Enterprise (see ss 3 and 5(g)) and is the business operator in respect of forestry land: see Attachment 1 at SCB 110.

- (c) as part of an activity carried out on business premises by a business occupier in relation to the premises or ancillary to, or connected to, such an activity; ...
- f. A “**business occupier**” is:
- (a) a business operator in relation to the business premises; and
  - (b) a business worker in relation to the business premises;
- g. “**Business operator**” in relation to business premises, means all of the following persons or entities in relation to the premises
- (a) an owner, lessee, or lawful occupier, of the premises, including a government entity that is an owner, lessee, or lawful occupier, of the premises;
  - (b) a government entity in which the premises are vested or that has management or control of the premises;
  - (c) a person who carries out a business activity on the premises under a contract (other than a contract of service), arrangement, or agreement, with a person who is, in relation to the premises, a business operator;
  - (d) a person who, under a permit, licence, or another authority, issued or granted under an Act, is entitled to carry out a business activity on the premises; ...
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19. Contravention of s 6(1), (2) and (3) is not of itself an offence but rather is the pathway to empowering a police officer to direct protesters to leave and stay away from the site for at least four days and up to three months (ss 6(4) and 11(6)). A second offence against s 6(4) can result in up to four years’ imprisonment.
20. The power of the police to direct protesters to leave and stay away from the premises or access area is enlivened by a reasonable belief that the protester has committed, is committing or is about to commit an offence under the Act or to contravene s 6(1) to (3): see s 11(1) and (2). It is an offence for a person to remain in – or return within four days to – a business access area having been directed to leave: s 8(1).
- 30 21. Both ss 6 and 7 mention safety, but neither is directed at or limited to prohibiting conduct that causes a risk to safety. For example, s 6(7)(b) provides that, “[w]ithout limiting the generality of [s 6(2)], an act ... prevents, hinders or obstructs the carrying out of a business activity ... if the act ... causes a risk to the safety of a business occupier in relation to the business premises”. (See also s 7(4)(e)(i) and (6)(b).)
22. Section 13 gives the police additional powers of arrest, “removal” and detention in respect of a person whom “the police officer reasonably believes is committing, or has committed within the previous 3 months, an offence, against a provision of [the] Act”

or, in the case of removal, a contravention of s 6(1), (2) or (3). Those powers may only be exercised if the police officer reasonably believes that it is necessary to do so for one of the purposes set out in s 13(4), which include to prevent the continuation or repetition of an offence against a provision of Part 2 (s 13(4)(d)).

23. Applicable penalties are set out in ss 16 and 17, and orders for compensation may be made under s 18.

### Standing

- 10 24. A police officer requested Dr Brown to leave the Reserve in purported reliance upon s 11 of the Act [SCB 61 [41]]. Dr Brown was arrested for failing to comply with that direction [SCB 62 [48]]. Dr Brown was taken to a police station and charged under s 8(1)(a) and released on bail on condition that he appear at Court and not return to the forestry coupe [SCB 62 [49]]. Ms Hoyt was likewise directed to leave, and removed from, the forest on 19 January 2016 [SCB 59 [28]]. She later received an infringement notice in respect of her conduct alleging an offence against s 8 of the Act, and she was convicted of that offence [SCB 60 [33]]. Ms Hoyt was arrested in the forest the next day, and she later received a complaint in respect of her conduct charging her with an offence under s 11(6) of the Act.
- 20 25. In these circumstances, each of the plaintiffs has a “special interest”<sup>2</sup> or “real interest” in the validity of the Act, and do not seek to raise a question which is abstract or hypothetical.<sup>3</sup> It was under the Act that the police took action against each of the plaintiffs, and it was by reference to prohibitions established by the Act that each of the plaintiffs was charged.
26. Tasmania’s contention<sup>4</sup> that the plaintiffs lack standing because Tasmania withdrew the infringement notice issued to Ms Hoyt and tendered no evidence in the Magistrates Court when the charges against each were heard should not be accepted. It is an unattractive contention, for it would countenance governments avoiding scrutiny of the validity of their legislation by dropping charges as soon as proceedings for declaratory relief as to invalidity of the legislation are commenced against them. Further, the contention is flawed.
- 30 27. First, it could not be suggested (and there is no suggestion) that Dr Brown lacked standing when he commenced these proceedings or that Ms Hoyt lacked standing when she joined them. The decisions to drop criminal proceedings against them were taken after these proceedings were on foot and after the joinder. A plaintiff does not lose

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<sup>2</sup> *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 528, 530.

<sup>3</sup> *Croome v Tasmania* (1997) 191 CLR 119 at 138 (Gaudron, McHugh and Gummow JJ). *Contra* Defence at [51(b)] (SCB 147).

<sup>4</sup> Defence at [51(a)] (SCB 146).

standing in the course of proceedings as a result of a defendant's choice, outside of the proceedings, to drop charges. Standing is to be assessed at the time of commencement.<sup>5</sup>

28. Second, dropping the charges does not undo the police's exercise of power upon each of the plaintiffs in purported reliance upon the Act. Each was given directions, detained and charged under, or in respect of matters under, the Act. Their liberty has been infringed, and they have an ongoing interest in determining whether that deprivation of liberty was valid.<sup>6</sup>
29. Third, it is an agreed fact that "[b]ut for the Act, and to the extent permitted by other laws, Ms Hoyt and Dr Brown would go back to the Lapoinya Forest to see, and raise public awareness of, the logging in the area" among other things [SCB 63 [55]]. As in *Croome v Tasmania*,<sup>7</sup> they have a special interest in knowing whether they will be liable to the Act's restrictions and executive discretions, and in knowing, in particular, whether Tasmania can do to them what it has done in the past. Or, as Dixon CJ stated in respect of a repealed provision, "what is at issue is whether what has been done can be repeated".<sup>8</sup>
30. Fourth, the relief sought is not moot.<sup>9</sup> This is not a proceeding where the plaintiffs seek the quashing of a charge,<sup>10</sup> which proceeding may well be rendered moot by the dropping of those charges.
31. For these reasons, the Court should conclude that both the plaintiffs have standing. In so far as issues of standing are subsumed within the requirement for a "matter", the validity of the treatment of the plaintiffs, and the validity of any future repetition of that treatment, is an "immediate right, duty or liability to be established by the determination of the Court" within the context of a genuine controversy.<sup>11</sup>

### Political communication

32. Freedom of political communication is an indispensable incident of the system of representative and responsible government created by the Commonwealth

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<sup>5</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 90 [112] (Gageler J); *Wragg v State of New South Wales* (1953) 88 CLR 353 at 392. The position in the United States is the same: see *Lujan v Defenders of Wildlife*, 504 US 555 at 569 n 4, 570 n 5 (1992); *Chevron Corporation v Donziger*, 37 F Supp 3d 653 at 666 (SD NY, 2014); *Azim v Vance*, 530 F App 44 at 45 (2nd Cir, 2013).

<sup>6</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 123 [235] (Keane J).

<sup>7</sup> (1997) 191 CLR 119.

<sup>8</sup> *Wragg v New South Wales* (1953) 88 CLR 353 at 371. See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 123 [235] (Keane J).

<sup>9</sup> *Contra* Defence at [51(a)] (SCB 146).

<sup>10</sup> *Cf Monis v The Queen* (2013) 249 CLR 92.

<sup>11</sup> See *Palmer v Ayres* [2017] HCA 5 at [27] (Kiefel, Keane, Nettle and Gordon JJ).

Constitution.<sup>12</sup> Whether a law infringes the freedom depends upon the answer to two questions. Does the law effectively burden the freedom in its terms, operation or effect? If so, is the law reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government?<sup>13</sup>

33. The second question involves asking whether the purpose of the law is legitimate, whether the law has a “rational connection” to the legitimate end pursued, whether there is any “obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom” and whether the law is “adequate in its balance” between “the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom”.<sup>14</sup>

#### **Burden**

34. The effect of the Act is “to prohibit, or put some limitation on, the making or the content of political communications”.<sup>15</sup> Its provisions operate to prevent the expression of opinions and beliefs where that expression has – or could potentially have – the proscribed effect on business activity. Tasmania admits that the Act will effectively burden the freedom “in certain circumstances”.<sup>16</sup> Further, the Act affects communications that have – or may have – a bearing on the choice of electors at federal elections, in light of the overlap between federal and State political issues<sup>17</sup> and, in particular, the overlap of Tasmanian environmental issues with federal politics.<sup>18</sup>

#### **Purpose and rationality**

35. In its defence,<sup>19</sup> Tasmania alleges that the Act has a number of purposes, including the safety of business operators, the maintenance of economic opportunities and the preservation of public order. The plaintiffs make the following submissions about those alleged purposes:

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<sup>12</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559.

