HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

ROBERT JAMES BROWN & ANOR PLAINTIFFS

AND

THE STATE OF TASMANIA DEFENDANT

Brown v Tasmania
[2017] HCA 43
18 October 2017
H3/2016

ORDER

Question 2 of the Special Case dated 9 December 2016 be amended and the questions stated in the Special Case (as so amended) be answered as follows:

Question 1

Do either or both of the plaintiffs have standing to seek the relief sought in the Amended Statement of Claim?

Answer

The defendant abandoned its challenge to the plaintiffs' standing. Question 1 therefore need not be answered.

Question 2

Is the Workplaces (Protection from Protesters) Act *2014 (Tas), either in its entirety or in its operation in respect of forestry land or business access areas in relation to forestry land, invalid because it impermissibly burdens the implied freedom of political communication contrary to the Commonwealth Constitution?*

Answer

Section 6(1), (2), (3) and (4), s 8(1), s 11(1), (2), (6), (7) and (8), s 13 and Pt 4 of the Workplaces (Protection from Protesters) Act *2014 (Tas) in their operation in respect of forestry land or business access areas in relation to forestry land are invalid because they impermissibly burden the implied freedom of political communication contrary to the Commonwealth Constitution.*

Question 3

Who should pay the costs of the Special Case?

Answer

The defendant should pay the plaintiffs' costs.

Representation

R Merkel QC and F I Gordon with C J Tran for the plaintiffs (instructed by Fitzgerald & Browne)

M E O'Farrell SC, Solicitor-General of the State of Tasmania with S K Kay for the defendant (instructed by Solicitor-General's Office (Tas))

Interveners

S P Donaghue QC, Solicitor-General of the Commonwealth with P D Herzfeld for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

P J Dunning QC, Solicitor-General of the State of Queensland with A D Keyes and P D Mott for the Attorney-General of the State of Queensland, intervening (instructed by Crown Solicitor (Qld))

R M Niall QC, Solicitor-General for the State of Victoria with M A Hosking for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

C D Bleby SC, Solicitor-General for the State of South Australia with T N Golding for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

S E Pritchard SC with J E Davidson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

B W Walker SC with J A Redwood and P M Bindon for the Human Rights Law Centre, as amicus curiae (limited to written submissions) (instructed by DLA Piper)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Brown v Tasmania

Constitutional law (Cth) – Implied freedom of political communication – *Workplaces (Protection from Protesters) Act* 2014 (Tas) – Where Act empowers police officers to direct protesters to leave and stay away from business premises and business access areas under pain of arrest and criminal penalties – Where business premises include forestry land – Where Act allows police officers to give such directions if they reasonably believe protester is preventing, hindering or obstructing business activity, has done so, or is about to do so – Where Forestry Tasmania authorised to undertake forest operations in Lapoinya Forest – Where plaintiffs protested in vicinity of forest operations – Where plaintiffs directed to leave and stay away from forestry land – Where plaintiffs arrested and charged, purportedly under Act, as result of protest activity – Whether Act restricts otherwise lawful protest activity – Whether implied freedom burdened – Whether Act, or provisions thereof, impose impermissible burden on implied freedom in their operation in respect of forestry land and related business access areas – Whether provisions suitable, necessary and adequate in balance.

Constitutional law (Cth) – Where plaintiffs charged under *Workplaces (Protection from Protesters) Act* 2014 (Tas) – Where charges not pursued – Where plaintiffs intend to engage in conduct unless conduct validly proscribed by Act – Whether plaintiffs have standing to challenge validity of Act.

Words and phrases – "burden", "business access area", "discriminatory effect", "implied freedom of political communication", "proportionality testing", "protest activity", "protester", "reasonably appropriate and adapted".

Forest Management Act 2013 (Tas), ss 8, 9, 13, 21, 22, 23.
Workplaces (Protection from Protesters) Act 2014 (Tas), ss 6, 8, 11, 13 and Pt 4.

1 KIEFEL CJ, BELL AND KEANE JJ. In 2014 the Parliament of Tasmania enacted the *Workplaces (Protection from Protesters) Act* 2014 (Tas) ("the Protesters Act"), the title of which reads:

> "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".

2 A "protester" is defined in the Protesters Act to mean a person engaging in a "protest activity", namely, an activity that takes place on business premises or a business access area in relation to business premises in furtherance of, or 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[1]. A person engages in 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"[2]. A person is not to be taken to be engaging in a protest activity if they have the consent of a business occupier to be on the premises and to there engage in the protest activity[3].

3 The definitions of "business premises" and "business access area, in relation to business premises" ("business access area") and their place in the Protesters Act will be discussed in more detail later in these reasons. It suffices presently to note that the definition of "business premises" includes "forestry land"[4], which is relevantly "an area of land on which forest operations are being carried out"[5].

4 The two plaintiffs were present at different times in the Lapoinya Forest for the purpose of raising public and political awareness about the logging of the forest and voicing protest to it. They were each arrested and charged with offences under the Protesters Act. The charges against the plaintiffs were not proceeded with and were ultimately dismissed when no evidence was tendered by the prosecution with respect to them.

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1 *Workplaces (Protection from Protesters) Act* 2014 (Tas), ss 4(1), 4(2).

2 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 4(3).

3 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 4(5).

4 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 5.

5 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 3.

5 The plaintiffs challenge the validity of certain provisions of the Protesters Act, and to that end invoke the test for invalidity stated in *Lange v Australian Broadcasting Corporation*[6] as explained in *McCloy v New South Wales*[7] with respect to laws which restrict the freedom of communication about matters of politics and government which is implied in the Constitution. The first question stated by the parties in the Special Case asks whether either or both of the plaintiffs have standing to seek the relief sought. There is now no dispute concerning the plaintiffs' standing because the defendant has conceded that the plaintiffs have standing. That question therefore need not be answered. It is necessary also to amend the second question so that it refers to business access areas in relation to forestry land, in addition to forestry land. Accordingly the two remaining questions stated by the parties for the determination of the Court should read as follows:

> (2) Is the *Workplaces (Protection from Protesters) Act* 2014 (Tas), either in its entirety or in its operation in respect of forestry land or business access areas in relation to forestry land, invalid because it impermissibly burdens the implied freedom of political communication contrary to the Commonwealth Constitution?
>
> (3) Who should pay the costs of the Special Case?

6 The Protesters Act has a wider application than to business premises that are forestry land. Indeed the definition of "business premises" in s 5 of the Protesters Act extends to various business premises as that term might be ordinarily understood, and to business activities conducted upon them. However, the facts in the Special Case are limited to operations conducted on forestry land and protests with respect to them. There is also a particular historical, social and legislative background to forest operations and public access to forests in Tasmania, and demonstrations in forests appear to have been the catalyst for the Protesters Act. In the course of argument the plaintiffs effectively restricted their case to key provisions of the Protesters Act so far as they concern forestry land. The Court should not speculate about the operation and effect of the Protesters Act in other contexts. These reasons are therefore limited to the question of the validity of the relevant provisions of the Protesters Act in their operation with respect to forestry land or business access areas in relation to forestry land, namely, ss 6, 7, 8, 11 and 13 and Pt 4 of the Protesters Act.

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6 (1997) 189 CLR 520 at 561-562; [1997] HCA 25.

7 (2015) 257 CLR 178 at 193-195 [2]; [2015] HCA 34.

Background facts

7 The Lapoinya Forest is situated near the township of Lapoinya in North West Tasmania. It is some 89 hectares in size. Part of the forest was identified as Forestry Coupe FD053A ("the coupe") in a Forest Practices Plan ("the FPP") which was submitted by Forestry Tasmania to the relevant authority in December 2015 to obtain authorisation to conduct forest operations[8]. That authorisation was provided. Those operations included tree felling in the coupe.

8 Forestry Tasmania is the "Forest Manager" as defined by the *Forest Management Act* 2013 (Tas) ("the FMA") and has the management and control of all land which is "permanent timber production zone land" ("PTPZ land")[9]. The land in the coupe was PTPZ land within the meaning of the FMA. If forest operations are occurring on PTPZ land, that land is "forestry land" for the purposes of the Protesters Act.

9 The map which accompanied the FPP identified the boundaries of the coupe and the boundaries of the "harvest area" within it in which tree felling was permitted. The land which the FPP so identified did not include any land declared as reserved land under the *Nature Conservation Act* 2002 (Tas). Land of this kind abutted the south eastern boundary of the forest ("the Reserve").

10 The work undertaken by Forestry Tasmania in the coupe involved clearing old forest roads and constructing new roads in preparation for logging. Forestry Tasmania decided to close two forest roads – that part of Maynes Road which was within the coupe, and Broxhams Road, which bounded the south eastern boundary of the coupe. It did so by erecting signs advising of the closure of the roads to all unauthorised vehicular and pedestrian traffic and by suspending chains across the roads a short distance from the signs, as it is entitled to do under the FMA. Some of the operations undertaken by Forestry Tasmania involve the use of heavy machinery. It is accepted that it has statutory duties and obligations to ensure, so far as reasonably practicable, the health and safety of persons from those operations[10].

