IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No H3 of 2016

BETWEEN

ROBERT JAMES BROWN
First Plaintiff

JESSICA ANNE WILLIS HOYT
Second Plaintiff

AND

THE STATE OF TASMANIA
Defendant

SUBMISSIONS OF THE HUMAN RIGHTS LAW CENTRE

10

SEEKING LEAVE TO INTERVENE AS AMICUS CURIAE

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PART I: CERTIFICATION

1 The Human Rights Law Centre (the "Centre") certifies that these submissions are in a form suitable for publication on the Internet.

PART II: BASIS FOR INTERVENTION

2 The Centre seeks leave to intervene as *amicus curiae* to make submissions on the following important issues before the Court:

(a) the analytical framework and principles for determining whether an impugned law impermissibly burdens the implied freedom of political communication (the "Freedom") in light of recent decisions of this Court;

(b) the relevance and importance of identifying and assessing the 'legitimate' end and the nature and extent of the burden on the Freedom;

(c) the criterion that a law restricting the Freedom be adequate in its balance and the relationship of that inquiry to alternative legislative means and the Rule of Law;

(d) the relevance and significance of existing or proposed statutory regimes in other jurisdictions for regulating protesting activities; and

(e) where appropriate, the relevance of comparative and international legal materials to the above issues.

3 The facts of the present case acutely engage all of those issues and the Centre's submissions are directed both to principle and its application to the present case.

4 There are four reasons why the Centre's application to intervene as an *amicus* should be granted.

5 First, the issues raised as to the analytical framework and principles for determining whether an impugned law impermissibly burdens the Freedom in light of recent decisions of this Court are of general importance throughout Australia and of particular significance to the activities, objectives and purposes of the Centre. Furthermore, those issues arise for renewed consideration and further explication in novel facts with potentially far-reaching implications for protesting activities throughout Australia and other modes of communication protected by the Freedom.

6 Secondly, the Centre's submissions address matters and put arguments not directly addressed in the Plaintiffs' submission or address similar matters from a somewhat different perspective or degree of emphasis. The Centre's submissions should therefore assist the Court in reaching a correct determination and in a way in which it would not otherwise be assisted.[1]

7 Thirdly, as set out in the affidavit of Emily Howie, the Centre has, on a pro bono basis, assisted applicants in a number of cases involving the Freedom. In addition, the Centre has been actively engaged in recent times in scrutinising and commenting on proposed anti-protest laws. It has also commented on proposed anti-protest laws from the perspective of Australia's international law obligations and insights drawn from comparative jurisdictions.

8 Finally, the participation of the Centre as *amicus* is likely to result in a more thorough and balanced consideration of very important issues before the Court in circumstances where the Plaintiffs are likely to be met with opposition from a number of interveners (Attorneys-General from other States) in support of Tasmania's position (especially Western Australia and New South Wales who have introduced or proposed similar anti-protest laws).

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1 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312; *Roadshow Films v iiNet Ltd* (2011) 284 ALR 222 at [6].

PART III: APPLICABLE LEGISLATION

9 The Centre adopts paragraph 71 of the Plaintiffs' submissions.

PART IV: STATEMENT OF ISSUES

10 The Centre supports the submissions made by the Plaintiffs as to invalidity but makes these submissions to emphasise different matters or similar matters from another perspective. It also considers the present case calls for a clarification of several important matters of principle and offers its assistance to the Court in that regard.

11 The Centre's concern is the criminalisation of peaceful protesting activities brought about by the Act. The Centre submits that at almost every level of analysis the Act is constitutionally flawed. It imposes a direct and substantial burden on the Freedom that is directed at communication per se and is calculated to have a particularly chilling effect on political communication in respect of environmental concerns. It does so in pursuit of an object or end of secondary significance. It is vague in content and leaves that vagueness to be resolved by police discretion. It pursues this end by means that are inconsistent with basic rule of law principles.

12 The Centre's submissions are principally directed to the protesting activities the subject of s 6 of the Act.

Preliminary Matters

13 A number of preliminary matters are emphasised before turning to the Centre's particular submissions about the Freedom and its related concerns about the validity of the Act.

14 ***Protesting and the Scope of the Freedom.*** It is uncontroversial that the kind of protesting activities or conduct the Act seeks to suppress are a form of political communication captured by the Freedom. The Freedom extends to non-verbal conduct: *Levy v Victoria* (1997) 189 CLR 579 at 613, 625 and 641. At the same time, the Centre submits this in an appropriate case for the Court to now clarify that a necessary feature or corollary of the Freedom is the freedom of citizens to peacefully assemble for the purposes of communicating information and ideas (including dissident views) with respect to political matters: *South Australia v Totani* (2010) 242 CLR 1 at [30]-[31] per French CJ; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 91 (per Toohey J) and 116 (per Gaudron J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 225 (per McHugh), 277 (per Kirby J). This would be to recognise a limited form of freedom of assembly indispensable to the system of representative government established by the *Constitution* and not a wider free-standing principle of freedom of association or movement.

15 This is justified for two reasons. First, such a freedom of peaceful assembly is an obvious and necessary ingredient of Australian political discourse deeply rooted in the Australian political tradition and the common law.[2] The historical connection between freedom of assembly and the right to petition Parliament under s 5 of the *Bill of Rights* has also been noted.[3] Secondly, the circumstances in which the law may validly restrict freedom of peaceful assembly to communicate political views may be more circumscribed than is the case with a law restricting other modes of political communication: *Kruger* at 126. This is because peaceful assembly to voice political dissent or protest is an especially potent mode of political communication.

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2 Legal scholars have traced the right to assembly back to 1215, to the signing of the Magna Carta and the enactment in 1412 of the first English statute dealing with public assembly: Jarret & Mind, "The Right of Assembly" (1931) 9(1) *New York University Law Quarterely Review* 1 at 2-10; Smith, the Development of the Right to Assembly: A Current Socio-Legal Investigation" (1967) 9(2) *William & Mary Law Review* 351 at 361-362.

3 Handley, "Public Order, Petitioning and Freedom of Assembly" (1986) 7 *Journal of Legal History* 123 at pp 138-141 as referred to by French CJ in *Totani* (at fn 117).

16 ***Common Law Right and the Principle of Legality.*** The protesting activities targeted by the Act fall for consideration against the background of fundamental rights and freedoms recognised by the common law. The common law attaches special significance to freedom of speech and the related right or freedom of peaceful assembly.[4] The common law is subject to and must conform to the Freedom but the common law itself also informs the Freedom. Moreover, any encroachment or curtailment of protesting activities by Australian legislatures must therefore be assessed and interpreted against the bedrock constitutional principle of legality: statutes should be construed, where constructional choices are open, so that they do not encroach or encroach as little as possible, upon fundamental rights and freedoms at common law: *Tajjour* at [28]. In that regard the words "hinder" (ss 6 and 7) and "participates" (s 4) in the Act should be given a narrow construction.

17 ***Australia's Commitment to Protect International Human Rights.*** The Act appears inconsistent with multiple fundamental rights recognised and protected under the International Covenant on Civil and Political Rights ("ICCPR"). Ratified by Australia in 1980, the ICCPR obliges all levels of government—including Tasmania at State level—to respect, protect and fulfil the human rights articulated in the ICCPR. A statute should be construed consistently with Australia's public international law obligations where the language permits: *CPCF v Minister for Border Protection* [2015] HCA 1 at [8]; *Kartineyri v Commonwealth* (1998) 195 CLR 337 at [95]-[101]. As submitted below, this may also be a matter of relevance to the question of balance under the *McCloy* test of proportionality. A law that (unnecessarily) infringes Australia's obligations at public international law to protect basic human rights ought to weigh (even if not decisively) against the law's constitutional balance in appropriate cases.