<sup>13</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562; *Coleman v Power* (2004) 220 CLR 1 at 50-51 [92]-[96] (McHugh J), 77-78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J); *Hogan v Hinch* (2011) 243 CLR 506 at 542 [47] (French CJ), 555-556 [94]-[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1 at 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>14</sup> *McCloy v New South Wales* (2015) 89 ALJR 857 at 863 [2] (French CJ, Kiefel, Bell and Keane JJ) (*McCloy*).

<sup>15</sup> *Monis v The Queen* (2013) 249 CLR 92 at 142 [108] (Hayne J); *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [119] (Keane J), *McCloy* (2015) 89 ALJR 857 at 883 [126] (Gageler J).

<sup>16</sup> Defence at [42] (**SCB 143**).

<sup>17</sup> See, eg, *Unions NSW v New South Wales* (2013) 252 CLR 530 at [25].

<sup>18</sup> **SCB 67-68 [68]-[72]**.

<sup>19</sup> Defence at [44(a)] (**SCB 144**).



- a. The Act (and ss 6 and 7 in particular) is not directed to safety or safety alone,<sup>20</sup> and therefore the safety of business operators cannot be said to be the purpose of either s 6 or s 7.<sup>21</sup> The same may be said about public order.
- b. The maintenance of economic opportunities for business operators is not a purpose of the Act, applying ordinary principles of statutory construction.<sup>22</sup> An objective of maintaining “economic opportunities” for business operators has no foothold in the statutory text and is too vague a statement to constitute an objective against which a burden on the freedom of political communication could properly be assessed.
- 10 c. The singling out of those expressing opinions or beliefs lacks any rational connection to safety, public order or the maintenance of economic opportunities, without some cogent, objective, justification for a particular threat posed by that category of persons to safety, public order and the maintenance of economic opportunities.
36. On the proper construction of the Act, its purpose is to prevent and/or punish the expression of opinions and beliefs that might affect a business activity at or near particular business premises. In particular, the purpose of s 7 (and associated enforcement mechanisms) is to ensure that protesters do not damage, or threaten to damage, business premises or business related objects (the **s 7 purpose**), and the purpose of s 6 (and associated enforcement mechanisms) is to ensure that protesters do not prevent, impede, hinder or obstruct the carrying out of business activities on business premises or business access areas (the **s 6 purpose**). The s 6 and the s 7 purpose are advanced by Tasmania in its defence.<sup>23</sup>
- 20 37. Those purposes (or the means adopted to achieve them<sup>24</sup>) are not compatible with the maintenance of the prescribed system of representative government for one or more of the following reasons:
- a. they are directed to the freedom of political communication;
- b. they discriminate against particular points of view; and
- 30 c. as to the s 6 purpose, it seeks to prevent political communication causing even trivial or transient disruption to business activity, when some interruption of

<sup>20</sup> Safety is mentioned in ss 6(7)(b), 7(4)(e) and (6)(b) only.

<sup>21</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530 at 558 [55] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>22</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *Monis v The Queen* (2013) 249 CLR 92 at 117 [29] (French CJ) and 163-164 [184] (Hayne J).

<sup>23</sup> Defence [44(a)(i) and (ii)] (**SCB 144**).

<sup>24</sup> *McCloy v New South Wales* (2015) 89 ALJR 857 at 863 [2] (French CJ, Kiefel, Bell and Keane JJ).

business activity is a necessary and accepted incident of the exercise of the freedom of political communication.

*The Act is directed to the freedom*

38. A law will not be legitimate if it is “directed to the freedom”,<sup>25</sup> unless, in targeting the freedom the law seeks to preserve, benefit or enhance the freedom.<sup>26</sup> This caveat explains the direct burden considered in *Australian Capital Television Pty Ltd v The Commonwealth*,<sup>27</sup> which was not invalid because of an illegitimate purpose but merely called for compelling justification (as to which, see below at paragraph 48 and following). In *ACTV*, the invalid law prohibited the broadcasting during an election period of political advertisements on radio and television and required the provision of free time on those media, but in a way that advantaged certain political parties and candidates. Members of the Court were prepared to assume that the purpose of the provisions was to safeguard the integrity of the political process by reducing pressure on political parties and candidates to raise substantial sums of money, thus lessening the risk of corruption and undue influence.<sup>28</sup>
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39. The Act’s prohibitions, preventative and coercive powers and its penalties operate on – and exclusively on – those engaged in political communication. Conduct having precisely the same effect on business activity will be penalised under the Act if it is in furtherance of political communication, but not penalised if it has another motive, or no motive at all. Thus, conduct is prevented and penalised *because* it is political communication. The Act is directed to the freedom in the relevant sense. The establishment of indictable offences, and the attachment of a penalty, for engaging in political communication is significant.<sup>29</sup>
- 20
40. There is no suggestion that the Act serves to enhance the freedom (or, if it be any different, the interests which the freedom advances). The Act singles out political communication for particular restrictions and for particular criminal penalties, which do not apply to persons engaged in the same conduct for reasons unrelated to political communication. There is no legitimate explanation for the singling out of political communication in the Act in this way.

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<sup>25</sup> *Monis v The Queen* (2013) 249 CLR 92 at 215 [349] (Crennan, Kiefel and Bell JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at 90 [221] (Crennan and Kiefel JJ); *Coleman v Power* (2004) 220 CLR 1 at 123 [326] (Heydon J).

<sup>26</sup> Cf *McCloy* (2015) 89 ALJR 857 at 870 [47] (French CJ, Kiefel, Bell and Keane JJ); *Coleman v Power* (2004) 220 CLR 1 at 52 [97] (McHugh J).

<sup>27</sup> (1992) 177 CLR 106 (*ACTV*).

<sup>28</sup> *ACTV* (1992) 177 CLR 106 at 144 (Mason CJ) 154-155 (Brennan J) and 188-189 (Dawson J).

<sup>29</sup> *Levy v Victoria* (1997) 189 CLR 579 at 614.4 (Gummow and Toohey JJ)

*Suppressing particular points of view*

41. When the s 6 and s 7 purposes are read taking into account the way in which relevant terms are defined, the purposes are to protect particular enterprises from the expression of particular views (albeit limited to expressions of views having, or reasonably believed to be about to have, the proscribed effects on business activity):
- a. “Business premises” and “business access areas” are defined primarily by reference to particular industries (mining, forestry, agriculture etc).
  - b. It is evident that political protest at or near such places is likely to be about those industries.
  - 10 c. Conduct by the operator or with the express or implied consent of the occupier of premises is treated differently. Under s 4(5) and (6), a person is not to be taken to be engaging in a protest activity if the person has the consent of the occupier or is the operator. The discretion (in s 11(4)) to direct a business operator to cease to carry out an activity does not undo the differential treatment.
  - d. “Protected industrial action” within the meaning of the *Fair Work Act 2009* (Cth) and lawful industrial action taken by a State Service officer or State service employee are not in the usual course political protest activities (s 4(7)).
42. Therefore, the provisions work to suppress the voice of those who are opposed to activities at particular premises, except where the issue is an industrial one. That is not  
20 a legitimate purpose. As Hayne J explained in *Monis v The Queen*, “[t]he very purpose of the freedom is to permit the expression of unpopular or minority points of view.”<sup>30</sup> And as Gageler J observed in *Tajjour v New South Wales*, “[t]he end of quelling a political controversy or of handicapping political opposition would not [be legitimate]”.<sup>31</sup>
43. The discriminatory operation of the Act raises especially acute constitutional concerns because a “business operator” includes the Executive, and in the context of environmental protests on forestry land will invariably be the Executive.<sup>32</sup> A “business operator” is defined to include “an owner ... including a government entity that is an owner” and “a government entity in which the premises are vested or that as  
30 management or control of the premises” (s 3). A government entity is “the Crown and includes a statutory officer and a statutory authority”. In this particular case, the business operator is Forestry Tasmania. Forestry Tasmania is a Tasmanian Government Business Enterprise established under the *Forestry Act 1920* (Tas), continued in

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<sup>30</sup> (2013) 249 CLR 92 at 146 [122].

<sup>31</sup> (2014) 254 CLR 508 at 579 [148].