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8 See *Forest Practices Act* 1985 (Tas), Pt III, Div 1, which sets out the requirements applying to Forest Practices Plans.

9 *Forest Management Act* 2013 (Tas), ss 7 and 8.

10 *Work Health and Safety Act* 2012 (Tas).

The plaintiffs

11 The announcement by Forestry Tasmania of its intention to fell trees in the coupe in the Lapoinya Forest resulted in public protests, including by a public action group formed by the Lapoinya community. The group wrote letters to politicians and newspapers, sent a delegation to the relevant Minister and distributed information amongst local residents.

12 The second plaintiff, Ms Jessica Hoyt, grew up in Lapoinya and was a founding member of the public action group referred to above. The first plaintiff, Dr Bob Brown, was formerly a Senator for Tasmania and a founding member and leader of the Australian Greens. He has been involved in environmental campaigns and protests since the 1970s.

13 On the first occasion Ms Hoyt was present in the Lapoinya Forest, she entered the Lapoinya Forest at Broxhams Road, passing the signs referred to above. She walked through the forest to Maynes Road. An employee of Forestry Tasmania asked her to wait whilst an excavator moved away, to which request she acceded. Ms Hoyt then walked to a point in the forest on the south western side of Maynes Road where she received a direction from a police officer to leave the area. When she refused to do so she was removed to the junction of Maynes Road and Lapoinya Road.

14 The following day Ms Hoyt returned to the forest with other members of the community who wished to protest against logging in the coupe, in order to show them what had taken place. She was walking some five to ten metres from, and to the south of, Maynes Road when she was instructed by a police officer to stop, which she did. She was then arrested and taken to Maynes Road.

15 On the date the subject of the charge against him, Dr Brown entered Broxhams Road and walked along a section of it with three other persons. He was then filmed speaking about environmental issues and calling upon the relevant Minister to protect the forest against a background which showed preparatory work for logging being undertaken. The footage included works being undertaken by a bulldozer. When Dr Brown was approached by two police officers he was standing on a cleared part of Broxhams Road which was in the Reserve. After a conversation with one of the officers he was directed to leave the area. When he failed to do so, he was arrested.

16 After the commencement of this proceeding by Dr Brown, the defendant, the State of Tasmania, decided not to pursue the charge made against him under the Protesters Act. Likewise, after Ms Hoyt had applied to be joined to this proceeding, it was decided not to pursue the charges made against her. Tasmania now accepts that Dr Brown was not within an area to which the Protesters Act

applied when he was arrested and does not allege that Ms Hoyt was in such an area, even though she contends that she was.

17 These matters may be put to one side for present purposes. They assume more importance with respect to difficulties relating to the identification of "forestry land" to which the Protesters Act applies than they do with respect to the question of the plaintiffs' standing, which Tasmania now concedes. That concession is appropriate. Standing is not lost because charges are withdrawn after the exercise of powers under a statute. As Dixon CJ observed[11] in *Wragg v State of New South Wales*[12], what has been done may be repeated. Furthermore, the plaintiffs have a "real interest" in the question of the validity of the Protesters Act because, unless constrained by it, the plaintiffs intend to engage in conduct which it proscribes. They are therefore interested to know whether they are required to observe the law[13].

The background to the Protesters Act

The FMA, access and powers

18 When the Protesters Act was enacted, the FMA and its predecessor statutes had been in operation for some time. The FMA provides Forestry Tasmania, its authorised officers and police officers with powers to ensure that forest management and operations, with which Forestry Tasmania is charged, are not impeded. It contains provisions with respect to public access to PTPZ land. There is no suggestion that there have been any real difficulties associated with its operation. The validity of its relevant provisions is not questioned in these proceedings.

19 As Forest Manager under the FMA[14], Forestry Tasmania has functions which include the management and control of all PTPZ land in Tasmania, including forest operations on that land for the purposes of selling forest products[15].

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11 *Wragg v State of New South Wales* (1953) 88 CLR 353 at 371; [1953] HCA 34.

12 (1953) 88 CLR 353.

13 *Croome v Tasmania* (1997) 191 CLR 119 at 137-139; [1997] HCA 5; *Kuczborski v Queensland* (2014) 254 CLR 51 at 101 [152]-[153]; [2014] HCA 46.

14 *Forest Management Act* 2013 (Tas), s 7.

15 *Forest Management Act* 2013 (Tas), s 8.

20 Section 13(1) of the FMA provides:

> "The Forest Manager must perform its functions and exercise its powers so as to allow access to permanent timber production zone land for such purposes as are not incompatible with the management of permanent timber production zone land under this Act."

21 A similar provision was introduced in 1991 as s 20B(1) of the statute which preceded the FMA, the *Forestry Act* 1920 (Tas), which was concerned with the functions of the Forestry Commission[16]:

> "The Commission must exercise its powers so as to afford members of the public access to State forest for such recreational purposes as are not incompatible with the management of State forest under this Act."

22 The original s 20B, which had been inserted in 1984, was in somewhat different terms[17]:

> "The Minister may ... by notice in the *Gazette*, declare an area of State forest to be an area into which persons may not enter and in which persons may not remain without the authorization in writing of the Commission."

23 It would appear from the Second Reading Speech to the 1984 Amendment Bill that it was thought necessary to include such a provision because the existing legislation was inadequate to deal with situations arising from recent demonstrations. The demonstrations referred to were those relating to the construction of the Franklin Dam[18]. It was said that[19]:

> "[t]he effect of the bill is to amend the Forestry Act to provide for a situation of trespass. The powers of arrest which follow from the amendment will enable the removal of person or persons causing the problem or the obstruction in the forests."

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16 *Public Land (Administration and Forests) Act* 1991 (Tas).

17 *Forestry Amendment Act (No 2)* 1984 (Tas).

18 See *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1; [1983] HCA 21.

19 Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 6 December 1984 at 2782.

24 The inference presently to be drawn from the original s 20B is that the Tasmanian Parliament considered it to be necessary to make express provision for notifying the public when they might *not* access forest areas. That provision, like the later s 20B(1) and the current s 13(1), recognises that there is an expectation on the part of the public in Tasmania, residents and visitors alike, that they may access forest areas and that that expectation should, so far as reasonably practicable, be met.

25 In the Second Reading Speech to the Bill which became the FMA it was said[20]:

> "Under this bill the people of Tasmania will still be able to access and use permanent timber production zone land for the range of purposes and activities they currently enjoy and undertake in their public forest estate. The provisions of the 1920 [A]ct are essentially maintained to ensure the right to access the land continue, so long as the access does not interfere with the management of the land."

26 Forestry Tasmania accepts many activities to be compatible with its strategic objectives with respect to PTPZ land. In the FPP concerning the forest operations here in question, it is said that such activities include "recreation sites, organised events, recreational vehicle use, hunting and firearm use, fossicking and prospecting, firewood collection, indigenous rights use, commercial or private access, apiary sites, mineral exploration and mining and tourism".

27 The access recognised as available to the public by s 13(1) of the FMA is qualified by s 13(2), which provides that nothing said in s 13(1) prevents the Forest Manager from exercising its powers under ss 21, 22 and 23.

28 Section 21(1) provides that the Forest Manager may erect signs on or in respect of forest roads or on PTPZ land for the purposes of discharging its responsibilities or in the interests of safety. Section 21(2) provides that it is to erect signs stating that a particular road is a "forest road" within the meaning of the FMA. By s 21(3) a person must not, without lawful excuse, undertake an activity or engage in conduct on a forest road or other land in PTPZ land contrary to the direction of the Forest Manager as expressed on a sign authorised by the Forest Manager.

29 The Forest Manager, under s 22(2), may appoint an employee to be an authorised officer. An authorised officer may, under s 22(3), request a person not

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20 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 24 September 2013 at 40.

to enter PTPZ land or a forest road, to leave that land or road or to cease to undertake an activity or engage in conduct on them. The request may be made if the authorised officer is of the opinion that the entry or presence of that person, activity conducted or conduct engaged in may prevent the Forest Manager from effectively or efficiently performing its functions. An authorised officer may also, under s 22(4), prohibit a person from entering, or remaining in, an area of PTPZ land in particular circumstances, including when it is in the interests of the person's safety.

30 Section 23(2) provides that the Forest Manager may close a forest road or any section thereof, either permanently or temporarily, to all traffic if it considers that closure is necessary or expedient for the purposes of discharging its responsibilities or in the interests of safety. Closure may be signified or effected by signage or signage in conjunction with barricades or trenches or any combination of them. Section 23(4) provides that a person must not drive a vehicle on or otherwise use a forest road that has been closed in accordance with the section.