18 Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression. Under article 19(3), the right to freedom of expression may only be restricted by measures provided by law that are necessary to respect the rights or reputations of others, or for the protection of national security, public order, public safety or public health or morals. Article 21 of the ICCPR which protects the right of peaceful assembly is also directly relevant. It also provides that no restrictions may be placed on this right unless necessary for the protection of national security, public order, public safety or public health or morals. The test for whether or not an assembly is protected at international law is whether it is peaceful.[5] There is a general presumption that assemblies are peaceful and the term "peaceful" should be interpreted to include conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties. In the case of both Articles 19 and 21 any restriction must be necessary and proportionate.

19 ***Distinguishing Levy and Other Decisions.*** It is emphasised at the outset that the impugned law in the present case is not at all comparable to the law held valid by this Court in *Levy v Victoria* (1997) 189 CLR 579. The impugned law in *Levy* was concerned with protecting personal and public safety. And the nature and extent of its restriction on protesting activities was far less extensive than that imposed by the Act. It was confined to specified hunting areas and the restriction was in the form of a licensing requirement for a relatively short period of time. Nor did the regulations directly prohibit or target freedom of speech (*Levy* at 614-615, 619-620, 627 and 642-648). *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382 is also very different. The burden on the Freedom was in furtherance of protecting public health and safety and the burden was slight in comparison as it preserved the ability to communicate their views and only prevented them camping overnight.

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4 *Watson v Trennery* (1998) 145 FLR 159 at 164-165; *Melser v Police* [1967] NZLR 437 at 445-446. In *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [5] Simpson J highlighted the interrelated nature of the rights of freedom of speech and freedom of assembly. See also *Protests and the Law in NSW* (NSW Parliamentary Research Service, 2015, at paragraph 3.2) noting the long history of the common law protecting protest. The observations of Brennan J in *Davis v Commonwealth* (1988) 166 CLR 79 (at 116-117) highlight the importance the law attaches to "peaceful expression of dissident views" and not muffling the voices of protesters.

5 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases and Materials and Commentary* (3rd ed) at [19.05].

20 *Importance of the Freedom.* Unlike implications drawn from Chapter III of the *Constitution*,[6] the Freedom has been consistently described in decisions of this Court as not absolute. It is from that premise that a form of proportionality testing or balancing adapted to the distinctive Australian constitutional setting in relation to the Freedom has proceeded. Critical to that process is the weight or importance to be ascribed to the Freedom. The Centre notes in that regard it has been emphasised by several judges in various cases that the Freedom is not a personal "right" but is an immunity from legislative or executive action.[7] The significance of this Hohfeldian distinction to the scope and importance of the Freedom is unclear: Zines, *The High Court and the Constitution* (2015, 6th ed), pp 585-586. If it is only to differentiate its animating rationale from the wider array of rationales underpinning First Amendment jurisprudence that is one thing. It would be another were it intended to downplay the Freedom's importance. The Freedom is a constitutional imperative and as Hayne J explained in *Monis* (at [104]) that the freedom is rooted in implication rather than in the express text of the *Constitution* does not make it brittle or make it otherwise infirm, or make it some lesser or secondary form of principle. The Freedom being intimately connected to voting is central to participation by citizens in the political life of the federal compact created by the *Constitution*: *Roach* (2007) 233 CLR 162 at [8] per Gleeson CJ.

Analytical Framework and Principles—*Lange, McCloy & Murphy*

21 In *McCloy v New South Wales* (2015) 89 ALJR 857 the Court confirmed that the question of whether an impugned law is invalid for impermissibly encroaching on the Freedom is to be determined by the application of the test expounded in *Lange*. In *McCloy,* the majority judgment (French CJ, Kiefel, Bell and Keane JJ) expressly sought to enhance the transparency of the reasoning process involved in the second limb of the *Lange* test by articulating a structured approach which unpacked the proportionality reasoning process into a series of stages (at [23], [74]). According to the majority, the final stage of the structured approach required an assessment of whether the impugned law was adequate in its balance. This stage in the majority's structured approach has been described as the "strict proportionality" or "balancing" approach (at [87]). More recently in *Murphy v Electoral Commissioner* [2016] HCA 36 French CJ and Bell J (at [37]) described the approach in *McCloy* as a mode of analysis applicable to some cases involving the general proportionality criterion.

22 Like the majority, Gageler J in *McCloy* recognised that there was a need to make a value judgment, consistently with the judicial function, as to whether the legitimate end justifies the burden of the Freedom (at [149], [151]). However, His Honour considered that the task was most effectively undertaken by ensuring that the standard of justification [i.e. the legitimate end] and the concomitant level or intensity of judicial scrutiny, not only is articulated at the outset but is calibrated to the degree of risk to the system of representative and responsible government established by the *Constitution* (at [150]). In this respect, Gageler J drew upon a series of previous judgments which had suggested that laws purporting to restrict categories of communication which have an inherently political content pose the greatest risk of stifling public discussion and criticism of government and therefore warrant strict scrutiny (*ACTV* at 143, 144, 147 per Mason CJ, 233, 234-5, 236, 238 per McHugh J, *Levy* at 618-619 per Gaudron J, *Mulholland* 220 CLR 181 at [40] per Gleeson CJ. This may be described as the "spectrum of scrutiny" approach. It has also been described by Professor Adrienne Stone as the 'two-tiered' approach.[8]

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6 *Re Woolleys* (2004) 225 CLR 1 at [66]-[80].

7 The Freedom is not dissimiliar to the common law 'right' to freedom of speech which is a reference to the residual area of freedom which remains after allowing for the impact of common law legal rules such as those relating to defamation and contempt of court and any legislation which impinges on freedom of speech. Doyle, "Common Law and Democratic Rights" in Finn, *Essays on Law and Government: Principles and Values* (1995), pp 147-149.

8 Adrienne Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23(3) *Melbourne University Law Review* 668); see also, Adrienne Stone, "The Limits of Constitutional Text and Structure Revisited" (2005) 28 *UNSW Law Journal* 842.

23 On this approach it was necessary, first, to categorise the burden imposed on the Freedom by the impugned law in order to determine the level of scrutiny appropriate to apply to it and, second, assess the importance of the legitimate end. If the burden could be categorised as restraining the *content* of political communication, it would warrant strict scrutiny, meaning that nothing but a compelling legitimate end would suffice to justify it ([153]-[155]). The clearest articulation of the spectrum of scrutiny approach was by Gageler J in *Tajjour* (at [152]):

> At one end of the spectrum, establishment of a sufficient justification may require "close scrutiny, congruent with a search for 'compelling justification'", constituted by establishing that the law pursues an end identified in terms of the protection of a public interest which is itself so pressing and substantial as properly to be labelled compelling and that the law does so by means which restrict communication on governmental or political matter no more than is reasonably necessary to achieve that protection. At the other end of the spectrum, establishment of a sufficient justification may require nothing more than demonstration that the means adopted by the law are rationally related to the pursuit of the end of the law, which has already been identified as legitimate.