<sup>32</sup> See *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at 31 [43] (French CJ).

existence under the *Forest Management Act 2013* (Tas) (FMA) and invested with functions under the FMA [SCB 55 [8]]. Forestry Tasmania must act in accordance with a ministerial charter prepared by a Tasmanian Minister and the Treasurer,<sup>33</sup> and it must also comply with directions and instructions issued to it by the Tasmanian Executive.<sup>34</sup> It is properly to be characterised as an emanation of the Tasmanian Executive.<sup>35</sup> The nature and scope of the protection given against political protests can be discerned from the breadth of Forestry Tasmania's activities and the breadth of its business premises and the areas that provide access to those premises.<sup>36</sup>

*Not legitimate to protect companies from disruption by protest, without more*

- 10 44. The principle of legality would arguably favour a construction of s 6 that required some kind of substantial interference in business activity before political communication could be halted or penalised.<sup>37</sup> Further, there are authorities in other statutory contexts suggesting that expressions such as “hinder” and “obstruct” should be read subject to a requirement that the hindrance or obstruction be substantial.<sup>38</sup>
45. However, for the following reasons, these submissions proceed – though all the arguments do not depend – on the understanding that s 6 of the Act and associated enforcement mechanisms seek to stop protest having even a minor or transient effect on business activity.
- 20 a. First, on the express terms of sub-ss (1) to (3) of s 6, it is sufficient to engage the prohibitions that the carrying out of a business activity be hindered or obstructed. Even where those provisions speak of “preventing” the carrying out of a business activity, there is no requirement that that state of affairs be of any significant duration.
- b. That s 6 is intended to apply to transient and insubstantial disruptions is confirmed by sub-s (5), which gives an indication of the kind of protest sanctioned by the legislature. Subsection (5) provides that “a person does not commit an offence against subsection (4) by reason only of the person forming part of a procession, march, or event, that ... passes business premises or a long a business access area ... at a reasonable speed, once on any day”.
- 30 c. There is no suggestion that the conduct of the plaintiffs in this case caused any substantial disruption to Forestry Tasmania's activities, let alone any loss.

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<sup>33</sup> *Government Business Enterprises Act 1995* (Tas) ss 36-38.

<sup>34</sup> *Government Business Enterprises Act 1995* (Tas) ss 65, 114-115.

<sup>35</sup> Cf *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 150 [164]; *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 544 [27].

<sup>36</sup> See SCB 68 [73]-[76], Attachment I at SCB 110 and Attachment B at SCB 74-88.

<sup>37</sup> Cf *R v. Bell; Ex parte Lees* (1980) 146 CLR 141 at 147-148 (Gibbs J).

<sup>38</sup> See, eg, *Schubert v Lee* (1946) 71 CLR 589 at 594 (Latham CJ, Rich and Dixon JJ).

- d. The police officers who are empowered to direct protesters to leave business premises and business access areas and who have powers of removal and arrest must apply the provisions in real time and would be expected to do so based on the express terms of the statute without any implicit additional requirement that the interruption of business be “substantial”. The likelihood that “the provision will be administered according to its ordinary, apparent and draconian meaning” cannot be ignored.<sup>39</sup>
- e. Whereas the terms “hinder”, “obstruct” and “prevent” have been given a narrower construction in the context of offences for not cooperating with the police or obstructing highways, in the context of protecting business interests, they have sometimes been given a much broader meaning.<sup>40</sup>
- f. In any event, authorities giving a narrow construction to verbs such as “hinder” and “prevent” in one context do not resolve the question of the same verbs used in this statutory context.<sup>41</sup>
46. The plaintiffs submit that it is not a legitimate purpose to protect business from any disruption by those engaged in political communication, without more, for the following reasons:
- a. Communication about business activities is a necessary part of the implied freedom of communication guaranteed by the Constitution. Profit-making business activities are pervasive in both private and government sectors, and how governments regulate, promote or discourage them and the balance struck between profit-making and other societal interests are important topics of political discussion, especially where, as in this case,<sup>42</sup> the business operator is an emanation of the State managing the logging of forests in Tasmania.
- b. A statutory purpose is illegitimate if it is inconsistent with a necessary aspect of the freedom of communication.<sup>43</sup>
- c. Where the purpose of a particular political communication is to bring to light (in an effective way) what is happening on business premises, then some effect on business activities is sometimes inevitable.
- d. Therefore, it is necessarily incompatible with the freedom of political communication to seek to suppress onsite political communication reasonably

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<sup>39</sup> *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 349 [42] (French CJ).

<sup>40</sup> See, eg, *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 45-46 (Mason CJ); see also *Australian Builders' Labourers' Federated Union of Workers* (1993) 42 FCR 452 at 459-460.

<sup>41</sup> *Sec Lee v NSW Crime Commission* (2013) 251 CLR 196 at 233 [72] (Hayne J).

<sup>42</sup> See the definitions in paragraph 12 above of “business operator” and “business activity”.

<sup>43</sup> *Monis v The Queen* (2013) 249 CLR 92 at 153 [145] (Hayne J).

believed to be about to cause, or which is causing, any disruption to business, without more.

47. Just as insult and invective, and consequent offence to persons, are a necessary part of freedom of political communication,<sup>44</sup> some interruption to business is a necessary part of freedom of political communication in relation to business activities. Under the general law,<sup>45</sup> businesses enjoy no absolute right to be free from interruption (see below at paragraphs 51 to 55).

### Balancing

- 10 48. This stage of the inquiry requires the Court to assess the balance struck between “the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom”.<sup>46</sup> As explained above at paragraphs 38 to 43, the burden imposed by Act is direct and discriminatory. If those aspects of the Act do not lead to the conclusion that the Act’s purpose is illegitimate then they nevertheless require Tasmania, upon whom the onus lies,<sup>47</sup> to provide a strong or compelling justification for the burden on political communication.<sup>48</sup>

### Importance of purpose

49. The Plaintiffs submit that the s 6 and the s 7 purposes are of a low order of importance, partly because of their discriminatory character, discussed above, and also for the following reasons.
- 20 50. By contrast with *Attorney-General (SA) v Corporation of the City of Adelaide*, where there was a direct public interest in the Council ensuring the safe and convenient use of roads, the Act operates for the convenience of the stipulated business and certain government ventures.
51. In this respect, it is significant that s 6 of the Act and associated enforcement mechanisms go beyond the doctrines which the common law has developed to protect

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<sup>44</sup> *Coleman v Power*; *Monis v The Queen* (2013) 249 CLR 92 at 174 [220] (Hayne J)

<sup>45</sup> *Monis v The Queen* (2013) 249 CLR 92 at 148-149 [128] (Hayne J).

<sup>46</sup> *McCloy* (2015) 89 ALJR 857 at 863 [2].

<sup>47</sup> *McCloy* (2015) 89 ALJR 857 at 866 [24] (French CJ, Kiefel, Bell and Keane JJ).

<sup>48</sup> See *ACTV* (1992) 177 CLR 106 at 143 (Mason CJ), 169 (Deane and Toohey JJ), 235 (McHugh J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at 89 [217] (Crennan and Kiefel JJ); *Monis v The Queen* (2013) 249 CLR 92 at 130 [64] (French CJ), 212 [342] (Crennan, Kiefel and Bell JJ); *McCloy* (2015) 89 ALJR 857 at 874 [70] (French CJ, Kiefel, Bell and Keane JJ), 904-905 [252]-[253] (Nettle J).

economic interests.<sup>49</sup> While the Tasmanian Parliament is not constrained by the common law, the historical development of the common law tells against any asserted importance of Tasmania's purpose without evidence substantiating the same.

52. In the absence of a tort of unlawful interference with trade, which has not yet been recognised by this Court as a part of the common law of Australia,<sup>50</sup> the common law has, directly or indirectly, protected economic interests through actions in negligence, the tort of inducing breach of contract, the tort of injurious falsehood, passing off, deceit, the action *per quod servitium amisit* and conspiracy.<sup>51</sup> It may be noted that the Act goes beyond the tort of unlawful interference with trade recognised by the House of Lords in *OBG Ltd v Allan*<sup>52</sup> in so far as it would criminalise conduct even when it does not cause, and was not intended to cause, loss to the plaintiff.<sup>53</sup>
- 10
53. The Act bears some resemblance to besetting. In *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia*, Mason JA explained that “[a]t common law, picketing is not necessarily a nuisance and unlawful as such, but it becomes so if it involves obstruction and besetting”.<sup>54</sup> Murphy J in *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* later explained that “[b]esetting is appropriately a term applied to the occupation of a roadway or passageway through which persons wish to travel, so as to cause those persons to hesitate through fear to proceed or, if they do proceed, to do so only with fear for their own safety or the safety of their property.”<sup>55</sup>
- 20
- In *Barloworld Coatings (Aust) Pty Ltd v Australian Liquor, Hospitality & Miscellaneous Workers’ Union*, Bryson J distinguished between “making a point of view known by addressing other persons and discouraging the passage of other persons by besetting them with insults, offensive language and threats.”<sup>56</sup>
54. Besetting is, however, ultimately a species of private nuisance.<sup>57</sup> The usual requirements for a private nuisance are not, therefore, irrelevant. The “essence of the wrong is the detraction from the occupier’s enjoyment of the natural rights belonging

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<sup>49</sup> See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 44-45 (Brennan J), 95 (Gaudron J); *ACTV* (1992) 177 CLR 106 at 217 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1 at 123 [327] (Heydon J); *Monis v The Queen* (2013) 249 CLR 92 at 149 [128] (Hayne J).