31 Sections 21 and 22 also provide for action to be taken by police officers. Section 21(5) provides that a police officer who reasonably considers that a person is offending against s 21(3) may direct the person to leave the forest road or other land in PTPZ land. Section 21(6) requires a person given such a direction to comply with it. Section 22(6) provides that a person must not, without lawful excuse, undertake an activity or engage in conduct on PTPZ land or a forest road contrary to the directions of a police officer. The penalty for a contravention of each of ss 21, 22 and 23 is a fine not exceeding 20 penalty units, which currently amounts to $3,180. Further, under ss 21(7) and 22(7), a police officer may arrest a person who fails to comply with a direction given under ss 21(5) and 22(6).

Protests and the Protesters Act

32 The parties agree that there is a long history of political protests in Australia, including protests concerning environmental issues, in spaces accessible to the public and on Crown land. In Dr Brown's experience, which is stated in the Special Case, the primary means of bringing environmental issues to the attention of the public and politicians is to broadcast images, including by the use of social media, of that part of the environment sought to be protected and which is said to be threatened.

33 The parties agree that, historically, protests have been a means of bringing about political and legislative change on environmental issues. Onsite protests have been a catalyst for granting protection to the environment in particular places and have contributed to governments in Tasmania and throughout

Australia granting legislative and regulatory environmental protection to areas not previously protected. Since 2006, some 37 protests have taken place in Tasmania in areas that, at some later time, have been provided with legislative or regulatory protection.

34 It is accepted that public debate about environmental issues generally is relevant to both State and federal politics. Public debate about environmental issues in Tasmania has featured prominently in previous federal campaigns.

35 It is an agreed fact that some protests have involved blocking the entry of machinery to forests and interfering with tree felling activities. Protest activity has included protesters placing themselves so as to render tree felling impossible. Prior to the enactment of the Protesters Act, there were prosecutions of protesters who had prevented equipment being used in forest operations; locked themselves to a boom gate and a vehicle; occupied tree houses; blocked forest roads; and locked themselves onto various devices whilst sitting in trees in order to prevent themselves being removed from the area.

36 A "Fact Sheet" was prepared with respect to the Workplaces (Protection From Protesters) Bill 2014 (Tas) ("the Protesters Bill"). It is a document provided to members of the Tasmanian Parliament for the purpose of debate and is said to be capable of constituting extrinsic material for the purpose of s 8B(3)(e) of the *Acts Interpretation Act* 1931 (Tas). The Protesters Bill is referred to in the Fact Sheet as "designed to implement the Tasmanian Government's election policy commitment to introduce new laws to address illegal protest action in Tasmanian workplaces". It says that the Bill creates indictable offences but does not seek to prohibit the right to peaceful protests. It says that it "does seek to regulate inappropriate protest activity that impedes the ability of businesses to lawfully generate wealth and create jobs". The Bill is said to send "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".

37 It is not suggested that the plaintiffs were engaged in protest action of the kind referred to above. It is not explained how the relevant police officer came to the view that the presence of the plaintiffs could have the effect of preventing, hindering or obstructing forest operations, as the Protesters Act requires. It is, however, to be inferred from the conversation that one police officer had with Dr Brown (which will be referred to later in these reasons) that it was thought that Dr Brown was on land which was "business premises" or a "business access area" to which the Act applied. The charges against Ms Hoyt under the Protesters Act must necessarily have been based on the same assumption. The uncertainty created by these terms is an important aspect of the operation and effect of the provisions of the Protesters Act, as will be explained.

The provisions of the Protesters Act

The prohibitions in s 6

38 The prohibitions which are central to the Protesters Act are contained in ss 6 and 7 of the Act. The plaintiffs direct attention to s 6 and its associated provisions, namely, ss 7, 8, 11 and 13 and Pt 4 of the Act.

39 Section 7 prohibits protesters from doing acts which cause damage to business premises or a "business-related object" and it prohibits threats of damage in relation to business premises for the purpose of promoting awareness of or support for an opinion or belief in respect of political, environmental or other issues. Section 7 is not engaged on the facts of the Special Case and no substantial argument was addressed to it. Save for the question of the purpose of the Protesters Act, to which s 7 may be relevant, it will not be further considered with respect to the principal question on the Special Case.

40 Section 6(1) to (3) provide:

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

41 A "business activity" is defined, *inter alia*, as a lawful activity carried out for the purposes of profit or by a Government Business Enterprise[21].

42 Section 6(7) provides that an act "prevents, hinders or obstructs the carrying out of a business activity on the business premises by a business occupier" 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."

43 The definitions of a "protester" and of "protest activity" have been referred to at the outset of these reasons.

"Business premises" and "business access areas"

44 The term "business premises" does not evoke images of forest lands, but the scheme of the Protesters Act applies that definition to places where protests might affect activities which involve economic interests, including those of a Government Business Enterprise such as Forestry Tasmania[22].

45 The term "business premises" is defined relevantly to mean premises that are "forestry land"[23]. "Forestry land" is defined relevantly to mean "an area of

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21 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 3.

22 *Government Business Enterprises Act* 1995 (Tas), Sched 1.

23 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 5(1)(b).

land on which forest operations are being carried out"[24]. "Forest operations" are defined widely to mean work comprised of, or connected with, seeding and planting trees; managing trees prior to harvest; or harvesting, extracting or quarrying forest products, and includes any related land clearing, land preparation, burning-off or access construction[25].

46 A "business access area" is relevantly defined to mean[26]:

> "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".

Directions and requirements

47 A contravention of s 6(1), (2) or (3) does not itself give rise to an offence, at least not in the first instance. The relevant offences are provided for in ss 6(4) and 8(1). They require, in the first place, that a direction be given by a police officer under s 11 that a person leave business premises or a business access area without delay. For the offence under s 6(4), the requirement referred to in s 11(6) must also be specified in the direction[27].

48 Section 11(1) and (2) provide:

> "(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.

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24 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 3.

25 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 3.

26 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 3.

27 Section 11(3), (4) and (5) of the *Workplaces (Protection from Protesters) Act* 2014 (Tas) relate to directions to a business operator and are not presently relevant.

(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."

49 Section 11(6) provides:

"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) … contravene section 6(1), (2) or (3)."

50 Section 11(7) provides that a direction may be issued to either a person or "a group of persons" and s 11(8) provides that if a direction is given to a group of persons it is 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."

The offences: s 6(4) and s 8(1)

51 It is necessary then to return to s 6(4), which is in these terms:

"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."

52 An offence is committed under s 6(4) when a direction is given under s 11(1) or (2) to leave forestry land, or the business access area in relation to it; that direction is accompanied by the requirement in s 11(6) that the protester not commit an offence under the Protesters Act or contravene s 6(1), (2) or (3) in a period of three months from the date of the direction; and the person does

commit an offence or contravene s 6(1), (2) or (3) in that period. No further direction is then necessary.

53 Section 6(4) applies to both "business premises" which is forestry land, and "business access areas". Section 8(1) is limited in its terms to business access areas. It provides that:

> "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."

54 An offence under s 8(1)(a) is committed where a person fails to comply with a direction to remove themselves from a business access area. Section 8(1)(b) invites further attention. An offence is here committed where a person enters the business access area where they received the s 11 direction or enters a business access area in relation to business premises where they received such a direction, within four days of that direction. The area that the person may not enter is not limited to the area where the person was at the time of the direction but, effectively, includes any area that is outside the "forestry land" (namely, the area in which forest operations are then being conducted) as is reasonably necessary to enable access to an entrance to, or to an exit from, the forestry land. No more is required for the commission of an offence than the person's presence in such an area in that period of time.

55 Ms Hoyt received an infringement notice with respect to the first occasion on which she was present in a part of the Lapoinya Forest. It specified an offence under s 8(1). The offence with which she was later charged, concerning the second occasion she was present, was that under s 6(4). Dr Brown was charged with an offence under s 8(1). Both plaintiffs were arrested under powers given to police officers by the Protesters Act.

Powers of arrest and removal

56 Section 13(1) provides that 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."

57 Section 13(2) provides the same powers of arrest in relation to a person who is on a business access area. A police officer may also remove a person from business premises or a business access area if the police officer reasonably believes that the person is committing or has committed an offence against the Act, or a contravention of s 6(1), (2) or (3)[28].

58 The powers of arrest and removal are exercisable only if the police officer "reasonably believes" that it is necessary to do so for specified purposes, which include ensuring the person's attendance at court; the preservation of public order; preventing the continuation or repetition of an offence; or the safety and welfare of the person or members of the public[29].

Penalties

59 The offences referred to above are indictable offences[30] but may, with the consent of the prosecutor, be heard and determined by a court of summary jurisdiction[31]. Relevantly, for an offence against s 6(4) or s 8(1) an individual may be fined up to $5,000 by a court of summary jurisdiction and up to $10,000 by other courts[32]. A further offence against s 6(4) may involve, as an alternative to that penalty, a term of imprisonment, to a maximum of 12 months in the case

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28 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 13(3).

29 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 13(4).

30 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 16(1).

31 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 16(2).

32 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 16(3)(b).

of a court of summary jurisdiction, and otherwise four years, or both penalty and imprisonment[33].