24 The Centre submits that a limited spectrum of scrutiny approach is capable of principled reconciliation with the governing strict proportionality approach of the majority in *McCloy* and therefore operating in a manner that is consistent with the *McCloy* framework. Afterall, the majority in *McCloy* (at [70]) recognised that convincing justification will be required when the burden on the Freedom is direct and substantial. Both approaches require an assessment of the precise nature and degree of the restriction which the impugned provisions impose on political communication and of the identification and characterisation of the end the provisions are designed to achieve. The strict proportionality approach frames the question of weighing the one against the other as part of the last stage of an evaluative exercise. Under the spectrum of scrutiny approach, the evaluative exercise will subject the burden on the Freedom to upfront categorisation of strict scrutiny and a compelling public interest in certain circumstances. Even if the strict proportionality approach does not begin the balancing exercise from a position of weighting in favour of the Freedom, it will require a more robust legitimate end in order to strike the adequate balance where the burden on the Freedom is substantial.[9] The two evaluative approaches should therefore converge to produce the same outcome.

25 An advantage of the spectrum of scrutiny approach is that in a case where a stricter standard of review is warranted, the process begins with a clear weighting, or presumption, in favour of the Freedom: (Stone (*id*) at pp 12-13). This is why only a compelling or convincing legitimate end will be sufficient to tip the balance the other way and the effect of that weighting is to cast the burden of proof on those who would restrict the Freedom to show such a convincing justification (Schauer, *id*).

26 There is substantial merit in recognising a limited spectrum of scrutiny approach insofar as it is consistent with the strict proportionality approach of the majority in *McLoy*. That would be so if strict scrutiny applied where the impugned law either targets the content of political communication or imposes a burden on political communication that is direct and substantial. Where the impugned law otherwise burdens political communication the strict proportionality approach of the majority in *McCloy* would apply. At the level of principle, such an approach is justified and consistent with the majority approach in *McCloy* because where a law purports to regulate the content of political communication or imposes a direct and substantial burden on political communication it should be seen as raising at a threshold level an issue of compatibility rather than proportionality (*McCloy* at [68]). In other words, the systemic risk to the system of representative government established by the *Constitution* should be immediately recognised in the analysis as demanding more exacting scrutiny and a much stronger public purpose to justify that kind of incursion into the Freedom. Accordingly, special weight in the balancing exercise should be given to the Freedom and the burden squarely cast on the government to justify the burden by pointing to a compelling public purpose. It is also

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9 Schauer, "Proportionality and the Question of Weight" in *Proportionality and the Rule of Law: Rights, Justification and Reasoning* (2014, Cambridge University Press), pp 177-178, 180.

consistent with the *McCloy* framework because it is recognised that the exact mode of analysis in *McCloy* will not be appropriate in all cases.

27 Explicitly incorporating a limited degree of strict scrutiny into the more transparent and robust analytical framework adopted by the majority in *McCloy* would not have the effect of importing into Australian law wholesale the elaborate categorical framework adopted under First Amendment jurisprudence. It would only draw upon a tool of analysis that is appropriate, transparent and useful in certain cases and in a manner that is consistent with the *McCloy* analytical framework.[10] It would leave the strict proportionality analysis of *McCloy* to apply in the vast majority of cases but would recognise limited instances in which a stricter scrutiny should be applied at an earlier stage of the analysis. It would inject further structure and certainty into the analytical framework. It may also have the advantage of greater conceptual symmetry with cases such as *Roach* and *Rowe* requiring an enhanced justification in the form of a "substantial reason" (*Murphy* at [61] per Kiefel J, at [85] per Gageler J) where the prima facie adverse impact to the *Constitution*'s system of representative government is comparable to forms of disenfranchisement justifying an enhanced standard of review in those cases.

Assessing the Nature and Extent of the Burden

28 The Act imposes a content burden on the Freedom in that it specifically restrains political communication. Unlike *McCloy*, the Act is in large part directed at communication *per se*, not an activity that may have a secondary impact on political communication. The Act regulates 'protest activity' which is defined as activity designed "in furtherance of or for the purposes of promoting awareness of or support for" particular issues (s 4). The definition of "protest activity" refers to activity taken to further or promote awareness of or support for 'an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue' (s 4). Not only is "political issue" expressly mentioned in this definition, it is to be observed that the other topics expressly listed are likely to be political issues too. That is, "environmental, social, cultural or economic" issues are among the central issues to which the Australian people have regard when electing their representatives for political office. If a spectrum of scrutiny approach is followed, this matter alone warrants enhanced or stricter scrutiny and a corresponding compelling justification.

29 In the Centre's submission, even though the Act does not expressly target environmentalists, in its practical operation it significantly impacts that group and is calculated to have a particularly chilling effect on political communication relating to environmental concerns. The definition of "business premises" in subsection 5(1) lists (in broad terms) mining, forestry, agriculture, manufacturing and retail as the types of businesses where protest activity is to be restrained. The first three of those industries are commonly recognised as being traditional areas of concern for environmentalists.

30 In addition, the Act seeks to restrain protest activity occurring on business premises or on the access area to business premises. It was acknowledged in *Levy* that restrictions on the location of protest or communication have been found to limit the ability to protest in a manner which would have achieved maximum effect (at 609 per Dawson J, 613-614 per Toohey and Gummow JJ, 623-625 per McHugh J and 636 per Kirby J).

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10 It is recognised that considerable caution must be exercised in transposing U.S. jurisprudence into the Australian setting. There are very real differences which must be recognised. But those differences should not overshadow similiarities and where tools of analysis used under First Amendment jurisprudence may be helpful. It has even been suggested that the difference between the form of balancing undertaken under U.S. First Amendment jurisprudence and European proportionality is not as dissimiliar as might be suggested. See Schlink, "Proportionality in Constutitutional Law" Why Everyhwhere but Here?" (2012) 22 *Duke Journal of Comparative and International Law* 292 at 297; Jackson, "Constitutional Law in an Age of Proportionality" (2015) 124 *Yale Law Journal* 8; cf Cohen-Eliya and Porat, "American balancing and German proportionality: The historical origins" (2010) 8 *International Journal of Constiutional Law* 263.

31 The Centre endorses the point made at paragraphs [59]-[60] of the Special Case (page 64 Special Case book) that the most effective way for environmental issues to be brought to the public's attention is through communication that occurs at the relevant site. Taking and publicising images of the environment under threat, and of the protest activity at the site where the perceived environment threat arises, is the most potent way of bringing the environmental issue to the public's attention. Circumscribing access to those areas will necessarily reduce the ability of environmental protesters to generate such images.

32 Certain features of the restrictions under the Act are such that they are likely to have a significant chilling effect on peaceful protest activity as an important mode of political communication. The following features are of particular concern to the Centre:

(a) ***Wide Primary Restrictions***. The restrictions contained in subsections 6(1), 6(2) and 6(3) of the Act hinge upon protest activity that "prevents, hinders or obstructs" the carrying out of business activity or access to business premises. No definition is provided for any of these terms. Their scope is potentially so wide as to capture a significant amount of activity that is harmless or could only be seen as minimally impairing (in impact or duration) business activity. While an example of activity that may qualify as "preventing, hindering or obstructing" is provided in subsection 6(7), it does not assist in understanding or narrowing the scope of the key expression "prevents, hinders or obstructs". The Second Reading Speech referred to regulating protesting activity that "starts to *unduly* interfere, interrupt, obstruct or hinder the ability of business to develop and operate productive, job creating ventures ..." (page 3) (emphasis added), however those words of qualification do not appear in the Act itself. Further, contrary to the suggestion made in the Second Reading Speech, there is no indication in the Act that the only protest activity which will qualify as "preventing, hindering or obstructing" business activity is that which "deliberately brings the operations of the targeted business to a halt" (page 3). The primary restriction otherwise operates by reference to a definition of protest activity under s 4 that extends to someone that "participates" in the activity without any qualitative carve-out where the degree of participation is minor or temporary.