<sup>50</sup> See *Sanders v Snell* (1998) 196 CLR 329 at [30] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

<sup>51</sup> See generally R P Balkin and J L R Davis, *Law of Torts* (5<sup>th</sup> ed, 2013) Chapter 20; John G Fleming, *The Law of Torts* (9<sup>th</sup> ed, 1998) Chapter 30.

<sup>52</sup> [2008] 1 AC 1.

<sup>53</sup> Cf *OBG Ltd v Allan* [2008] 1 AC 1 at [46]-[47] (Lord Hoffmann).

<sup>54</sup> [1971] 1 NSWLR 760 at 767; *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383 at 389.

<sup>55</sup> [1986] VR 383 at 388-389. See also *Australian Builders’ Labourers’ Federated Union of Workers – Western Australian Branch v J-Corp Pty Ltd* (1993) 42 FCR 452 at 457.

<sup>56</sup> (2001) 108 IR 107 at 113 [16].

<sup>57</sup> See generally *Shogunn Investments Pty Ltd v Public Transport Authority of Western Australia* [2016] WASC 42.

to ... the occupation of land”,<sup>58</sup> as opposed to harm to business activities on the land as such.<sup>59</sup> The interference with enjoyment of the land must be substantial, and the defendant’s conduct must be unreasonable in all the circumstances, including for instance established uses of the land, the type of damage suffered and the social or public interest in the defendant’s conduct.<sup>60</sup>

- 10 55. The Act strikes the balance differently from the common law action in nuisance (and for besetting as a subset of nuisance cases). There is no statutory requirement that the protester use insults, offensive language or threats or otherwise produce in an occupier any fear that inhibits the occupier’s enjoyment of the land. There is no requirement for loss or for a substantial interference with the enjoyment of land. And there is no inquiry into the unreasonableness of an accused’s conduct, for example by reference to its social utility. The absence of a reasonableness defence is significant,<sup>61</sup> given the importance of political communication and protest in relation to government policies and laws to Australia’s constitutional system.<sup>62</sup> In the context of the Act, that a protester is engaging in political communication could not possibly have a “lawful excuse” within the meaning of s 6(6) of the Act.

*Fundamentally important mode of communication*

- 20 56. The importance of Tasmania’s asserted legitimate ends must be weighed against the fact that the communication at which the Act is directed in the present context is a fundamentally important mode of communication about environmental matters concerning Tasmania’s forests.
57. Dr Brown’s experience is that “on-site protests, and broadcasting images of parts of the environment at risk of destruction, are the primary means of bringing environmental issues to the attention of the public and politicians”, and “the wider public is more likely to take an interest in an environmental issue when it can see the environment sought to be protected” [SCB 63-64 [58]]. That is because “[o]n-site protests enable images of the protest and of the environment which the protestors believe to be under threat to

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<sup>58</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 507 (Dixon J).

<sup>59</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 493 (Latham CJ), 506-507 (Dixon J), 523-524 (McTiernan J).

<sup>60</sup> See generally *Gartner v Kidman* (1962) 108 CLR 12 at 44 (Windeyer J); *Southern Properties (WA) Pty Ltd v Executive Director, Department of Conservation and Land Management* (2012) 189 LGERA 359 at 382 [118]; *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514 at 545 [138]; *Sleeman v SPI Electricity Pty Ltd* [2014] VSC 49 at [35]; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 299 (Lord Goff); *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 831 [5]; *Antrim Truck Centre Ltd v Ontario (Transportation)* [2013] 1 SCR 594 at [2], [19], [26], [28], [29]; John G Fleming, *The Law of Torts* (9<sup>th</sup> ed, 1998) 466-467.

<sup>61</sup> *Cf Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>62</sup> See *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 554 [40], 556 [44]-[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).



reach a wide audience” [SCB 64 [59]]. Protests, and in particular onsite protests, have historically been a catalyst for protecting tracts of the environment [SCB 64 [60]]. The attraction and power of onsite protesting was recognised by members of this Court in *Levy v Victoria*.<sup>63</sup>

58. The Act is very different from the law upheld in *Attorney-General (SA) v Corporation of the City of Adelaide*.<sup>64</sup> In that case, a majority of the Court dismissed a challenge to a by-law that prohibited preaching, canvassing, haranguing or distributing printed material without the permission of the local council. The impact of that by-law on the implied freedom was regarded as incidental because permission would only be granted or refused “having regard to the safety and convenience of road users”, and the by-law did not operate in respect of certain core political communications<sup>65</sup> and did not extend to a particularly significant place for expressing political views (the Speakers Corner).<sup>66</sup>
- 10
59. By contrast, onsite protests are vitally important if there is to be any genuine flow of communication on forestry issues, whereas there was nothing about protesting on roads in *Attorney-General (SA) v Corporation of the City of Adelaide* to suggest that regulating such conduct would deter speech on particular topics and from particular viewpoints. It is consistent with this Court’s previous decisions to pay careful regard to the nature or qualities of the place where political expression is sought to be regulated. The freedom may require certain speech to be tolerated in a public place which the freedom may permit legislatures to prohibit when directed into a person’s home. *Coleman v Power* is an example of the former; the joint judgment in *Monis v The Queen* is an example of the latter. In this regard, it is not unimportant that there is a long history of protesting on Crown land (including, therefore, forests), and that “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>67</sup>
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60. Thus, the impact of the Act cannot be diminished, avoided or explained away by invocation of the uncontroversial proposition that the implied freedom does not confer personal rights on speakers.<sup>68</sup> What the Act prohibits is not some idiosyncratic form of expression sought to be engaged in by Dr Brown and Ms Hoyt. In so far as environmental protest is concerned, the Act strikes at, and seeks to prohibit, a primary
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<sup>63</sup> (1997) 189 CLR 579 at 595 (Brennan CJ), 613 (Toohey and Gummow JJ), 623-624 (McHugh J).

<sup>64</sup> (2013) 249 CLR 1.

<sup>65</sup> (2013) 249 CLR 1 at 88 [217] (Crennan and Kiefel JJ).

<sup>66</sup> (2013) 249 CLR 1 at 87 [212] (Crennan and Kiefel JJ).

<sup>67</sup> *Hague v Committee for Industrial Organization*, 307 U.S. 496 at 516-517 (1939) (Roberts J).

<sup>68</sup> See, eg, *McCloy* (2015) 89 ALJR 857 at 867 [29]-[30] (French CJ, Kiefel, Bell and Keane JJ), 914 [317] (Gordon J).

and distinctive means of communicating this subject matter to and among the people of the Commonwealth. To exclude people from protesting on or near the site of alleged environmental harm is, to adopt the language of Mason CJ in *ACTV*, to “directly exclude potential participants in the electoral process from access to an extremely important mode of communication with the electorate.”<sup>69</sup> The Act is therefore “apt to distort the flow of political communication within the federation”.<sup>70</sup> In the words of Eric Barendt:<sup>71</sup>

10 For many people, participation in public meetings or less formal forms of protest—marches and other demonstrations on the streets, picketing, and sit-ins—is not just the best, but the only effective means of communicating their views. ... Taking part in public protest, particularly if the demonstration itself is covered on television and widely reported, enables people without media access to contribute to public debate.

*Absence of compelling justification*

61. Neither the Special Case nor the extrinsic materials justify the Act beyond assertion. Clearly, some protests may hinder rather than help the profitability of business activities. But not all protests have that consequence. To take Dr Brown and Ms Hoyt as examples, it is not at all apparent that their actions caused any real detriment to Forestry Tasmania’s business activities.
- 20 62. What is lacking is any evidence of the extent of the financial impact of protesting on Tasmanian business activity that could explain, let alone justify, the substantial intrusion upon the implied freedom. There is no decision of this Court requiring the legislature to have such evidence before legislating, and the plaintiffs do not contend for such a hard line rule. The absence of such evidence is, however, suggestive of a failure carefully to calibrate a legislative regime to an allegedly pressing issue. And, more importantly, the absence of evidence complicates the task for Tasmania in demonstrating the importance of its purpose for legislating. Such an approach is consistent with this Court’s decisions. The presence of a substantial evidentiary basis for legislating was relevant to validity in *McCloy*<sup>72</sup> and its absence was relevant to invalidity in *Rowe v Electoral Commissioner*,<sup>73</sup> while the existence of a substantial evidentiary record was insufficient to sustain the validity of the legislation in *ACTV*.<sup>74</sup>
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<sup>69</sup> (1992) 177 CLR 106 at 145.