60 Where an infringement notice is issued to an individual by a police officer with respect to an offence under s 6(4) or s 8(1), a penalty of two penalty units ($318) may be imposed on that individual[34].

The terms, operation and effect of the Protesters Act

61 In order to answer the question whether a statute impermissibly burdens the implied freedom of political communication, it is necessary to consider in some detail the operation and effect of the statute[35]. That consideration assumes particular importance in this matter.

62 An obvious feature of the Protesters Act is that it is expressed to apply only to protesters. Other persons who might be present on, or remain on, land where forest operations are taking place and who do acts which affect forest operations in the ways mentioned in s 6(1), (2) and (3) are not subject to the Protesters Act or its consequences. The Protesters Act may be contrasted in this respect with the FMA, which applies to all persons.

63 Another feature is that the definition of "protester" in the Protesters Act refers expressly to matters about which protesters may be voicing opinions. Those matters and opinions receive no further mention in the Act, the operative provisions of which are addressed to the conduct of protesters as it may impact upon forest operations. It would seem that protesters are identified in this way because they, or some of them, are seen to be persons who are likely to engage in that conduct.

64 It may be accepted that protesters will seek to conduct protests concerning forest operations, such as clearing or tree felling, in the vicinity of those operations. The plaintiffs refer to protests of this kind generally as "onsite protests". It is important, however, to recognise that protests will take different forms and some will occur much closer to forest operations than others. The Fact Sheet for the Protesters Bill itself distinguishes between protests which are intentionally disruptive of business activity and peaceful protests. The former

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33 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 16(3)(b), s 17(2).

34 *Workplaces (Protection from Protesters) Act* 2014 (Tas), s 15(3).

35 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 553-554 [35]-[36]; [2013] HCA 58.

kind of protest might involve physical interaction between protesters and machinery being used in forest operations, the physical presence of protesters in or around trees due to be felled, physical confrontations with Forestry Tasmania personnel and blocking access to forest operations.

65 It is to be inferred from ss 6 and 7 that the Protesters Act is directed to protesters engaged in protests of that kind because it is the activities involved in such protests which are likely to damage or prevent, hinder or obstruct business activities conducted on forestry land. Not all protests can be assumed to be of that kind. Indeed, the facts in the Special Case do not suggest that activities resulting in such damage or harm have been common occurrences in protest actions which have been conducted over many years. To take one example similar to the facts of the Special Case, a protest may involve persons standing at a distance from, but within sight of, forest operations, holding placards, voicing their protests and being filmed. Protesters of this kind are also likely to be affected by the exercise of powers under the Protesters Act.

66 The powers given to police officers by the Protesters Act are conditioned upon a primary question of fact and law – whether a protester is in an area that is "business premises", here forestry land, or a "business access area" with respect to that land. This question must be addressed when a police officer is considering whether to direct a person to leave an area under s 11(1) or (2), whether a person has remained on or entered a business access area under s 8(1), whether a person is about to contravene s 6(1), (2) or (3) or commit an offence under s 6(4) and whether to remove or arrest a person under s 13.

67 The principal problem, practically speaking, for both police officers exercising powers under the Protesters Act and protesters is that it will often not be possible to determine the boundaries of "business premises" or a "business access area". That problem arises because the term "business premises" is inapt for use with respect to forestry land. The definition of "business premises" with respect to forestry land does not provide much guidance. The question simply becomes whether a protester is in an area of land on which forest operations (a widely defined term) are being carried out. The vagueness of the definition of "business access area" compounds the problem.

68 Forest operations might involve the use of sheds but not "business premises" as that term is ordinarily understood. Forest operations are not conducted in premises or even enclosures; the operations will not be located at one site, because they will be carried out progressively at different locations in the harvest areas of the coupe. There will be nothing to indicate the boundaries of these locations so that it is understood where a protester may not be present. Forestry Tasmania may identify such areas by signs or by physical barriers under the powers given by the FMA, but the Protesters Act does not identify the areas

to which it applies as those designated under the FMA. It makes no connection with the FMA in this regard at all.

69 The boundaries of an FPP are surveyed. They are marked by pink tape on vegetation or fixtures along the boundary, but these markings may not be visible to a person in a forest for a number of reasons. In any event they do not designate business premises, which will not comprise the whole area of the FPP, or even the harvest area within it, but a smaller area where forest operations are being conducted from time to time.

70 It may be possible to identify as an area on which forest operations are being carried out, and therefore as "business premises", the exact location where machinery is being used, or where trees are being felled, or where roads or tracks for access are being constructed. Even in these cases, it may not be possible to discern whether a protester standing some distance from these activities is within or outside of the area to which the Protesters Act is intended to apply.

71 It might be thought that the consequences of the conduct of a protester, or of their presence, which are sought to be avoided by the Protesters Act, might provide some guidance as to the identification of the area the subject of the Protesters Act. Tasmania's initial position was that the phrase "prevents, hinders or obstructs" should not be read narrowly, but in the course of argument it accepted that it should be construed, consistently with the principle of legality and s 3 of the *Acts Interpretation Act* 1931 (Tas)[36], so as to apply only to the conduct or presence of a person which "substantially" or "seriously" hinders or obstructs business activities.

72 The Protesters Act does not require a police officer, before exercising the powers it provides, to simply consider what the particular protest action involves and whether it is likely to have these effects upon business activities then being carried out on forestry land. Had it done so, attention would undoubtedly be directed to the kind of protest activity referred to earlier in these reasons, which is likely to have a direct, discernible impact upon those business activities.

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36 Section 3 of the *Acts Interpretation Act* 1931 (Tas) provides:

> "Every Act shall be read and construed subject to the limits of the legislative powers of the State and so as not to exceed such powers, to the intent that, where any enactment thereof, but for this provision, would be construed as being in excess of such powers, it shall nevertheless be a valid enactment to the extent to which it is not in excess of such powers."

73 In each case the primary focus in determining whether the Protesters Act applies is upon where a protester is situated. In this statutory scheme the further enquiries, as to what effects a protester's presence or conduct might have and their foresight of those effects, are of secondary importance. In many cases it will be difficult for a police officer to be able to correctly determine where a protester is situated and where the line around business premises and business access areas is to be drawn. A protester will be in no better position in making such determinations. But the powers exercised by police officers under the Protesters Act have important consequences for protesters and for protests generally and experience suggests that their exercise will not always be based upon a correct appreciation of whether the land in which a protester is situated is forestry land to which the Protesters Act applies. In its practical operation, the Protesters Act may bring protest activity to an end upon the mistaken, albeit reasonable, belief of a police officer, unless the protesters are disposed to resist a direction, and thereby risk a breach of the peace, in order to test the issue.

74 There can be little doubt that the determination of whether a protester is in an area of forestry land has proved difficult for police officers exercising powers under the Protesters Act. The circumstances surrounding the arrest of Dr Brown are revealing. The point is not that the police officer was unaware that Dr Brown was then standing on the Reserve, to which Tasmania now concedes the Protesters Act did not apply, but rather that he was addressing the question whether Dr Brown was present in an area where forest operations could be said to be carried out. His enquiry of Dr Brown reflects the difficulty police officers, and protesters, will experience in determining where the line is to be drawn. He asked: "Do you realise you are getting close to impinging on forestry operations?"

75 Information about the charges made under the Protesters Act, provided in the Special Case, is also illuminating. Since the commencement of the Protesters Act nine people, including the plaintiffs, have been charged under it: seven under s 8(1)(a) and two under s 6(4). All charges were discontinued because the direction given was not correctly referable to "business premises" or a "business access area".

76 This accords with the statement made by the Tasmanian Police Commissioner after the decision was made not to proceed with the charges against Dr Brown. The Commissioner explained that the decision was based upon advice received from the Tasmanian Director of Public Prosecutions, who had observed that "it was difficult for police officers to determine whether a person was in a business access area or on business premises". It is unlikely that the Director was referring to a difficulty in choosing between the two.

77 The point to be made is not that prosecutions of charges made under the Protesters Act are unlikely to succeed, if they do proceed. It is that the difficulty associated with identifying the area to which the Protesters Act applies in a given circumstance is likely to result in errors being made except in the clearest of cases. The result will be that some lawful protests will be prevented or discontinued and protesters will be deterred from further protesting. They will be deterred because it will come to be appreciated, if it is not already, that there is a real likelihood that if they are present on land in the vicinity of forest operations they may be subjected to a direction to leave the area and all the effects which flow from such a direction even if there is no basis in law for the direction because the area is not forestry land or a business access area in relation to that land.

78 The vagueness of the terms "business premises" and "business access area" is also likely to work against a protester in seeking a remedy by means of judicial review of a direction made to leave the area where they were protesting. It is one thing for lawyers advising the government to determine whether it can be proved that a protester was in an area to which the Protesters Act applied. It is another for protesters to have a direction ruled unlawful in time to return to continue their protest. The result will be that protests will be stifled when they should not be.