(b) ***Captures Public Areas***. "Business access area" is defined 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". It is obvious that this includes places in which members of the public would ordinarily be perfectly entitled to stand and occupy.[11] The Act extends beyond the occupation of private space by trespass or other unlawful means. It is noteworthy that whilst definition of business access area is limited to those areas reasonably necessary to access or exit the business premises the primary restriction in s 6(2) itself is *not* directed to activities that hinder access or exit to the business premise but fastens on activities that take place on that public space that hinder the carrying of business activities in the business premise. For example, standing in the public space encompassed by the business access area and using a mega-phone for 15 minutes to project a political message against the adverse environmental impact of logging activities of the business, whilst in no way hindering access to the business premise, could amount to hindering the carrying on of business activity for that period. That s 6(2) has this effect is made plain by s 6(3), which is limited to hindering access to or exit from business premises. Section 6(2) is plainly not a time, place and manner provision. It is a substantive restriction on an important mode of political communication in a public space.

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[11] It is worth noting that section 5 of the *Peaceful Assembly Act 1992* (Qld) states that a "person has the right to assemble with others in a public place."

(c) *Negligence Standard.* The primary restrictions employ a negligence standard to establish culpability for a contravention. That is, rather than there being a reasonableness defence it is sufficient to establish a contravention that the protester ought reasonably to be expected to know that his or her conduct is likely to "prevent, hinder or obstruct" business activity. This contradicts the false or misleading assertion made in the Second Reading Speech that the Act regulates protest activity that "*deliberately* brings the operations of the targeted business to a halt" (page 3) and "does not ... place someone who may *unintentionally* disrupt a business's activities at risk of breaching these laws" (page 18). As discussed below, contraventions of these primary restrictions may be a criminal offence in certain circumstances.

(d) ***Harsh Penalties.*** With one exception, the offences under the Act are indictable offences and the penalties are sizeable.

33 The combination of the wide and uncertain scope of the primary restrictions, the negligence fault standard for the imposition of potential criminal liability, harsh penalties and the extension to public spaces, give the Act a practical operation that imposes a direct and substantial burden on the Freedom. The Centre submits that not only does the Act impose a content burden on the Freedom it also imposes a burden that is direct and substantial. This is a further ground for subjecting the Act to stricter scrutiny and a corresponding need for Tasmania to show a compelling justification if a limited spectrum of scrutiny approach is recognised as part of the analytical framework.

Identifying and Assessing the 'Legitimate' End

34 As submitted, both the governing strict proportionality approach and the spectrum of scrutiny approach require some kind of assessment—consistent with the necessarily limited role of this Court in determining consistency with the Freedom—of the legitimacy and importance of the object or end pursued. And if enhanced scrutiny requiring a greater justification of a legislative purpose in terms of a "convincing or compelling justification", "overriding public purpose" or a "substantial reason" is warranted in certain instances then it becomes directly relevant to evaluate whether the asserted justifying purpose pursued rises to that level of importance.

Principles

35 Any assessment of the legitimate end cannot logically or in principle be limited to consideration of its compatibility with the maintenance of the constitutionally prescribed system of representative and responsible government. The threshold question of whether the impugned law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government will not progress the inquiry far in many cases. In cases such as the present where the impugned law is not concerned with regulating the electoral or political process, the need to assess the legitimacy and importance of the object or end is squarely raised. Some guidance of the legitimate ends and their importance can be gleaned from the Court's previous decisions.

36 In *Lange*, the legitimate end pursued by the common law of defamation was the protection of personal reputation. The Court unanimously found that this was not of sufficient importance to override the Freedom and some resulting adjustment or development of the common law was required to conform with the Freedom.

37 In *Levy* and for some judges in *Adelaide City Corporation*, the legitimate end pursued was public safety and protection from physical injury. In both cases this was found to be of sufficient importance to justify the burden on the Freedom.

38 In *Coleman* the legitimate end pursued was the prevention of 'insulting words' likely to provoke physical violence. A majority found this to be sufficiently important to justify the burden on the Freedom (although it would not have so found if the legitimate end was the prevention of insulting

words 'calculated to hurt the personal feelings' of the person to whom they were directed (at 78-79 [199])).

39 In *Hogan v Hinch* (2011) 243 CLR 506 the legitimate end pursued was the protection of the community from sex offenders once released from prison. This was accepted as sufficiently important to justify the burden on the Freedom.

40 In *Monis*, the legitimate end pursued was the prevention of the use of the postal service to send offensive material into a person's home or workplace. Three judges were satisfied that this was of sufficient importance to justify the burden on the Freedom (at 214 [348] per Crennan, Kiefel and Bell JJ). Three judges disagreed. They in fact went further and found that such an end - directly curbing offensive communication - was not even 'legitimate' in the sense of being compatible with the constitutionally prescribed system of government (at 134 [74] per French CJ (Heydon J agreeing), 173-174 [214]-[221] per Hayne J).

41 In *Wotton v Queensland* (2012) 246 CLR 1, *Wainohu v New South Wales* (2011) 243 CLR 1 and *Tajjour* the legitimate end pursued was community safety and the prevention of crime. In all cases the legitimate end was found to be of sufficient importance to justify the burden on the Freedom (although in *Wainohu* the law was declared invalid on other grounds).

42 The decided cases reveal examples and it may readily be accepted the list is not closed *Monis* (at [129]). Another obvious legitimate end not mentioned in the decided cases is national security although it is noteworthy in that regard that the Criminal Code (s 100) expressly carves out of the definition of "terrorist act" advocacy, protest or dissent not intended to cause harm. It should also be accepted that an end or object is not legitimate merely because it falls within a legislative head of power (which would be a particularly barren inquiry in relation to State legislatures). And something more is required than pointing to nebulous notions of an "ordered society" and "public interest" (*Monis* at [143]).

43 Apart from decided cases, the general law may also provide guidance as to what constitutes a legitimate end (*Monis* at [128]) and its importance. Plainly a legitimate and important end or object would be one concerned with promoting or protecting some other constitutional value such as the institutional independence, integrity and impartiality of the judiciary or the administration of justice.

44 A review of those decided cases and the general law does suggest that there are certain legitimate ends which may more readily be seen as lying on the upper end of the scale of importance such as human and community safety and protection from crime. There are also ends which the Court may more readily regard as lying lower down the scale of importance such as reputation and protection from personal insult. The issue in the present case is where the object or end pursed by Tasmanian sits on a continuum of importance if it is a legitimate end.

45 The articulation of the legitimate end which a law pursues is a question of statutory interpretation. Different judges may reach different conclusions on that interpretive question. There is, however, an important question of principle that ought to be resolved at least in terms of how broadly or narrowly the Court should seek to characterise the legitimate end. That issue of principle is directly raised by circumstances of the present case.

46 It has been pointed out that both broad and narrow approaches have been discernible in recent decisions of the Court (Stellios *Zines's The High Court and the Constitution* (Federation press, 6th ed. 2015 at 591-592). The narrow approach may be described as one which follows closely the legal operation of the provisions in question. Examples may be found in the judgments of French CJ and Hayne J in *Monis* at 162 [179], 134 [74]. Each described the impugned provision according to its legal operation of penalising the sending of offensive material via the post. Each denied that a second, broader purpose could be claimed. A similar approach seems to have been adopted by both judges in *Adelaide City Corporation*.