<sup>70</sup> *Unions New South Wales v New South Wales* (2013) 252 CLR 530 at 578 [137] (Keane J).

<sup>71</sup> Eric Barendt, *Freedom of Speech* (2<sup>nd</sup> ed, 2005) at 268.

<sup>72</sup> *McCloy* (2015) 89 ALJR 857 at 871 [50]-[52] (French CJ, Kiefel, Bell and Keane JJ), 901 [233], 908 [268] (Nettle J).

<sup>73</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 38 [75] (French CJ), 61 [167] (Gummow and Bell JJ), 120 [382] (Crennan J).

<sup>74</sup> Cf *ACTV* (1992) 177 CLR 106 at 129-131 (Mason CJ).

63. Further, the Act is not carefully tailored to protecting business operations in Tasmania in that its prohibitions operate in such a sweeping and uncertain fashion. What is a “business access area” and what is a “business area” are by no means clear in practice. That Tasmania has changed its mind each time it has charged a person under the Act speaks to this [SCB 69 [77]]. The Act also chills political expression beyond the precise terms and operation of the prohibitions in s 6(1), (2) and (3) and s 7(4) and (5) in different ways. A person directed to leave under s 11 must not return to a business access area in relation to business premises within four days—for any reason (s 8(1)). The police can ratchet up the prohibitions in s 6(1), (2) and (3) by giving a person a direction not to contravene those prohibitions for the next three months. And the police have the power to move protestors along based on reasonable suspicion that they are about to prevent, hinder or obstruct the carrying out of a business activity, even if they have not done so and were not going to do so.

#### *Alternatives*

64. Finally, there are “obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom”,<sup>75</sup> in so far as forestry land is concerned. One alternative in relation to forestry land is the set of powers already contained in the FMA. Under s 22, an authorised officer may request a person not to enter, to leave or to cease to undertake any activity if that person “is preventing, has prevented or is about to prevent the Forest Manager from effectively or efficiently performing its functions” (s 22(3)). An authorised officer may also prohibit a person from entering or remaining on permanent timber production zone land in the interests of a person’s safety (s 22(4)(c)). Under s 23, the Forest Manager may also close roads “for the purposes of discharging its responsibilities” or “in the interests of safety” (s 23(2)). These powers under the FMA are equally effective as the Act in protecting logging interests in Tasmania, for the FMA equips authorised officers with the same move on powers. Given that the FMA has already been enacted, it is an “obvious and compelling” and “reasonably practicable” alternative. And, importantly, it is less restrictive of the freedom. It does not directly target protesting or other politically expressive conduct. The powers of authorised officers is more tightly conditioned, and the consequences for a contravention are less severe. In so far as people are prohibited from going onto a particular place under s 23, there has to be some clarity by way of signage to put them on notice.

65. Another alternative is the existing provisions of the *Police Offences Act 1935* (Tas), and in particular s 15B. That provision permits a police officer to direct a person to leave a place for not less than four hours upon reasonable belief that he or she has committed or is likely to commit an offence (including unlawful entry upon land:

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<sup>75</sup> *McCloy* (2015) 89 ALJR 857 at 863 [2], 872 [58] (French CJ, Kiefel, Bell and Keane JJ).

s 14B), is obstructing or is likely to obstruct the movement of pedestrians or vehicles or is endangering or likely to endanger the safety of any other person. The penalty for failing to do so is two penalty units. Under s 55(2B) and (2C) of the *Police Offences Act 1935* (Tas), a police officer may only arrest a person whom he or she believes on reasonable grounds to be on any land, building, structure, premises, aircraft, vehicle or vessel without consent if the officer has previously requested him or her to leave. There is also provision for reasonable excuse, which, unlike in the Act, could be read as accommodating the implied freedom of political communication.

- 10 66. Other alternatives are furnished by legislation (or proposed legislation) in Western Australia and New South Wales. In *Befair Pty Ltd v Western Australia*, the Court relied upon Tasmanian legislation as an alternative in assessing whether the Western Australian scheme was “reasonably necessary”.<sup>76</sup>
67. In Western Australia, the Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (WA) would, if enacted, amend the *Criminal Code* to provide that “[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”. This is less restrictive of the freedom in that it is more limited than the legislative conditions which enliven the Act prohibitions. And it will be equally efficacious as the Act in addressing large or violent or long protests of the kind that are likely to pose a threat to commercial interests.
- 20 68. In New South Wales, the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW) amended the *Inclosed Lands Protection Act 1901* (NSW) to make it an offence to enter or remain on inclosed land without consent and interferes with, or attempt or intend to interfere with, the conduct of the business or undertaking or do anything that gives rise to a serious risk to the safety of the person or any other person on those lands. This legislation is less restrictive of the freedom because the offence only applies to “inclosed land”, being “any land, either public or private, inclosed or surrounded by any fence, wall or other erection, or partly by a fence, wall or other erection and partly by a canal or by some natural feature such as a river or cliff by which its boundaries may be known or recognised”. The boundaries of its application are more precise and certain than the Act while being directed at the same kind of conduct.
- 30 69. In so far as these alternatives adversely impact upon political expression, it may be that they too raise constitutional questions. That issue does not arise in this case, for it is enough to note that they are directed at, and achieve, the same end as the Act, but they do so in ways that avoid the Act’s amalgam of concerning features. Finally, if the

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<sup>76</sup> (2008) 234 CLR 418 at 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). See also *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at 1045 [70] (Kiefel J).

alternatives do not satisfy the “obvious and compelling” criterion, they do demonstrate why the Act is not “adequate in its balance”.<sup>77</sup>

70. For these reasons, the Court should hold that the Act goes too far and impose an “undue” burden on the implied freedom in its operation with respect to forestry land, and is invalid to that extent.

## VII APPLICABLE PROVISIONS

71. The applicable statutory provisions are set out in Annexure A.

## VIII ORDERS SOUGHT

- 10 72. The questions reserved should be answered: (1) Yes. (2) Yes, in its entirety. Alternatively, yes, in its operation in respect of forestry land. (3) The Defendant.

## IX ESTIMATE OF TIME

73. The plaintiffs estimate that they will require a total of 3 hours for the presentation of oral argument and 20 minutes in reply.

Date: 27 February 2017



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<sup>77</sup> *McCloy* (2015) 89 ALJR 857 at 863 [2], 875 [79].

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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**ANNEXURE A TO PLAINTIFFS' SUBMISSIONS**

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

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# tasmanian legislation

TASMANIA'S CONSOLIDATED LEGISLATION ONLINE

[VIEW SUMMARY](#)The legislation that is being viewed is valid for **27 Feb 2017**.

## Workplaces (Protection from Protesters) Act 2014 (No. 25 of 2014)

Requested: 27 Feb 2017

Consolidated: 27 Feb 2017

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### INFORMATION

Notes: Not specified

Links: Not specified

Table of Amending Instruments: [\(click to view Table of Amendments\)](#)

Responsible Minister and Department: Not specified

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## Workplaces (Protection from Protesters) Act 2014

An Act to ensure that protesters do not damage business premises or business-related objects, or prevent, impede or obstruct the carrying out of business activities on business premises, and for related purposes

[Royal Assent 17 December 2014]

Be it enacted by Her Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

### PART 1 - Preliminary

#### 1. Short title

This Act may be cited as the Workplaces (Protection from Protesters) Act 2014.

#### 2. Commencement

The provisions of this Act commence on a day or days to be proclaimed.