79 The foregoing observations reflect experience of the practical operation of the Protesters Act in relation to forestry land. That the Protesters Act may operate effectively to stifle political communication which it is not the purpose of the Act to stifle is not merely a function of the vagaries of the application of the concepts employed by the legislation to "facts on the ground"; it is a consequence of the design of the Act in its deployment of a possibly mistaken, albeit reasonable, belief of a police officer as the mechanism by which it operates. Protests may be effectively terminated in circumstances where it is not necessary that the protester has, in truth, contravened s 6(1), (2) or (3) of the Protesters Act, where it is not necessary to establish that any offence has been committed by the protester, and where judicial review of the mechanism whereby such a result is brought about is not practically possible before the protest is terminated.

80 In this regard, the directions contemplated by s 11 may be based on a mistaken, albeit reasonable, belief on the part of a police officer that a person has committed, is committing or is about to commit, inter alia, a contravention of s 6(1), (2) or (3) on or in relation to business premises or a business access area. A protester who, in truth, has not committed, is not committing and is not about to commit a contravention of s 6(1), (2) or (3) on or in relation to business premises or a business access area may be directed to leave an area which is not, in truth, business premises or a business access area. In this way, protesters who are not disposed to risk breaching the peace in order to test in court the

reasonableness of the police officer's possibly mistaken belief may be moved on by the police, and their protest thereby terminated.

81 Section 8(1)(b) requires special attention. Together with s 13, it permits protesters to be physically removed and arrested without warrant if they are present in any "business access area", wherever that is thought to be, in the period of four days after they were directed to leave the area they were in when they were given the direction. They may be guilty of an offence and liable to a substantial penalty. This provision operates in that period to deter a person from being present in the area where they were present when given the direction under s 11(1) or (2), and also from being present in any "business access area" at all with respect to the relevant forestry land, with all the vagueness that that term implies. The area of forest operations may have moved as work within the coupe is carried out. Importantly, the offence with which the person may be charged is not based upon any foresight on the part of a police officer that the person's presence might have an adverse effect on forest operations. The person's presence in a business access area alone is sufficient for the offence to be committed.

82 The effect of these provisions should also be understood in light of their operation in conjunction with s 11(7) and (8). It will be recalled that under s 11(7), a direction under s 11(1) or (2) may be given to a group of persons, which, according to s 11(8), is taken to have been given to each person who is a member of the group and who ought reasonably to be expected to have heard the direction. The effect of s 11(7) and (8) is therefore to widen the effect of deterrence and to stifle the protest of a potentially large number of persons. All persons present in an area and within earshot of a direction given by a police officer, which may include by loudspeaker, will have to leave the area. They will be subject to s 8(1) even if most, or all, of the group are not undertaking any activity which might amount to a contravention of s 6(1), (2) or (3). A police officer is not required to even consider that prospect.

83 Where a requirement under s 11(6) is added to a direction under s 11(1) or (2), a person will be guilty of an offence under s 6(4) if they are considered by a police officer to contravene s 6(1), (2) or (3) in a period of three months from the time the direction is given. That consideration will be subject to the same vagaries about where the person is located as have been referred to above.

84 In summary, an exercise of the powers given under s 11(1) and (2) in combination with s 6(1), (2) and (3); the offences created under s 8(1) and s 6(4) (the latter in combination with s 11(6) and s 6(1), (2) and (3)); and the powers of arrest and removal given by s 13, are likely to have significant deterrent effects on protesters. Their effects will extend to protesters undertaking protest activities of a kind and in a place which would not affect forest operations and

whose presence would not be excluded by the FMA. Their effects will extend beyond individual protesters to entire groups, because of the operation of s 11(7) and (8).

85 Protesters of this kind will be deterred from being present in the vicinity of forest operations for fear that they may be subject to a direction to leave, with all the consequences which flow from such a direction. They will be deterred from protesting even though the direction may be based upon an erroneous view of where they are situated.

86 The combined effect of the provisions referred to above is immediate. It can bring the protest of an entire group of persons to a halt and its effect will extend over time. Protesters will be deterred from returning to areas around forest operations for days and even months. During this time the operations about which they seek to protest will continue but their voices will not be heard.

87 The possibility that a protester might be liable to a substantial penalty should not be overlooked, but it may not loom so largely as a deterrent. This may be because no charge under the Protesters Act has been successfully prosecuted. There has been no successful prosecution for the reason that mistakes have been made about whether the Protesters Act applied. However, from the point of view of protesters, there is nothing to suggest that mistakes will not continue to be made. That circumstance will operate as a significant deterrent. That will occur as a practical matter whether or not a prosecution for an offence is pursued to a successful conclusion and without any occasion for the determination by a court of whether or not the operation of provisions infringes the implied freedom in the circumstances of the case[37].

A burden on the freedom?

88 It is necessary to keep firmly in mind that the implied freedom is essential to the maintenance of the system of representative and responsible government for which the Constitution provides. The implied freedom protects the free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political sovereignty by the people of the Commonwealth. It operates as a limit on the exercise of legislative power to impede that freedom of expression. The enquiries posed by *Lange* are the indispensable means by which a legislative measure which is apt to impede the free flow of political

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37 Cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144; [1992] HCA 45.

communications may be justified. The first enquiry is whether the freedom is in fact burdened.

89 Tasmania does not dispute that protesters to whom the Protesters Act applies may be taken to communicate about matters relating to politics or government. It concedes that the Protesters Act may burden the freedom. It does not accept that the Protesters Act has that effect with respect to the plaintiffs, for it did not apply to them or persons in their position who were protesting on public land adjacent to a site on which a business activity was being undertaken. Tasmania says the Protesters Act therefore had no relevant operation. It may be accepted that Dr Brown was on the Reserve, which was land to which Tasmania conceded the Protesters Act did not apply, but Tasmania did not explain how that conclusion was to be reached with respect to where Ms Hoyt was situated.

90 Where a statute is said to impermissibly burden the freedom, the first enquiry is whether the statute in fact burdens the freedom[38]. The extent of the burden is a matter which falls to be considered in relation to the assessments required by the second limb of *Lange*[39]. The first enquiry requires consideration as to how the statute affects the freedom generally[40]. It is not answered by reference to the operation of the statute in individual cases, although such evidence may provide useful examples of the statute's practical effect, and therefore of the burden the statute may have on the freedom[41]. This Court has said more than once[42] that the freedom spoken of is not a personal right or

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38 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [40]; *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [24].

39 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [40].

40 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 553 [35].

41 *Wotton v Queensland* (2012) 246 CLR 1 at 31 [80]; [2012] HCA 2.

42 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 150; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 149; [1994] HCA 46; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 327; [1994] HCA 44; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Wotton v Queensland* (2012) 246 CLR 1 at 23-24 [54], 31 [80]; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 73-74 [166], 89 [220]; [2013] HCA 3; *Monis v The Queen* (2013) 249 CLR 92 at 189 [266], 192 [273], 206-207 [324]; [2013] HCA 4; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [30], 554 [36]; *Tajjour v New South Wales* (2014) 254 CLR 508 at

(Footnote continues on next page)

freedom. The freedom is better understood as affecting communication on the subjects of politics and government more generally and as effecting a restriction on legislative power which burdens communications on those subjects[43].

91 In any event, Tasmania's argument that, with respect to the facts of the present case, it is not shown that the freedom is effectively burdened should not be accepted. The circumstances relating to the plaintiffs show clearly how the freedom is burdened. Even if the plaintiffs were not on business premises or in a business access area the police officers who arrested and removed them were unable to correctly determine whether they were on those premises or in that area. As a result of their error the plaintiffs' protests and their communications to others about the forest operations were silenced.

92 The other aspect of the Protesters Act to be considered is its discriminatory effect, namely, that it imposes a burden on the freedom solely in relation to protesters. No decision of this Court holds that a law effecting a discriminatory burden is, for that reason alone, invalid and the plaintiffs did not contend for such an approach. Such an approach would seem to be at odds with the questions posed by *Lange* and, in particular, the second, which involves an enquiry as to whether the burden can be justified.

93 In *Australian Capital Television Pty Ltd v The Commonwealth*[44] ("*ACTV*"), Mason CJ held[45] that some provisions of the statute in question were discriminatory because they were weighted in favour of established political parties and against new and independent candidates. His Honour did not say that they were invalid simply because they effected a discriminatory burden. Rather, his Honour held them not to be "justified or legitimate" after considering, and rejecting, arguments about whether the regulatory regime introduced a "level playing field" and whether equality in sharing free broadcasting time was unattainable.

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569 [104], 593 [198]; [2014] HCA 35; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30].

43 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30].

44 (1992) 177 CLR 106.

45 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 145-146.

94 A law effecting a discriminatory burden on the freedom does not necessarily effect a greater burden on the freedom. It may effect a discriminatory burden but impose only a slight, or a less than substantial, burden on the freedom. *McCloy* provides an example of such a law. The provisions of the statute there in question included provisions prohibiting the making or accepting of a political donation by a "prohibited donor", where the definition of "prohibited donor" singled out certain groups, such as property developers. The provisions were not considered to effect a substantial burden on the freedom because their effect was indirect, given that their direct effect was to enhance freedom of political speech generally by levelling the playing field, and there were many other available methods of communicating on matters of politics and government, including influencing politicians to a point of view[46].