47 On the other hand, the broad approach may be described as one which looks more to the policy goals of the law rather than just its legal operation. An example may be found in the joint judgment of Crennan, Kiefel and Bell JJ in *Monis*. Their Honours stated that the purpose of the impugned provision was 'to protect people from the intrusion of offensive material into their personal domain' (at 207 [324]). Their Honours appeared to reject the idea that the purpose could be discernible only by reference to the text of the provision (at 205 [317]).

48 Arguably, the approach of French CJ and Hayne J did not reject *in principle* that the Court should look to the broader purpose of the law when construing the legitimate end. Rather, in *Monis* at least, their Honours appear to have concluded that it was not *possible* to discern any such broader purpose of the particular provision in issue in that case. In any event, it does appear that the Court has most recently favoured a broader interpretation of the legitimate end over a narrow one. For example, in *Tajjour* each judgment was prepared to accept that the purpose of the law was the broader policy goal of the prevention of crime, rather than the more limited legal operation of prohibiting consorting with criminals. Equally, in *McCloy*, all judgments characterised the purpose of the law along the lines of preventing corruption in elections for political office, rather than the more limited legal operation of regulating political donations. In both cases, the limited legal operation of the impugned provisions was seen as a means of achieving the broader policy goal.

49 The Centre accepts that it is appropriate to look beyond the legal operation of the provision when determining the legitimate end of the impugned law. This is consistent with the accepted principles of statutory interpretation which emphasise the need to interpret provisions in context rather than in isolation. It may also assist to avoid the practical problem of attempting to apply the *Lange* test to a multiplicity of purported ends (some of which may be legitimate and others not). While it may be accepted that a given provision may have more than one legal operation or effect, focusing on the broader policy goal achieved by the legal operation of the provision will usually yield a common overarching purpose applicable to a range of provisions which may be under consideration. This is relevant to the present case as discussed below.

Identifying and Assessing the Importance of any Legitimate End of the Act

50 In the present case, the long title describes the purpose of the Act in the following terms:

> 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.

51 The fact sheet which accompanied the Bill began by describing the rationale as follows:

> The legislation is designed to implement the Tasmanian Government's election policy commitment to introduce new laws to address illegal protest action in Tasmanian workplaces. The Bill creates new indictable offences under Tasmanian law. The Bill does not seek to prohibit the right to peaceful protest. It does seek to regulate inappropriate protest activity that impedes the ability of businesses to lawfully generate wealth and create jobs.

52 Further on, the fact sheet stated:

> The Bill regulates protest activity to ensure that businesses and employees can go about their legitimate commercial activities free from acts of obstruction, prevention or hindrance. This Bill sends a strong message to protest groups that intentionally disruptive protest action that prevents or hinders lawful business activity is not acceptable to the broader Tasmanian community.

53 The Second Reading Speech made similar statements as to the purpose of the Act. Of particular note is the description that the Bill is designed to "*rebalance the scales*". In its defence, Tasmania asserts a set of six purposes to the Act (para 44). Some of these are stated at a high level of generality consistent with the various descriptions of the purpose set out above. Others are described in more

specific terms. The Centre makes the following points about construing the purpose of the Act from these various assertions of purpose and the provisions of the Act.

54 First, Tasmania's argument that the Act's purposes include those stated in subparas 44(iii) and 44(vi) of the defence relating to the safety of business operators and preserving public order does not withstand scrutiny. In this regard, the Centre endorses the point made at subpara 35(a) of the Plaintiffs' submissions. Safety is mentioned in only three provisions of the Act and it occurs in the context of *examples* of conduct that might constitute preventing, hindering or obstructing business activity, a threat to damage property, or damage to property. Public order is not mentioned at all. It may be the case that in a given factual scenario, one *effect* of the Act may be to enhance safety or public order. However, the fact that the Act may apply where neither safety nor public order are in issue indicates they are, at best, incidental effects of the Act and not among the predominant purposes to which it is directed.

55 Secondly, the Centre notes the Plaintiffs' argument that, in fact, the purpose of the law is to prevent and punish political communication that might affect business activity (Plaintiffs' submissions para 36) and perhaps even political communication of a particular kind directed to the environment given the legislative history and references to forestry land and forestry operations in the Act. The Centre agrees that if this is the purpose of the Act, it could not classified as compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

56 The practical effect and substantive operation of the Act on the Freedom is significantly greater than that suggested in Tasmania's defence at para 48(b) in that:

(a) it is true that the Act is not directed at protest activity "generally", however it is directed at protest activity *in a large number of locations* and the subject-matter of those locations (forestry lands in many instances) suggests it has targeted protesting activity of a particular kind relating to environmental concerns which amplifies rather than alleviates the constitutional problem;

(b) it is plainly conceivable that the Act could prohibit peaceful protest activity by lawful occupants of business access areas. To take a simple example, a protestor may fly flags, sing songs or film the business from a business access area. This may distract workers who are working on site from their tasks or discourage business clients or contractors from entering the site in the first place. This may amount to a hindrance or obstruction to the business activity, yet would be a perfectly peaceful protest;

(c) it is not accurate to say, as it does in subpara 48(b)(iv) of the defence, that in so far as the Act extends beyond business premises to business access areas, it does so "only for the purposes of ensuring access by a business operator to an entrance to or an exit from business premises". As previously noted, subsection 6(2) prohibits a protester from doing an act on business premises, *or on a business access area,* if the act prevents, hinders or obstructs the carrying out of a business activity. It does not require that the act relate to hindering the access to an entrance or exit to the business premises (that is covered in a separate provision subsection 6(3)). It would cover the very scenario described in point (b) above;

(d) the practical effect of the ability of a police officer to direct that a person leave a business premises or a business access area may be seen to amount to a requirement that political communication cease. This is because, by virtue of s 8, the person who has been directed to leave must not return to the business access area within four days of receiving the direction. As explained persuasively by the Plaintiffs (see especially paragraphs [56]-[59] of the Plaintiffs' submissions) and discussed further below, on-site protests are vitally important for genuine flow of communication on environmental issues. In that context,

prohibiting a person from returning to the site for a specified period could effectively stop the flow of communication on environmental issues from a site to the broader public;

(e) it may be the case that, in the absence of a police direction under s 11, it is not the intention that the Act exposes a person to an offence unless they disobey a direction or cause or threaten damage to property. However, the wide discretion conferred on police to make such a direction creates considerable uncertainty as to when exposure to criminal liability may arise (a fact starkly exposed by the very facts of this case where the Plaintiffs were charged only to have charge withdrawn because of police uncertainty as to whether the Act had been transgressed);

(f) it is specifically noted that the Act is not limited to preventing protesters from occupying private property (through trespass or otherwise). The Centre broadly accepts the evident legitimacy of that more limited purpose. The Act though extends way beyond such a purpose.

57 Third, despite the position outlined in the paragraph above, the Centre is prepared to accept that the broad approach to construction of the purpose of the Act described above may support the claim that the Act is directed to the several purposes described at para 44 of the defence (excepting subparas (iii) and (vi)). These several purposes may be encapsulated in a broader description of the purpose being to protect business activity from interference. Alternatively, if that broad description fails to capture what might be a recognisable distinction in the Act, the purposes may be described as twofold: protecting business activity from interference (s 6 purpose) and protecting business property from damage (s 7 purpose). The Centre's principal focus is the s 6 purpose.