#### 3. Interpretation

In this Act –

**area of land** includes any waters on the area of land;

**building** includes a structure;

**business access area**, in relation to business premises –

(a) means so much of an area of land (including but not limited to any road, footpath or public place), 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; and

(b) in relation to business premises consisting of a vessel or aircraft, includes a mooring, airport, and landing strip, at which the vessel or aircraft is, or is to be, stationed and so much of an area of land as is reasonably necessary to enable access to the mooring, airport or landing strip;

**business activity** means a lawful activity carried out –

(a) for the purposes of profit or in the course of, or in relation to, carrying out an activity undertaken for the purposes of profit; or

(b) by a Government Business Enterprise; or

(c) as part of an activity carried out on business premises by a business occupier in relation to the premises or ancillary to, or connected to, such an activity; or

(d) for a prescribed purpose that is related to the carrying out of an activity to which paragraph (a), (b) or (c) relates –

but does not include an activity that is prescribed to not be a business activity for the purposes of this definition;

**business occupier**, in relation to business premises, means –

(a) a business operator in relation to the business premises; and

(b) a business worker in relation to the business premises;

**business operator**, in relation to business premises, means all of the following persons or entities in relation to the premises:

(a) an owner, lessee, or lawful occupier, of the premises, including a government entity that is an owner, lessee, or lawful occupier, of the premises;

(b) a government entity in which the premises are vested or that has management or control of the premises;

(c) a person who carries out a business activity on the premises under a contract (other than a contract of service), arrangement, or agreement, with a person who is, in relation to the premises, a business operator;

(d) a person who, under a permit, licence, or another authority, issued or granted under an Act, is entitled to carry out a business activity on the premises;

(e) a person –

(i) who is a member of a prescribed class of persons who are

concerned in the management of the carrying out of a business activity; and

(ii) who carries out a business activity on the premises;

**business premises** has the meaning it has in [section 5](#);

**business-related object**, in relation to business premises, means an object that belongs to, is in the possession of, or is to be used by, a business occupier in relation to the business premises;

**business worker**, in relation to business premises, means –

(a) a person who is, under a contract of service, employed by a business operator in relation to the premises; and

(b) a person who is a member, in relation to the premises, of a prescribed class of persons who carry out business activities in relation to the premises;

**damage**, in relation to business premises or an object, includes to destroy, or the destruction of, the business premises or the object;

**development** includes –

(a) the construction, exterior alteration or exterior decoration of a building; and

(b) the demolition or removal of a building or works; and

(c) the construction or carrying out of works; and

(d) the subdivision or consolidation of land, including buildings and airspace; and

(e) the placing or relocation of a building or works on land; and

(f) the construction or putting up for display of signs or hoardings; and

(g) any activities ancillary to, or preliminary to, the carrying out of development;

**engaging in a protest activity** has the meaning it has in [section 4](#);

**forest operations** means work comprised of, or connected with –

(a) seeding and planting trees; or

(b) managing trees before they are harvested; or

(c) harvesting, extracting or quarrying forest products –

and includes any related land clearing, land preparation, burning-off or access construction;

**forest products** means any of the following:

- (a) vegetable growth on or from forestry land;
- (b) a product of growing trees, or a product of dead trees on or from forestry land;
- (c) shrub, timber, or other vegetable growth, that is on or from forestry land;
- (d) sand, gravel, clay, loam, or stone, that is on or from forestry land;

**forestry land** means –

- (a) an area of land on which forest operations are being carried out; and
- (b) an area of land on which work preparatory to the submission of a plan for certification as a certified forest practices plan under the Forest Practices Act 1985 is being carried out or, but for protest activities on the land, would be being carried out; and
- (c) an area of land that is a private commercial forest within the meaning of the Private Forests Act 1994; and
- (d) premises that are used to process forest products or to store vehicles, or equipment, for use on forestry land, whether or not the premises are forestry land;

**Government Business Enterprise** has the same meaning as in the Government Business Enterprises Act 1995;

**government entity** means the Crown and includes a statutory officer and a statutory authority;

**object** includes machinery and a vehicle, vessel, aircraft, or other mobile structure;

**owner**, in relation to business premises, means –

- (a) if the premises are Crown land that is permanent timber production zone land within the meaning of the Forest Management Act 2013 – the Forestry corporation within the meaning of that Act; and
- (b) if the premises are land held in fee simple – the person in whom the estate of fee simple is vested or, if the land is general law land subject to mortgage, the person having the equity of redemption in that land; and
- (c) if the premises are land held under a tenancy for life – the person who is the life tenant; and

(d) if the premises are land held under a lease for a term of not less than 99 years – the person who is the lessee of the land; and

(e) if the premises are land held under any other interest prescribed to be an interest for the purposes of this definition – the person who is the holder of the land under that interest;

**premises** means any of the following:

(a) a building;

(b) an area of land;

(c) a building floating on any waters on an area of land;

(d) any other place, or object on a place, that is within a prescribed class of places;

**process**, in relation to timber, means to pulp, chip, cut, or saw, timber;

**protester** has the meaning it has in [section 4](#);

**statutory authority** means an incorporated or unincorporated body which is established, constituted or continued –

(a) by or under a Tasmanian or Commonwealth Act; or

(b) under the royal prerogative –

being a body which, or of which the governing authority, wholly or partly comprises a person or persons appointed by –

(c) the Governor-General or the Governor; or

(d) a Minister of the Crown, including the Crown in right of the Commonwealth; or

(e) another statutory authority or a statutory officer;

**statutory officer** means a person, including a corporation sole, established or appointed by or under a Tasmanian or Commonwealth Act by –

(a) the Crown, including the Crown in right of the Commonwealth; or

(b) a Minister, including a Minister of the Commonwealth; or

(c) another prescribed person or a member of a class of prescribed persons –

to carry out any functions, or exercise any powers, under a Tasmanian or Commonwealth Act;

**timber** includes the trunks and branches of trees, whether standing or not, and all wood, whether or not the wood is cut up, sawn, hewn, split or otherwise fashioned;

**works** includes –

- (a) development; and
- (b) repair or maintenance, other than repairs or maintenance that are carried out by a person other than for profit; and
- (c) actions, on a site of works, preliminary to the carrying out of works on the site of works, including, but not limited to including –
  - (i) works referred to in paragraph (a) or (b); and
  - (ii) mapping, surveying, testing, or designing; and
  - (iii) any works that are prescribed; and
- (d) any prescribed works.

#### 4. Meaning of protester and engaging in a protest activity

(1) For the purposes of this Act, a person is a protester if the person is engaging in a protest activity.

(2) For the purposes of this Act, a protest activity is an activity that –

(a) takes place on business premises or a business access area in relation to business premises; and

(b) is –

(i) in furtherance of; or

(ii) for the purposes of promoting awareness of or support for –

an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue.

(3) For the purposes of this Act, a person is engaging in a protest activity if the person participates, other than as a bystander, in a demonstration, a parade, an event, or a collective activity, that is a protest activity.

(4) Nothing in subsection (3) is to be taken to limit the generality of subsection (1).

(5) For the purposes of this Act, a person is not to be taken to be engaging in a protest activity in relation to business premises, a part of business premises, or a business access area in relation to business premises, if the person has the consent, whether express or implied, of a business occupier in relation to the business premises –

(a) to be on the premises, part or area; and

(b) to engage in the protest activity on the premises, part or area.

(6) For the purposes of this Act, a person is not to be taken to be engaging in a protest activity in relation to business premises, or a business access area in relation to business premises, if the person is –

(a) a business operator in relation to the business premises; or

(b) a business worker in relation to the business premises who has the express or implied consent of a business operator in relation to the premises to engage in the protest activity.

(7) For the purposes of this Act, a person is not to be taken to be engaging in a protest activity on business premises, or a business access area in relation to business premises, if the protest activity is –

(a) protected industrial action within the meaning of the *Fair Work Act 2009* of the Commonwealth; or

(b) part of lawful industrial action undertaken by a State Service officer or State Service employee.

(8) For the purposes of this Act, a person is not to be taken to be engaging in a protest activity if the activity is within a class of activities prescribed not to be protest activities for the purposes of this subsection.

## 5. Meaning of business premises

(1) In this Act –

***business premises*** means –

(a) premises on which –

(i) mining; or

(ii) mining operations; or

(iii) exploration for minerals –

within the meaning of the *Mineral Resources Development Act 1995*, is or are being carried out or is or are authorised under an Act to be carried out; and

(b) premises that are forestry land; and

(c) premises used for agriculture, horticulture, viticulture, aquaculture, commercial food production or commercial food packaging, or as an abattoir, or for any associated purposes; and

- (d) premises used for manufacturing, building, or construction, for the purposes of a business activity; and
- (e) premises used as a shop, market or warehouse; and
- (f) premises used for the purposes of the administration or management of the conduct of business activities in relation to premises that are referred to in another paragraph of this definition; and
- (g) premises occupied by a Government Business Enterprise that performs functions, or exercises powers, in respect of a use made of other premises that are referred to in another paragraph of this definition; and
- (h) a vehicle, vessel, aircraft, or other mobile structure, used for the purposes of a business activity that is carried out in relation to premises that are referred to in another paragraph of this definition; and
- (i) premises used for purposes ancillary to the carrying out of a business activity on business premises that are referred to in another paragraph of this definition.

(2) The following premises are not to be taken to be business premises for the purpose of this Act:

- (a) a hospital that is owned, leased or occupied by, or on behalf of, a government entity;
- (b) a day-procedure centre, a private hospital, or a residential care service, each within the meaning of the Health Service Establishments Act 2006;
- (c) a prison or detention centre;
- (d) a primary school, high school or tertiary institution;
- (e) premises occupied by a charitable, volunteer or religious organisation;
- (f) any premises that are a member of a class of premises that is prescribed for the purposes of this paragraph.