95 A discriminatory law does, however, serve to identify the group targeted by a law and informs the assessment of the restrictions imposed by the law upon the ability of those persons to communicate on matters of politics and government. It is this assessment which must be undertaken in order to answer the question whether the freedom is burdened. In the present case the answer is clear. Protesters will be deterred from voicing their protests with respect to forest operations. The freedom is burdened.

The purpose of the Protesters Act

96 Once it is concluded that the freedom is burdened by a statute, the true purpose of that statute assumes importance with respect to each of the enquiries which follow, which are directed to whether the burden is justified. The identification of that purpose is to be arrived at by the ordinary processes of construction[47].

97 The plaintiffs submit that the purpose and practical operation of s 6 and associated provisions is to "prevent onsite protests that ... relate to 'political, environmental, social, cultural or economic issues', which are the key issues to which electors will have regard when choosing their representatives" and to "prevent, hinder or obstruct, or be about to prevent, hinder or obstruct, business activities at the site where private or governmental entities carry on business".

98 For its part, Tasmania says that the purpose of the Protesters Act is to "prevent people from damaging or threatening to damage real or personal property connected with a business; to ensure that protesters do not impede,

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46 *McCloy v New South Wales* (2015) 257 CLR 178 at 220-221 [93].

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

hinder or obstruct the carrying out of lawful business activity on business premises or business access areas; and to protect business operators going about their business safely and without disruption. The objects of the Act are connected with the advantage of having a settled and orderly economic environment in which to conduct business."

99 The purpose of the Protesters Act is most clearly discerned from the sections which contain the relevant prohibitions, ss 6 and 7. Those provisions are directed towards the harm that the conduct of particular kinds of protest activities may cause. They are directed to conduct which may cause damage to the property of a business or disrupt its activities. They are directed towards protesters because protesters are seen as the potential source of such harm. It is not to be inferred that the purpose of the Act is to deter protesters more generally, even if that is the effect of some of the measures it employs in seeking to achieve its purpose of prevention of damage to and disruption of forest operations.

100 The plaintiffs' submissions elide the purpose of the Protesters Act with its operation and effect. In a later submission they recognise that it is the Act's operation in respect of onsite environmental protests which will stultify the effectiveness of protests. It is the measures for which the Act provides, and in particular the powers given to police, which affect the ability of persons to protest. But this is not to deny that those measures are directed to the protections it seeks to achieve.

101 Although protesters are targeted and discriminated against and special measures are directed towards them, it may be seen that the legislation was enacted against a background where protesters, or at least some of them, were perceived to be those persons, or groups, who would cause damage or disrupt economic activities during protests of particular kinds. It is important, however, to be clear about the purpose of the Protesters Act. It is not correctly stated simply as the protection of the interests of business just as it is not the prevention of protests. It is the protection of businesses and their operations, here forest operations, from damage and disruption from protesters who are engaged in particular kinds of protests. This is the mischief to which the statute is directed[48].

Compatibility

102 In *McCloy*[49] it was said that the process for the justification of the burden the statute places on the freedom commences with the requirement, stated in

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48 *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132] per Gageler J.

49 *McCloy v New South Wales* (2015) 257 CLR 178 at 212 [66].

Lange[50], that the purpose of the provisions in question be "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government". Clearly enough, the purpose of the Protesters Act, understood in the way described above, could not be said to be incompatible with the freedom.

103 In *Coleman v Power*[51] it was said that the adjectival phrase referred to above does not merely qualify the "legitimate end". It qualifies the compound conception of the fulfilment of such an end. That is to say, the manner of achieving the statute's purpose, as well as the purpose itself, must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

104 In its submissions in this matter the Commonwealth, intervening, drew attention to the summary version of this requirement of the *Lange* test which appears at the outset of the joint reasons in *McCloy*[52]. The Commonwealth said that it may be understood to suggest that a conclusion as to whether the means adopted to achieve the statutory object are "reasonably appropriate and adapted" or proportionate to a legitimate end is to be reached at a point before proportionality testing is undertaken. Clearly the statute's purpose must be assessed for compatibility with the constitutionally prescribed system of government at this stage, but in practical terms the means adopted could not be. The point is well made. The commencing words of Questions 2 and 3 stated in *McCloy* should read:

> 2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
>
> 3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

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50 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

51 (2004) 220 CLR 1 at 50 [92]; [2004] HCA 39.

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

A slight burden?

105 The submission that Tasmania puts is that where the Protesters Act does effect a burden, it will only be slight. In essence, it argues that in most cases protesters will not be able to lawfully be present in areas where forest operations are being carried out. It does not say how these areas are to be identified.

106 It will be recalled that the plaintiffs claimed that there is a need for persons to be able to make "onsite protests" in those parts of the natural environment which are considered to be under threat of damage or destruction. The rationale for this view is that it is necessary to be present in order that images of forest operations together with protests concerning them can be communicated to the public at large. For a reason not explained, images taken by equipment such as drones flown overhead were not seen to be practicable, at least at present.

107 The plaintiffs did not distinguish between protesters whose actions may directly affect operations and those simply present at a distance from those operations. In either case Tasmania submits that persons have no right to be "onsite". It says that there can be no right to carry out protests on the site of a business activity carried out by a business occupier in lawful possession of premises who does not consent to the presence of protesters. In such a situation a protester is a trespasser and the protester's activity on the property may amount to a nuisance, and in neither case does the freedom alter this state of affairs.

108 Tasmania calls in aid the observations of McHugh J in *Levy v Victoria*[53]. In that case, a regulation prohibited persons other than holders of game licences from entering upon a permitted hunting area between certain hours and on specified dates. His Honour observed[54] that the constitutional implication does not create rights and questioned whether, in the absence of the regulations, the protesters had the right to be present in the permitted hunting area. Unless the common law or a statute gave them a right to enter the area, it might be said that the lack of that right, not the regulations, denied them the opportunity to protest. The matter was taken no further for, as his Honour went on to explain, the argument for the parties assumed that, in the absence of the regulations, the plaintiff and others were entitled to enter the area.

109 The question to which McHugh J adverted in *Levy* does not arise in this case. As has been seen, the Protesters Act may operate to stifle political

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53 (1997) 189 CLR 579; [1997] HCA 31.

54 *Levy v Victoria* (1997) 189 CLR 579 at 625-626.

communication on the mistaken, albeit reasonable, belief of a police officer as to the effect of protest activity whether or not it involves the presence of protesters on land where they have no right to be and where that question may never be determined by a court. As will be explained later in these reasons, it is in consequence of this overreach of means over ends that the Protesters Act operates more widely than its purpose requires. In this regard, it may be contrasted with the FMA. It may be accepted to be logical to approach the burden which a statute has on the freedom by reference to what protesters could do were it not for the statute. But in the context of forestry land, as opposed to other business premises, this does not involve questions of right of entry or trespass, unless the powers of the FMA are invoked. The relevant enquiry involves a comparison between the effect of the FMA and the effect of the Protesters Act upon the ability of people to access forest areas and undertake protest activities on them.

110 As earlier explained, the premise of the FMA is that persons are able to access forest areas unless the Forest Manager exercises its powers to exclude them. The Forest Manager may only exercise those powers in order to perform its functions effectively or efficiently, or in the interests of safety. It is not necessary to determine the nature of the right of public access which is recognised by the FMA, for example, whether it is some kind of conditional licence. It is sufficient to appreciate that the scheme of the FMA is that persons will not be impeded in their access to forestry land or in their use of such land for any purpose so long as their presence or the activity which they undertake is not incompatible with the management of the forestry land, which would include forest operations conducted on that land. It is difficult to comprehend that every form of protest will necessarily be incompatible with this purpose.

111 The validity of the FMA is not challenged. Under the FMA, persons may lawfully be excluded from certain areas of land or from roads from time to time and this will be so even if a person wishes to be in the area in order to make a protest about what is taking place there. The extent of the burden effected by the Protesters Act must be determined having regard to the restrictions already imposed on the freedom by the FMA.

112 When the powers under the FMA are exercised for the purposes of carrying out the Forest Manager's functions, the Forest Manager may be expected to designate an area at least in general terms. The Forest Manager may do so via the use of signs and physical barriers. This may be contrasted with the ambiguous definitions of "business premises" and "business access area", which, it may be inferred, were intended to operate more widely.

113 There are indications in the circumstances surrounding the arrests of the plaintiffs that steps of the kind mentioned had been taken under the FMA. There

were signs concerning road closures and chains were placed across the roads. It may be assumed that the employee of Forestry Tasmania who requested Ms Hoyt to remain where she was when equipment was being moved was a person authorised under the FMA. However, neither plaintiff was requested to leave the area in which they were present in the vicinity of forest operations by an officer authorised under the FMA. As the charges later brought against them confirm, the police officers who directed them to leave, and arrested and removed them when they did not, were purporting to exercise powers under the Protesters Act.