58 Even if it is assumed that such an end meets the threshold *Lange* test of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government it would be necessary to assess the *importance* that such a legitimate end ought to be afforded. The following observations are relevant in that regard.

59 First, it is not itself concerned with *furthering* that system in the sense of either protecting or enhancing it.

60 Secondly, it can not sensibly be said it is directed to safety, public order or protection from crime. While the fact sheet at one point referred to the election promise to address "*illegal* protest action", it later stated that the Act sought to regulate "*inappropriate*" protest activity. The Second Reading Speech erroneously claimed that the purpose of the Act was to "ensure that [the right to protest] is exercised responsibly and *lawfully* so that others rights are not negatively impacted". Yet, the long title of the Act does not expressly refer to the prevention of *unsafe*, *illegal* or *unlawful* protest activity. Action which prevents, hinders or obstructs business activity is not necessarily unsafe, illegal or unlawful. And it is tolerably clear that the Act is not directed at or confined to activity that is unlawful. It would appear that the only illegality the Act can be sure about is the illegality it creates and attaches to otherwise peaceful and lawful protesting. While it is possible that protest activity in a given factual scenario may pose a risk to safety or public order, the blanket restrictions on protest activity imposed by the Act go well beyond goals of safety or public order (even if those had been the legitimate ends claimed, which they are not).

61 Thirdly, it has not been recognised (presumably in part because it has not been raised) as a valid restriction on the Freedom in any previous decisions of the Court; nor is it an interest recognised by the general law as a weighty or important public interest justifying significant curtailment of freedom of speech as reflected by the common law of public nuisance, trespass or other torts protecting economic interests: Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement* (2004, Federation Press), pp 96-102.

62 Fourthly, as noted above, it does not appear as an explicit basis for limiting freedom of expression at an international level. For example, the ICCPR recognises that freedom of expression may be subject to certain restrictions by law but only if they are necessary for the respect of the rights or reputations of others or for the protection of national security or of public order (ordre public), or of public health or morals (Art 19 and Art 21 above).

63 Fifthly, it does not appear to have been recognised by other common law jurisdictions as a permissible basis for interfering with the right to freedom of expression or assembly. The following comments are provided by way of brief overview of the position in various other common law jurisdictions:

(a) *United States.* The Supreme Court has held that both the rights to freedom of speech and assembly enshrined in the First Amendment encompass the right to peaceful social protest, which is critical to the preservation of "freedoms treasured in a democratic society" (*Cox v Louisiana No 49* 379 U.S. 559 (1965) 574). As to the meaning of "peaceful" it has been held that the First Amendment does not provide the right to conduct an assembly at which there is a clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order (*Jones v Parmley,* 465 F.3d 46, 56–57 (2d Cir. 2006). It has been held that "neither energetic, even raucous protesters who annoy or anger audiences, nor demonstrations that slow traffic or inconvenience pedestrians, justify police stopping or interrupting a public protest" (*Jones v Parmley*, 465 F.3d 46, 56–57 (2d Cir. 2006) citing *Cox v Louisiana No 24*, 379 U.S.546-47 (1965)). There is no decision that has held that preventing interference with business interests justifies suppressing freedom of speech.

(b) *Canada.* The Canadian Charter protects freedom of thought, belief, opinion and expression as well as freedom of peaceful assembly (Art 2). As with the rights to freedom of expression and assembly at international law and in comparative jurisdictions, it has been held that peaceful protests and non-violent expression will be protected by the Canadian Charter (see eg *R v Semple and Heroux* [2004] OJ No 2137). There are no decisions where protection of business activity has been recognised as a justification for restricting peaceful protect activities.

(c) *New Zealand.* The New Zealand Bill of Rights Act 1990 guarantees persons the right to freedom of peaceful assembly and freedom of expression in similar terms to the Canadian Charter (ss 14, 16). Similarly to the situation at international law and in other domestic jurisdictions, New Zealand courts have taken the view that freedom of expression encompasses all forms of expression except those that take the form of violence: *Bradford v Police* [1995] 2 HRNZ 405; *Auckland Council v Occupiers of Aotea Square* [2011] NZDC 2126.

(d) *South Africa.* The Bill of Rights of the Constitution of South Africa provides that the right to assemble is limited to assembly that is conducted "peacefully and unarmed" and specifically protects the right of people to demonstrate, picket and present petitions (Art 17). The Constitutional Court of South Africa has emphasised that it is only when individuals have no intention of acting peacefully that they lose their constitutional protection to assemble (*South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13 [53]).

(e) *United Kingdom.* The rights to freedom of expression and freedom of assembly in the UK are now guaranteed by the *Human Rights Act 1998* (UK). English courts have generally adopted a similar approach to the European Court of Human Rights and held that the rights to freedom of expression and assembly protect non-violent protests (see eg *Novartis*

Pharmaceuticals UK Ltd v Stop Huntingdon Animal Cruelty [2009] EWHC 2716, *The Mayor Commonalty and Citizens of London v Samede (St Paul's Churchyard Camp Representative)* [2012] EWCA Civ 160 [43]–[49]).

64 The various observations set out above suggest that if the protection of business activity from interference is a legitimate end it is one at a lesser tier of importance on the spectrum of legitimate ends. The same is true of protection of businesses from property damage, although that purpose may perhaps be regarded as more important on a continuum than interference with business activity (but less important than protection of human safety). It does not require any large or controversial value judgment to conclude the intrinsic importance of protecting legitimate business activity should be viewed as at least a second order objective justifying a burden on the Freedom when compared to first order objectives issues such as national security, public safety, prevention of physical harm, public order or protection from crime. Certainly those first order objectives are more consonant with Mill's harm principle as a traditional justification for suppression or curtailment of free speech.[12] Moreover, those first-order objectives are more compatible with maintaining the operation of the system of representative government established by the *Constitution*. Speech that endangers public safety is more likely to impinge upon the functionality of the system of representative government established by the *Constitution* than speech which interferes with the carrying on of business activity.

65 Not only does the purpose pursued by the Act lack the intrinsic importance of a compelling interest, as the Plaintiffs' submissions highlight, Tasmania has failed to otherwise adduce any evidence to discharge what the Centre submits should be its burden of establishing the purposes of the Act are of that character.

66 In the Centre's submission, it is clear that on applying a spectrum of scrutiny approach and therefore enhanced scrutiny to the Act, the end or object pursued by Tasmania of protecting business activity is not sufficiently compelling to justify the burden it imposes on the Freedom. That is sufficient, without more, to establish invalidity. At the same time, applying the governing strict proportionality approach should result in the same outcome because at the third stage of the structured proportionality inquiry it would be recognised that the balance between the secondary importance of the purpose pursued by the Act and the substantial burden it imposes on the Freedom is not adequately congruent.

Constitutional Balance (Second Limb of *Lange*)

67 The Centre makes the following submissions in relation to the alternative legislative means aspect of the second limb of *Lange*, as further clarified and refined by the majority in *McCloy*, and the relevance of the Rule of Law to the second limb of *Lange*.

Principles

68 *Lange* and subsequent decisions have been accepted that when applying the second limb of the *Lange* test it is relevant to consider whether there were any alternative, less drastic, and reasonably practicable means by which the legislature could have pursued the legitimate end (see, eg, *Lange* at 568, *Unions* at [44], *McCloy* at [57]). This is has sometimes been referred to as the consideration of "necessity" (*McCloy* at [57]).