## **PART 2 - Protection of Business from Protesters**

### **6. Protesters not to invade or hinder businesses, &c.**

(1) A protester must not enter business premises, or a part of business premises, if –

- (a) entering the business premises or the part, or remaining on the premises or part after entry, prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier in

relation to the premises; and

**(b)** the protester knows, or ought reasonably to be expected to know, that his or her entry or remaining is likely to prevent, hinder or obstruct the carrying out of a business activity on the premises by a business occupier in relation to the premises.

**(2)** A protester must not do an act on business premises, or on a business access area in relation to business premises, if –

**(a)** the act prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier in relation to the premises; and

**(b)** the protester knows, or ought reasonably to be expected to know, that the act is likely to prevent, hinder or obstruct the carrying out of a business activity on the premises by a business occupier in relation to the premises.

**(3)** A protester must not do an act that prevents, hinders, or obstructs access, by a business occupier in relation to the premises, to an entrance to, or to an exit from –

**(a)** business premises; or

**(b)** a business access area in relation to business premises –

if the protester knows, or ought reasonably to be expected to know, that the act is likely to prevent, hinder or obstruct such access.

**(4)** A person commits an offence if he or she contravenes a requirement, specified in accordance with section 11(6) on a direction issued to the person under section 11(1) or (2), that the person must not, in the period of 3 months after the date on which the direction is issued, contravene subsection (1), (2) or (3) of this section.

**(5)** A person does not commit an offence against subsection (4) by reason only of the person forming part of a procession, march, or event, that –

**(a)** passes business premises; or

**(b)** passes along a business access area in relation to business premises –

at a reasonable speed, once on any day.

**(6)** It is a defence to an offence against subsection (4) if the defendant proves that he or she had a lawful excuse for committing the offence.

**(7)** Without limiting the generality of subsection (2), an act on business premises, or a business access area in relation to business premises, prevents, hinders or obstructs the carrying out of a business activity on the business premises by a business occupier in relation to the premises if the act –



**(a)** prevents, hinders or obstructs the use, by a business occupier in relation to the business premises, of a business-related object on the business premises; or

**(b)** causes a risk to the safety of a business occupier in relation to the business premises.

## **7. Protesters not to cause or threaten damage or risk to safety**

**(1)** A protester must not do an act that causes damage to business premises if the protester knows, or ought reasonably to be expected to know, that the act is likely to cause damage to the business premises.

Penalty:

In the case of –

**(a)** a body corporate, a fine not exceeding \$250 000; or

**(b)** an individual, a fine not exceeding \$50 000 or imprisonment for a term not exceeding 5 years, or both.

**(2)** A protester must not do an act that causes damage to a business-related object that –

**(a)** is on business premises; or

**(b)** is on a business access area in relation to business premises and is being taken to or from the business premises –

if the protester knows, or ought reasonably to be expected to know, that the act is likely to cause damage to such a business-related object.

Penalty:

In the case of –

**(a)** a body corporate, a fine not exceeding \$250 000; or

**(b)** an individual, a fine not exceeding \$50 000 or imprisonment for a term not exceeding 5 years, or both.

**(3)** A person must not issue a threat of damage in relation to business premises –

**(a)** in furtherance of; or

**(b)** for the purposes of promoting awareness of or support for –

an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue.

Penalty:

In the case of –

- (a) a body corporate, a fine not exceeding \$250 000; or
- (b) an individual, a fine not exceeding \$50 000 or imprisonment for a term not exceeding 5 years, or both.

**(4)** For the purposes of subsection (3), a threat of damage in relation to business premises is a threat to the effect that –

(a) damage to a business-related object that is on business premises has been, is being, or is to be, caused by a person; or

(b) damage to a business-related object that –

(i) is on a business access area in relation to business premises; and

(ii) is being taken to or from the business premises –

has been, is being, or is to be, caused by a person; or

(c) the use of a business-related object that is on business premises has been, is being, or is to be, prevented, hindered or obstructed by a person; or

(d) the use of a business-related object that –

(i) is on a business access area in relation to business premises; and

(ii) is being taken to or from the business premises –

has been, is being, or is to be, prevented, hindered or obstructed by a person; or

(e) a risk to –

(i) the safety on business premises; or

(ii) the safety on a business access area in relation to business premises –

of a business occupier in relation to the premises has been, is being, or is to be, caused by a person.

**(5)** It is a defence to an offence against subsection (1) or (2) if the defendant proves that he or she had a lawful excuse for committing the offence.

**(6)** Without limiting the generality of subsection (1) or (2), an act causes damage to business premises, or to a business-related object, if, as a consequence of the performance of the act, the use of any business-related object by a business occupier

in relation to the premises causes, or would be likely to cause –

- (a) damage to the business premises, the object or any other business-related object; or
- (b) a risk to the safety of a business occupier in relation to the business premises.

#### **8. Persons must, at direction of police officer, leave and stay away from business access areas**

(1) A person must not –

- (a) remain on a business access area in relation to business premises after having been directed by a police officer under section 11 to leave the business access area; or
- (b) enter a business access area in relation to business premises within 4 days after having been directed by a police officer under section 11 to leave –
  - (i) the business premises; or
  - (ii) a business access area in relation to the business premises.

Penalty:

In the case of –

- (a) a body corporate, a fine not exceeding \$100 000; or
- (b) an individual, a fine not exceeding \$10 000.

(2) It is a defence to an offence against subsection (1) if the defendant proves that he or she had a lawful excuse for committing the offence.

#### **9. Persons must not prevent removal of obstructions**

(1) A person must not prevent, hinder or obstruct a police officer from taking action under section 12.

Penalty:

In the case of –

- (a) a body corporate, a fine not exceeding \$100 000; or
- (b) an individual, a fine not exceeding \$10 000.

(2) It is a defence to an offence against subsection (1) if the defendant proves that he or she had a lawful excuse for committing the offence.

### **PART 3 - Police Powers**

## 10. Police officer may demand proof of identity, &c.

(1) A police officer who reasonably believes that a person has committed, is committing, or is about to commit, an offence against a provision of this Act or a contravention of section 6(1), (2) or (3), may require the person –

- (a) to state the person's name and date of birth; and
- (b) to state the address at which the person ordinarily resides; and
- (c) to give to the officer any evidence of the person's identity that the person has in his or her possession.

(2) A person on whom a requirement is imposed under subsection (1) must not –

- (a) fail, or refuse, to comply with the requirement; or
- (b) in response to the requirement, state a false name or address or date of birth or give false evidence of identity.

Penalty:

Fine not exceeding \$2 000.

(3) A police officer may search a person who the police officer reasonably believes has failed to comply with a requirement imposed on the person under subsection (1)(c).

## 11. Police officer may direct person to leave business premises or business access area

(1) A police officer may direct a person who is on business premises to leave the premises without delay, if the police officer reasonably believes that the person has committed, is committing, or is about to commit, an offence, against a provision of this Act, or a contravention of section 6(1), (2) or (3), on or in relation to –

- (a) the business premises; or
- (b) a business access area in relation to the business premises.

(2) A police officer may direct a person who is in a business access area in relation to business premises to leave the business access area without delay, if the police officer reasonably believes that the person has committed, is committing, or is about to commit, an offence, against a provision of this Act, or a contravention of section 6(1), (2) or (3), on or in relation to –

- (a) the business premises; or
- (b) a business access area in relation to the business premises.

(3) A police officer may not issue to a person who is a business operator in relation to business premises a direction under subsection (1) or (2) in relation to the business premises or a business access area in relation to the premises.

(4) A police officer may direct a person who is a business operator in relation to business premises to cease to carry out an activity that, if the person were not such a business operator, may constitute an offence against a provision of this Act, or a contravention of section 6(1), (2) or (3), on or in relation to the business premises or the business access area in relation to the premises.

(5) A natural person must not contravene, or fail to comply with, a direction issued under subsection (4), including a requirement included in the direction under subsection (6).

Penalty:

Fine not exceeding \$10 000.

(6) A direction issued under this section to a person may include a requirement that the person must not, in the period of 3 months after the date on which the direction is issued –

(a) commit an offence against a provision of this Act; or

(b) except in the case of a direction issued under subsection (4), contravene section 6(1), (2) or (3).

(7) A direction may be issued under this section to a person or to a group of persons.

(8) If a direction is issued under this section to a group of persons, the direction is to be taken to have been issued to each person –

(a) who is a member of the group to whom the direction is issued; and

(b) who ought reasonably to be expected to have heard the direction.