114 A person authorised under the FMA may direct a person not to enter or remain on land[55]. That person therefore exercises a power similar to that given by the Protesters Act to police officers. But the direction given under the FMA is only for statutory purposes related to actual operations and safety. The authorised person can be expected to have this clearly in mind just as they would have in mind the object of s 13 of the FMA. The area of exclusion would be limited to no more than is necessary for the operations and to ensure continued public access.

115 The area to which the Protesters Act applies and in which a protester may not be present will in many cases not be capable of identification, but the indications given by that Act, in particular by its definitions, are that it is intended to apply more widely than land which may be the subject of powers exercised under the FMA. There is nothing in the Protesters Act to suggest that the areas to which it is intended to apply are coextensive with those designated under the FMA as unavailable for public access and use.

116 It follows that there will be areas of forestry land which will not be the subject of the exercise of the powers of exclusion under the FMA but to which the Protesters Act will apply. It may reasonably be inferred that persons would be able to access these areas in order to effectively voice their protests were it not for the Protesters Act.

117 It can hardly be suggested that the provisions of the Protesters Act referred to above affect the freedom only slightly. This is so even though protests about forest operations may be communicated in other ways. Further, other methods of communication are less likely to be as effective as the communication of images of protesters pointing to what they claim to be damage to the natural environment.

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55 *Forest Management Act* 2013 (Tas), s 22(4).

118 It has been explained[56] that the exercise of powers given under the Protesters Act will likely result in persons wrongly being excluded from areas of a forest, their protests being brought to an end, and them being deterred from further protests in the foreseeable future. In its practical operation the Protesters Act indirectly burdens the freedom but it does so to a significant extent. Generally speaking, the sufficiency of the justification required for such a burden should be thought to require some correspondence with the extent of that burden[57].

A compelling justification?

119 The plaintiffs submit that because the Protesters Act operates by reference to political and environmental protests, it is directed to the content of these political communications and a "compelling justification" is therefore required. The submission implies that measures which burden the freedom in this way will require a higher level of justification.

120 In *ACTV*, Mason CJ expressed[58] the view that laws which "target ideas or information" may require "a compelling justification". His Honour was speaking of a law specifically directed at, and which prohibited, the broadcasting of matters relating to public affairs and political discourse. It effected a direct burden on the freedom. His Honour did not use the words "content-based" with respect to the laws in question. In US jurisprudence concerning the First Amendment that term may refer to a law targeting speech based on its communicative content[59]. Under the doctrine of strict scrutiny such a law is regarded as "presumptively unconstitutional"[60] because it poses "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information"[61].

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56 At [77].

57 *Tajjour v New South Wales* (2014) 254 CLR 508 at 580 [151] per Gageler J.

58 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143.

59 *Reed v Town of Gilbert, Arizona* 192 L Ed 2d 236 at 245 (2015).

60 *Reed v Town of Gilbert, Arizona* 192 L Ed 2d 236 at 245 (2015).

61 *Turner Broadcasting System Inc v Federal Communications Commission* 512 US 622 at 641 (1994).

121 In the context of the implied freedom and the test in *Lange*, what Mason CJ said in *ACTV* might be thought to require more by way of justification only at the balancing stage of proportionality analysis rather than justification operating presumptively at the outset of the analysis under the second limb. The only basis given in *Lange* for the invalidation of a law at the threshold, which is to say before testing for proportionality, is when a law does not have a legitimate purpose, in other words, where the purpose of the law is not compatible with the maintenance of the scheme of representative and responsible government for which the Constitution provides[62].

122 It should in any event be observed that neither the terms of the Protesters Act nor its purpose seeks to affect the content of the opinion which a protester may seek to voice with respect to forest operations. "Protesters" are defined by reference to those opinions, perhaps unnecessarily, but the Act takes it no further. Its terms, in their operation and effect, are directed to the conduct of protesters.

McCloy and proportionality testing

123 Although the purpose of the Protesters Act meets the requirement of compatibility, the measures it adopts to achieve that purpose effect a burden on the freedom and must be further justified[63]. In *McCloy*, it was suggested[64] that the question posed in *Lange*[65] whether a measure is reasonably appropriate and adapted, or proportionate, to its purpose might be approached by reference to certain criteria of proportionality. If the criteria were not met, and the answer is in the negative, it would follow that the burden imposed on the freedom is not justified. The means could not be said to meet the requirement of compatibility. The freedom would operate to restrict the exercise of legislative power.

124 Tasmania submits that the methods of analysis suggested in *McCloy* as useful to determine whether a provision is reasonably appropriate or adapted, or proportionate, to its purpose should be reconsidered. The methods should be reconsidered, it is submitted, because there had not been full argument with respect to them in that case. Queensland, intervening, supports this submission.

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62 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568.

63 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68] per French CJ, Kiefel, Bell and Keane JJ, 232 [131] per Gageler J.

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

65 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

125 In the course of argument it was pointed out that in *McCloy* it was said[66] that the methods of proportionality analysis there referred to might not be the only criteria by which legislation can be tested in accordance with *Lange*. Tasmania did not suggest any alternative method. Queensland proposes that the question whether a statute could be said to be reasonably appropriate and adapted could be answered, for example, by simply determining if it went "too far". Such an approach would invite little more from the Court than an impression. It does not address the need for transparency in reasoning which was regarded as necessary by a majority of Justices in *McCloy*[67].

126 The Commonwealth contends for a "modified version of *McCloy*". In summary it accepts that the first enquiry, that of "suitability", which is as to the connection of a measure adopted by a statute to its purpose[68], is relevant to all cases involving the freedom. The second test, that of "necessity"[69], should be taken as sometimes, but not always, decisive. The last assessment, that of strict proportionality or "balancing"[70], should only be undertaken where the burden on the freedom is "direct and substantial", it submits.

127 The last-mentioned submission overlooks that *Lange*, correctly understood, requires that *any* effective burden on the freedom must be justified. The first enquiry posed by *Lange* is whether a burden, or restriction, is imposed on the freedom at all. If it is, the process of justification commences with the question of compatibility of purpose, as mentioned earlier in these reasons[71], and it continues with enquiries as to proportionality.

128 It is possible that a slight burden on the freedom might require a commensurate justification. Certainly a heavy burden would ordinarily require a significant justification. Much will depend upon the nature of the legislative measure and its effects. No general rule should be prescribed. It is sufficient

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66 *McCloy v New South Wales* (2015) 257 CLR 178 at 215-216 [74].

67 *McCloy v New South Wales* (2015) 257 CLR 178 at 215-216 [74]-[75].

68 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 560 [60], 561 [64]-[65]; *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2], 217 [80].

69 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2], 217 [81]-[82].

70 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2], 219 [87].

71 At [102].

here to observe that an argument that only particular degrees of burden warrant justification is inconsistent with *Lange*.

129 The Commonwealth does not suggest that an enquiry as to whether a legislative measure is necessary to achieve a statute's purpose is novel. It has been utilised for some time with respect to laws which burden the freedom guaranteed by s 92 of the Constitution and, more recently, with respect to the freedom of political communication.

130 There can be little doubt that the availability of other measures which are just as practicable to achieve a statute's purpose, but which are less restrictive of the freedom, may be decisive of invalidity[72]. In such a case it could hardly be said that the measure which is more restrictive of the freedom is necessary. A legislative measure could not rationally be justified by an inexplicable legislative choice. At least that would be so unless some other means of justifying the burden was identified.

131 In *McCloy* the Commonwealth submitted[73] that some statutory purposes may justify very large incursions on the freedom. No such submission is made by Tasmania in this case. The Commonwealth's submissions in *McCloy* drew attention to another method of justification, that referred to as the test of strict proportionality. The point presently to be made is that whilst the Court may propose methods of analysis, of what is proportionate or reasonably appropriate and adapted, it is for those supporting the impugned legislation to justify any of its measures which burden the freedom.

Connection to purpose

132 Given that the purpose of the Protesters Act is to prevent damage and disruption to forest operations from the conduct of protesters, the question arises whether the provisions referred to above can be said to pursue that purpose. In *McCloy*[74], the enquiry was said to be whether the statutory provisions in question have a rational connection to their purpose. If they do not, it would follow that they are simply a burden on the freedom without a justifying purpose[75].

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72 *McCloy v New South Wales* (2015) 257 CLR 178 at 233 [135] per Gageler J.

73 *McCloy v New South Wales* (2015) 257 CLR 178 at 218 [84].

74 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2], 217 [80].

75 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [51].

133 This enquiry, as to the suitability of a legislative measure[76], is not novel. It was applied in *Unions NSW v New South Wales*[77] and was understood in *McCloy* to be "an inquiry which logic requires"[78]. The view of the Commonwealth earlier mentioned, that the question will be relevant in all cases, is correct.

134 The prohibitions in s 6 clearly enough reflect the purpose of the Protesters Act. The fact that protesters are targeted is explained by the history of protests which provided a catalyst for the Act. The powers of direction, removal and arrest and the offences created may generally be seen as preventing harms to forest operations occurring and deterring protesters from engaging in protest activities which may have those effects.