69 It has been suggested that qualification to the consideration of adequate alternative means is that those means must be "obvious and compelling" (*Monis* at [347], *Unions* at [44]). This qualification was said to ensure that the courts "do not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments" (*Tajjour* at [36]). However, as was pointed out by Nettle J (at [262]) in *McCloy*, *"[n]othing which was said in Unions NSW implies that such a lack of obvious compelling alternatives would necessarily be dispositive of the constitutional validity of*

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12 Brown, "The Harm Principle and Free Speech" (2016) 89 *Southern California Law Review* 953.

the prohibition". A number of judgments have made the point that it is not essential to the *Lange* test that adequate alternative means be considered. For example, in *Rowe* (at [445]) Kiefel J observed that "*[a] test of reasonable necessity, by reference to alternative measures, may not always be available or appropriate having regard to the nature and effect of the legislative measures in question*" (see also *McCloy* at [328] per Gordon J).

70 The Centre respectfully acknowledges that there is logical appeal and utility in asking the question of adequate alternative means. However, the Centre makes two observations as to the role of alternative means in assessing validity since the issue is so prominently raised by the present case.

71 First, the Court's consideration of adequate alternative means ought not be constrained by the alternatives which an opposing party may propose or which might otherwise appear to the Court as "obvious and compelling" (*Monis* 249 CLR 92 at [247]). Most immediately, this is because neither the Court nor, in many cases, the opposing party is in the position of the executive arm of government supported by departmental resources capable of investigating hypothetical alternatives.[13] Further, it is at odds with the nature of the Freedom as a fundamental constitutional imperative and *restraint* on legislative and executive power that the parties affected by the purported restraint should be required to demonstrate that there are adequate alternative means available to achieve the legitimate end which are less restrictive on the Freedom.

72 The Centre respectfully submits that this application of the adequate alternative means consideration reduces its usefulness as a tool of analysis for the second limb of the *Lange* test. It is also noted in that regard that in no other common law jurisdiction where adequate alternative means is part of a proportionality or analogous balancing process of ends and means in protecting a fundamental constitutional interest is the practical onus cast on the party whose freedom to engage in political communication has been curtailed to show some hypothetical legislative design that is less restrictive.

73 At the very least, in the Centre's submission, where the impugned law contravenes one or more basic rule of law values or has an adverse effect on fundamental common law rights or freedoms, it should be incumbent on the proponent of the impugned law to demonstrate that no adequate alternative means are available to achieve the legitimate end. In those circumstances it may fairly be presumed that adequate alternative means are available and it is appropriate that the proponent of the impugned law then bear the onus of demonstrating to the Court that no other reasonably practicable measures are available to achieve the legitimate end which are less restrictive of the Freedom.

74 Such an approach is consistent with the following views expressed by Mason CJ in *Cunliffe* (at 297):[14]

> And, in determining whether the means selected by the law for achieving that object or purpose are disproportionate, it is material to ascertain not only whether the provision goes beyond what is reasonably necessary for the achievement of the legitimate end sought to be attained but also whether the provision causes adverse consequences, including infringement of fundamental values, unrelated to the achievement of that object or purpose.

75 Unlike the consideration of hypothetical alternative means, the Court's institutional competence is well equipped to assess the impugned law's alignment with basic rule of law concepts and fundamental common law values. Indeed, upholding the Rule of Law goes to the heart of the Court's constitutional role since the rule of law is embedded in the common law and an assumption on which the *Constitution* is based (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 per

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13 This risk was recently pointed out by French CJ and Bell J in *Murphy v Electoral Commissioner* [2016] HCA 36 at [39] where their Honours observed that the arguments based on alternative means "invited the Court to undertake an hypothetical exercise of improved legislative design by showing how such alternatives could work. In doing so, they invited the Court to depart from the borderlands of the judicial power and enter into the realm of the legislature".

14 See also *Davis v. The Commonwealth* (1988) 166 CLR 79 at 100; *Nationwide News* (1992) 177 CLR at 29-31 per Mason CJ, 101 per McHugh J); *Tajjour* (at [29] per French CJ) and *APLA* (at [350] per Kirby J).

Dixon J; *APLA* at [30]) and there is a close relationship between fundamental common law values and the rule of law: *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at [182].

76 Secondly, the Centre respectfully submits that it may be preferable to recognise alternative legislative means as an important consideration in many (but not all) cases in assessing whether the impugned law is adequate in its balance as part of the third stage of the proportionality inquiry under *McCloy*. This is because it will always be necessary to assess the adequacy of the impugned law's balance but it will not always be decisive to determine whether alternative legislative means are available. Its weight in assessing validity will vary with the nature and intensity of the burden to be justified. Moreover, the availability of alternative legislative means is better seen as informing the assessment of adequacy of the law's balance than as a distinct requirement. A law that goes further than is necessary to achieve a legitimate purpose will invariably impose a burden on the Freedom that is not congruent. The converse is not necessarily so.

Rule of Law Values

77 Returning to fundamental precepts of the Rule of Law, although numerous formulations have been proffered, there is substantial agreement as to what the rule of law practically requires, at least in a 'thin' or formal sense.[15] Lon Fuller's list included that laws must be general, public, prospective, clear, consistent, capable of being followed, stable, impartially applied and enforced.[16] Joseph Raz's formulation is along similar lines.[17] Those are largely uncontroversial principles. More recently, Lord Bingham unpacked the rule of law into the following 8 practical sub-rules (Lord Bingham, "The Rule of Law" (2007) 66(1) *Cambridge Law Journal* 67):

(a) laws must be accessible and so far as possible intelligible, clear and predictable (at 69);

(b) questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion (at 72);

(c) laws of the land should apply equally to all, save to the extent that objective differences justify differentiation (at 73);

(d) laws must afford adequate protection of fundamental human rights (although Lord Bingham acknowledged that this sub-rule would not be universally accepted as embraced within the rule of law) (at 75);

(e) means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve (at 77);

(f) ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers (at 78);

(g) adjudicative procedures provided by the state should be fair (at 80);

(h) states should comply with obligations in international law, whether deriving from treaty or international custom and practice (at 81-82).

78 A number of aspects of the Act appear to offend basic rule of law concepts. These include:

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15 See, eg, Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) *Public Law* 467; Randall Peerenboom 'Human rights and the rule of law: what's the relationship?' (2005) 36 *Georgetown Journal of International Law* 809.

16 Fuller, *The Morality of the Law* (1968), Chapter 2.

17 Raz, *The Authority of the Law* (1979, OUP), Chapter 11.

(a) ***Vagueness and Overbreadth.*** The breadth of the primary restrictions under the Act manifest a considerable degree of uncertainty and vagueness. In some respects, statements in the Second Reading Speech suggest that the Act is intended to have a more circumscribed reach than its terms in fact provide. Those statements cannot be reconciled with the language in the Act.[18] There is no way for protesters to know with sufficient clarity in advance how narrowly or broadly the Act will in fact be applied and whether a minor act of "hindrance" will be susceptible to prosecution. In the lexicon of a U.S. constitutional lawyer, the Act can thus be seen to suffer at once from both vagueness and overbreadth.[19] Both are indicia of a law that is contrary to basic rule of law principles.[20] The Act is vague because it is unclear in its operation. A law burdening political communication needs to be especially clear because if it not protected communications may be chilled or suppressed. It is overbroad in that it is imprecise and appears to cast the net so widely as to criminalise protected communications that are unnecessary to fulfil a legitimate statutory purpose.