## 12. Police officer may remove obstructions

(1) A police officer may remove, or cause to be removed, from an area of land, an object that the police officer believes on reasonable grounds to have been placed on the area of land in contravention of a provision of Part 2.

(2) A police officer may carry out, or cause to be carried out, an activity on an area of land, other than business premises, that the officer reasonably believes to be necessary to make good any damage caused to an area of land by a person in contravention of a provision of Part 2.

## 13. Arrest without warrant and removal of persons

(1) A police officer may arrest without warrant a person –

(a) who is on business premises; and

(b) who the police officer reasonably believes is committing, or has committed within the previous 3 months, an offence, against a provision of this Act, on or in relation to –

(i) the business premises; or

(ii) a business access area in relation to the business premises.

(2) A police officer may arrest without warrant a person –

(a) who is on a business access area in relation to business premises; and

(b) who the police officer reasonably believes is committing, or has committed within the previous 3 months, an offence, against a provision of this Act, on or in relation to –

(i) the business premises; or

(ii) a business access area in relation to the business premises.

(3) A police officer may remove from business premises, or a business access area in relation to business premises, a person who the police officer reasonably believes is committing, or has committed, an offence against a provision of this Act, or a contravention of section 6(1), (2) or (3), on or in relation to –

(a) the business premises; or

(b) a business access area in relation to the business premises.

(4) A police officer may only arrest a person under subsection (1) or (2), or remove a person under subsection (3), if the police officer reasonably believes that it is necessary to do so for any of the following purposes:

(a) to ensure the attendance of the person before a court of competent jurisdiction;

(b) to enable the detention of the person in accordance with the *Criminal Law (Detention and Interrogation) Act 1995*;

(c) to preserve public order;

(d) to prevent the continuation or repetition of an offence against a provision of Part 2;

(e) for the safety or welfare of members of the public or of the person –

and may detain a person so arrested only for so long as is necessary to fulfil the purpose, or purposes, for which the person was arrested.

#### 14. Use of force

A police officer may use, in relation to premises, a person or an object, the reasonable force necessary to exercise his or her powers, or perform his or her functions, under this Act.

#### 15. Infringement notices

**(1)** A police officer may issue and serve on a person an infringement notice if the police officer reasonably believes that the person is committing, or has committed, an offence against section 6(4) or section 8(1).

**(2)** An infringement notice –

**(a)** is to be in accordance with section 14 of the *Monetary Penalties Enforcement Act 2005*; and

**(b)** is not to relate to more than one offence.

**(3)** The penalty payable under an infringement notice for an offence against section 6(4) or section 8(1) is –

**(a)** in the case of a body corporate – 10 penalty units; or

**(b)** in the case of an individual – 2 penalty units.

## PART 4 - Court Proceedings

### 16. Certain offences to be indictable

**(1)** An offence against a provision of this Act, other than section 10(2), is an indictable offence.

**(2)** Despite subsection (1), an offence against a provision of this Act may, with the consent of the prosecutor, be heard and determined by a court of summary jurisdiction.

**(3)** If an offence against a provision of this Act is dealt with by a court of summary jurisdiction under subsection (2), the court may impose –

**(a)** if the offence is an offence, committed by a body corporate, against –

**(i)** section 6(4) – a fine not exceeding \$25 000; or

**(ii)** section 7(1) or (2) – a fine not exceeding \$25 000; or

**(iii)** section 7(3) – a fine not exceeding \$25 000; or

**(iv)** section 8(1) or 9(1) – a fine not exceeding \$10 000; or

**(b)** if the offence is an offence, committed by an individual, against –

**(i)** section 6(4) and section 17(2)(a) applies in relation to the individual – a fine not exceeding \$5 000; or

**(ii)** section 6(4) and section 17(2)(b) applies in relation to the individual – a fine not exceeding \$5 000 or a term of imprisonment of not more than 12 months, or both; or

**(iii)** section 7(1) or (2) – a fine not exceeding \$5 000 or

imprisonment for a term not exceeding 12 months, or both; or

(iv) section 7(3) – a fine not exceeding \$5 000 or a term or a term of imprisonment not exceeding 12 months, or both; or

(v) section 8(1) or 9(1) – a fine not exceeding \$5 000; or

(vi) section 11(5) – a fine not exceeding \$5 000.

## 17. Penalties for invading or hindering business

(1) A court that convicts a body corporate of an offence against section 6(4) may impose in respect of the offence a fine not exceeding \$100 000.

(2) A court that convicts an individual of an offence against section 6(4) may –

(a) if paragraph (b) does not apply to the offence, impose in respect of the offence a fine not exceeding \$10 000; or

(b) if the offence is an offence (a *further offence*) that is committed by the person after the person was convicted by a court for another offence against section 6(4), impose in respect of the further offence, a fine not exceeding \$10 000 or imprisonment for a term not exceeding 4 years, or both.

## 18. Compensation for loss

(1) If a court convicts a person of an offence against section 6 or 7 that has caused damage to business premises, a court may order the person to pay, to a business operator in relation to the premises, the amount determined by the court to be the cost of repairing the damage.

(2) If –

(a) a court convicts a person of an offence against section 6 or 7 in relation to business premises or a business access area in relation to premises; and

(b) the offence has caused damage (including by virtue of section 7(6)) to a business-related object in relation to the business premises –

a court may order the person to pay, to a business operator in relation to the premises, the relevant amount in relation to the business-related object.

(3) The relevant amount in relation to a business-related object is the cost that is determined by the court to be reasonably required in order to –

(a) restore the object to the condition it was in before the damage was caused; or

(b) replace the object, if the object cannot be restored to the condition it was in before the damage was caused.



**(4)** A reference in this section –

**(a)** to causing damage to a business-related object includes a reference to doing an act in relation to the object such that the use of the object causes or, if the object were to be used, would cause –

**(i)** the object, another object or premises to be damaged; or

**(ii)** a risk to the safety of a person; and

**(b)** to the relevant amount in relation to a business-related object is, in a case to which paragraph (a) refers, a reference to the cost determined by the court to be reasonably required in order to –

**(i)** restore the object to the condition it was in before the act referred to in paragraph (a) occurred; or

**(ii)** replace the object, if the object cannot be restored to the condition it was in before that act occurred.

**(5)** If a court convicts a person of an offence against section 6 that consists, in whole or in part, of –

**(a)** using an object to prevent, hinder or obstruct the carrying out of a business activity on business premises; or

**(b)** using an object, or doing an act, to prevent, hinder or obstruct access to an entrance to, or to an exit from, business premises or a business access area in relation to business premises –

and a police officer has, under section 12, removed the object, or caused the object to be removed, or made good, or caused to be made good, any damage to an area of land caused by the act, a court may order the person to pay to the Crown the removal and repair costs in relation to the object or act.

**(6)** For the purposes of subsection (5), the removal and repair costs in relation to an object or act are the costs reasonably incurred in –

**(a)** removing the object or having the object removed; and

**(b)** disposing of the object or having the object disposed of; and

**(c)** carrying out, or causing to be carried out, works to make good any damage caused by the use of the object or by the act.

**(7)** If –

**(a)** a court convicts a person of an offence against section 6; and

**(b)** a police officer arrested the person while, or immediately after, the offence was being committed, or removed the person from premises under section 13; and

(c) equipment was required to be used in order to effect the arrest or the removal –

a court may order the person to pay to the Crown the costs reasonably incurred in hiring or obtaining the equipment, and operating the equipment, in order to effect the arrest or removal.

(8) If a court convicts a person of an offence against section 6 or 7 in relation to business premises or a business access area in relation to business premises, the court may order the person to pay, to a business operator in relation to the business premises, the amount determined by the court to be equal to the amount of the financial loss suffered by the business operator as the natural, direct and reasonable consequence of the offence.

(9) If –

(a) a court convicts 2 or more persons of an offence against section 6 or 7 in relation to –

(i) the same business premises; or

(ii) a business access area in relation to the same business premises; and

(b) the offences each contributed to part or all of the same damage to premises or to a business-related object or to the same incident of financial loss of the business operator in relation to business premises –

a court may, in a determination under this section as to the amount of any cost or financial loss, apportion between the convicted persons so much of the cost or amount of the financial loss, and in the proportions, as the court thinks just in all the circumstances.

## PART 5 - Miscellaneous

### 19. Regulations

(1) The Governor may make regulations for the purposes of this Act.

(2) The regulations may be made so as to apply differently according to matters, limitations or restrictions, whether as to time, circumstance or otherwise, specified in the regulations.

### 20. Administration of Act

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

(a) the administration of this Act is assigned to the Treasurer; and

(b) the department responsible to that Minister in relation to the administration of this

Act is the Department of Justice.