(b) ***Excessive Police Discretion.*** The concerns as to vagueness and overbreadth are compounded by the excessive discretion give to Tasmanian police in administering the Act. The Act grants extensive discretion to police to issue directions, arrest without warrant and remove a person from a location. For the most part, no criteria are provided to govern the exercise of discretion.[21] Where criteria is provided, it is typically a low bar or extremely broad. And, being police discretion, the exercise of these powers is more difficult to review as a practical matter. This falls afoul of the cardinal principle that legal right and liability should ordinarily be resolved by application of the law and not the exercise of executive discretion. As Lord Bingham put it, *"[t]he broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law"* (footnotes omitted) (at 72).

(c) ***Executive Discretion to create a new offence and impose severe bans.*** A remarkable feature of the legislative regime is that it extends the power to give a preventative direction in the police's discretion to those who are not even suspected of having committed an offence or a contravention of the primary restrictions. A further discretion is granted to police under subsection 11(6) to include a requirement when issuing a direction under s 11 that the person subject to the direction not commit an offence against the Act or a contravention of the primary restrictions for a period of three months. A breach of this requirement exposes the individual to liability for a separate offence under subsection 6(4). In effect, the exercise of discretion pursuant to this provision converts a contravention of the Act into a criminal offence with imprisonment of up to four years. The discretion to convert a contravention into an offence is not a common discretion granted to police under Tasmanian law and, aside from the Act, only appears in the *Security and Investigations Agents Act 2002* (Tas) (in which the relevant provision is concerned with the protection and preservation of public safety where there is a reasonable belief that a licence holder is intoxicated). Once again, the provision contains no criteria to govern the exercise of such an extraordinary police discretion. The

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18 The disconformity between the statements made in the Second Reading Speech and the Act itself is a matter of particular concern to the Centre.

19 Tribe, *American Constitutional Law* (Foundation Press, New York, 2nd ed, 1988), pp 1033-1034.

20 *Momcilovic* (at [382] per Heydon J).

21 In marked contrast to the Act, in *City of Lockwood v Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) in holding a parade permit regulation unconstitutional the Supreme Court emphasised that a law must not give a government official enforcing it a discretion to deny a parade permit because of the content of the expression and must establish narrow, objective and definitive standards to control the exercise of the discretion by the executive official.

imposition of a particular timeframe of three months appears both arbitrary and severe. The power of the police to create an offence in their discretion based upon a direction not itself predicated upon an anterior determination of criminal guilt by a Court may itself raise Ch III issues under the *Lim* principle. At the very least, it is a discretion that is acutely difficult to square with rule of law values.

(d) ***Prosecutor sole discretion to deal with offence summarily.*** Subsection 16(2) allows an offence against a provision of the Act to be heard and determined by a court of summary jurisdiction 'with the consent of the prosecutor'. This would appear to mean that the decision to deal with the offence summarily is contingent solely on the consent of the prosecutor. If so, this is a unique provision in Tasmania in that other Tasmanian laws allowing for indictable offences to be heard summarily expressly require the consent of the defendant as well, and usually, include a requirement that the court form the view that it is proper for the matter to be heard summarily. This is a further example of how the extensive executive discretion under the Act impedes citizens' ability to know in advance how the coercive powers of the state will be applied.

(e) ***Unfair Adjudicative Procedures.*** A further example of the rule of law being undermined is that the Act creates an infringement notice regime for certain offences which heavily disincentivises court determination of liability and encourages acceptance of executive determination of liability. While there is an infringement notice regime for offences under subsections 6(4) and 8(1) (for which the penalties are only 10 penalty units for a body corporate and 2 penalty units for an individual), the issuance of infringement notices is again a matter of police discretion for which there is no specified criteria. Further, the penalties applicable are many times greater where the infringement notice is not paid and liability is determined by a court. There is, therefore, an overwhelming disincentive for the accused to challenge the executive's determination of guilt for these offences.

(f) ***Inconsistency with fundamental common law freedoms and international human rights.*** While the notion that the rule of law operates to uphold fundamental human rights may be a more contentious one, it is relevant to note (*Momcilovic* at [382]) that the Act trenches upon both freedom of expression and freedom of assembly as those concepts are recognised at common law and by international human rights instruments to which Australia has promised to the community of nations under international law to promote and protect.

79 In the Centre's submission, the Court should be very slow to confirm the validity of any burden on the Freedom under the governing strict proportionality test of *McCloy* imposed by a law which contravenes several basic rule of law values, let alone a burden which is also direct and substantial. In those circumstances the onus must be on Tasmania to demonstrate that no available means that are more compliant with rule of law principles are available to achieve the legitimate end.

80 The assessment of alternative means is also informed by the alternatives that already exist under the general law. The Plaintiffs' submissions in that regard draw attention to the laws of nuisance, trespass and besetting as existing means of protecting the kind of ends pursued by the Act.

81 It also bears emphasis that the extensive powers given to police under the Act are to be viewed in light of existing or other powers to arrest, detain and charge people for a suite of offences like trespass, obstruction, nuisance, breach of the peace and property damage.[22] The provisions of the Act and the sweeping discretion conferred on the police by its provisions stand in marked contrast to the balanced statutory scheme relating to public assemblies in Part 4 of the *Summary Offences Act 1988*

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22 See generally, Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement* (2004, Federation Press).

(NSW) which, inter alia, by s 25 requires the Commissioner of Police to apply to a Court for any order to oppose or limit any protest and careful criteria have been established for any such order.[23]

Other Recent Anti-Protest Legislation

82 As to specific alternative means which are less restrictive of the Freedom, the Centre submits existing legislative regimes in other jurisdictions provide a better basis for assessment rather than by formulating hypothetical ones.

83 Existing or proposed legislation in some other Australian states which appears to cover similar ground as the Act includes: *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (WA), *G20 (Safety and Security) Act 2013* (QLD), *Summary Offences and Sentencing Amendment Act 2013* (Vic)(subsequently repealed), and the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW). Without attempting to make a comprehensive comparison of these other legislative regimes, the following brief observations may be made:

(a) ***Prohibitions***. The legislation in Victoria and NSW contain quite strict provisions against trespass and interference with property (with penalties of between 25 and 50 penalty units). However these prohibitions apply to relatively extreme conduct, such as jeopardising a person's safety or intentionally destroying property.

(b) ***Police Powers***. The legislation in Queensland and Victoria make failing to provide proof of identity an offence with a fine, which is more harsh than the comparable offence under the Act. However, overall, the police powers go much further under the Act where a person does not provide proof of identity or does not leave a premises upon being given a direction to do so.

(c) ***Penalties***. The penalties under the proposed legislation in WA and the legislation in Queensland and NSW are severe (although approximately the same or less severe than under the Act). However, their scope is much more narrow and specific to certain events or circumstances than under the Act.

84 A comparison with other legislative regimes further reveals the excessiveness of the Act in the means it employs to achieve its desired end. It bears emphasis, however, that being able to demonstrate the burden on the Freedom imposed by those other legislative regimes is less restrictive than the Act is not to say those other legislative regimes would themselves pass constitutional muster. Rather, its significance is in highlighting that those regimes are less restrictive.

Part V: ESTIMATED TIME FOR ARGUMENT

85 The Centre estimates that the time for presentation of any oral argument by them, if permitted, should take no longer than 30-45 minutes.

7 March 2017

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[23] *Commissioner of Police v Jackson* [2012] NSWSC 96 at [14] and [67]ff.

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