135 Section 8(1)(b) cannot be said to share the purpose of the Protesters Act. It deters a person being in any business access area on pain of arrest or penalty, even though they may not present any threat of damage or disruption and may not reasonably be considered to contravene s 6(1), (2) or (3). The inference to be drawn is that it is directed solely to the purpose of deterring protesters. Accordingly, it fails the test of suitability.

136 The same conclusion may be reached with respect to s 11(7) and (8), which effect a blanket exclusion of a whole group of persons from an area by a single direction of a police officer, even when the police officer could not conceivably have formed any view about whether each person is about to contravene the Protesters Act. So understood, the only purpose of these provisions must be to bring a protest to an end and deter further protests, regardless of whether damage or disruption is foreseeable.

137 The period over which s 11(6) applies, three months from a direction given under s 11(1) or (2), might suggest that it is intended merely to further deter protesters. However, it is not s 11(6) itself which effects that deterrence. It creates the conditions for an offence under s 6(4). It is the prospect that they might offend against that provision which will deter protesters and a necessary element of that offence is a contravention of s 6(1), (2) or (3), which is connected to the statute's protective purpose. The period of three months referred to in s 11(6) does not operate outside the statutory purpose. Properly understood, it merely effects a limit on the temporal operation of s 6(4).

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76 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2], 217 [80].

77 (2013) 252 CLR 530 at 556-560 [44]-[60].

78 *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [80].

138 The question whether s 11(6) and the remaining provisions referred to above which burden the freedom (s 6(1), (2) and (3), s 11(1) and (2), s 13 and Pt 4) can be justified falls to be determined by whether they can be said to be necessary.

Are the measures reasonably necessary?

139 The question whether a law can be said to be reasonably necessary, in the sense in which that term applies in the context of the freedom, does not involve a free-ranging enquiry as to whether the legislature should have made different policy choices. It involves determining whether there are alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect on the freedom[79]. Where such alternative measures are obvious and their practicability compelling it may be difficult for those arguing for the validity of the legislation to justify the legislative choice as necessary, as previously explained[80].

140 The FMA does not burden the freedom to the same extent as does the Protesters Act. It seeks to ensure that only those persons, protesters included, whose presence or activities are likely to interfere with forest operations will be excluded from forestry land. The Protesters Act operates more widely than its purpose requires. It is principally directed to preventing protesters being present within ill-defined areas in the vicinity of forest operations or access points to those areas, whereas its purpose is similar to that of the FMA.

141 The powers given by the FMA, in the context of PTPZ land, are directed to the protection of Forestry Tasmania's property, to its functions and operations and to the safety of its employees and the public. The purpose of the Protesters Act is essentially the same. So far as concerns forestry land, its purpose is to prevent damage and disruption to forest operations.

142 Tasmania points to a difference between the Protesters Act and other legislation which it submits is of importance. That difference is that the focus of the Protesters Act is on protest activity. So much may be accepted, but it serves only to identify the source of the perceived problem. It goes no way towards explaining why measures which have the effect of deterring protests generally are reasonably necessary to its more limited purpose. It is not all protest activity

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79 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

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

which is the concern of the Protesters Act, but only that kind which is likely to result in the aforementioned harms.

143 The Special Case contains no indication that, generally speaking, the provisions of the FMA have been ineffective to prevent the disruption of forest operations or damage to property associated with those operations. Putting aside particular powers such as those given by s 11(6), (7) and (8), the basic powers of direction, removal and arrest provided by the Protesters Act are much the same as those provided by the FMA. It must, however, be accepted that the history of environmental protests shows that, regardless of the existence of these powers, some protest activities having these effects have taken place.

144 The Protesters Act seeks to address this by adopting measures which, in their operation and effect in the context of that statute, will have substantial deterrent effects. To an extent those effects are achieved by extending the areas of its operation, creating further consequences for non-compliance with directions including special offences and heavy penalties. More importantly they are achieved by the uncertainty which surrounds the areas within which the Act applies.

145 Tasmania may well argue that the Protesters Act may be distinguished from the FMA because of its strong deterrent effects. Whether it will be effective with respect to the kinds of protests to which its purpose is addressed may be debatable. It is not necessary to consider that question. The concern of the Court is the extent to which the Protesters Act restricts protests more generally. It is likely to deter protest of all kinds and that is too high a cost to the freedom given the limited purpose of the Protesters Act.

146 The purpose of the Protesters Act is not significantly different from that of the FMA. In the measures it adopts to deter protesters the Protesters Act goes far beyond those reasonably necessary for its purpose. The validity of the FMA's measures was not questioned in these proceedings. However, it is sufficient to observe that those measures, by contrast, are substantially less restrictive of the freedom.

US doctrines and *Lange*

147 These reasons do not invoke the void-for-vagueness doctrine which is part of US constitutional jurisprudence[81]. The plaintiffs make no claim to invalidity on the basis of such a doctrine. Their claim for invalidity is that the provisions of

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81 See, eg, *Kolender v Lawson* 461 US 352 (1983).

the Protesters Act burden the freedom and cannot be justified by reference to what was held in *Lange* and further explained in *McCloy*.

148 The US doctrine is addressed to First Amendment freedom of speech and is rooted in the due process requirements of the Fifth and Fourteenth Amendments, neither of which has a counterpart in the Australian Constitution and the implied freedom. It is well understood that our Constitution does not say that the uncertainty of laws violates a constitutional safeguard[82].

149 Under the US doctrine of vagueness, vague laws are *per se* invalid and cannot be justified[83]. Under Australian law a vague law is not invalid on that account alone, but laws which have that quality and which, in their practical operation and effect, burden the freedom must be justified according to the questions in *Lange* if they are to survive challenge. This does not involve the importation of foreign constitutional doctrine.

150 *Lange* requires that a legislative measure which effects any burden on the freedom be assessed not only for its purpose, but for its operation and effect[84]. The ultimate question, whether a legislative measure can be justified as reasonably appropriate and adapted, or proportionate, cannot be answered without determining its operation and effect. The enquiry as to its effect on the freedom generally is necessarily one about its operation and *practical* effect[85]. Whilst the freedom is not an individual right, the extent of the burden on the freedom is usually ascertained by reference to the effect upon the ability of persons to communicate on the matters the subject of the freedom in various ways, for example by giving political donations which might meet the costs of political communication[86] or, as here, by protesting. It is not to the point that a court might resolve the bounds of the physical area to which the Protesters Act applies in a given case, a question of mixed fact and law. As earlier explained, at

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82 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 195; [1945] HCA 23.

83 *Kolender v Lawson* 461 US 352 at 361 (1983).

84 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; see also *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 337.

85 *Coleman v Power* (2004) 220 CLR 1 at 49-50 [91]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 558 [60], 578-579 [146].

86 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [37]-[38].

this point a burden has already been effected, the protest quelled and future protests deterred.

151 Under US constitutional law, vague laws are said to offend several important values, one of which is the First Amendment freedom of speech[87]. In the context of First Amendment freedom of speech, this is described as the "chilling effect"[88]. It is not necessary to discuss how the doctrine is applied by US courts in determining the invalidity of a statute. The term "chilling effect" is not employed in these reasons. It has been used in judgments of this Court with respect to the implied freedom[89]; however, the term has relevantly been used only to describe an effect of inhibition or deterrence on the freedom and for the purpose of determining the practical effect upon political communication and debate.

Conclusion and orders

152 The measures adopted by the Protesters Act to deter protesters effect a significant burden on the freedom of political communication. That burden has not been justified. The means adopted cannot be considered as compatible, in the sense described in *Lange*[90].

153 Part 4 provides the enforcement regime for offences under the Protesters Act. To the extent that it provides for enforcement of and penalties for the provisions here held to be invalid, it too is invalid.

154 Question 2 of the Special Case dated 9 December 2016 should be amended and the questions stated in the Special Case (as so amended) be answered as follows:

1. Do either or both of the plaintiffs have standing to seek the relief sought in the Amended Statement of Claim?

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87 *Grayned v City of Rockford* 408 US 104 at 108-109 (1972).

88 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 693.

89 See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 131, 135, 155, 156-157, 174, 185; *Roberts v Bass* (2002) 212 CLR 1 at 40-41 [102]; [2002] HCA 57.

90 See [104] above.

Answer: The defendant abandoned its challenge to the plaintiffs' standing. Question 1 therefore need not be answered.

2. Is the *Workplaces (Protection from Protesters) Act* 2014 (Tas), either in its entirety or in its operation in respect of forestry land or business access areas in relation to forestry land, invalid because it impermissibly burdens the implied freedom of political communication contrary to the Commonwealth Constitution?

   Answer: Section 6(1), (2), (3) and (4), s 8(1), s 11(1), (2), (6), (7) and (8), s 13 and Pt 4 of the *Workplaces (Protection from Protesters) Act* 2014 (Tas) in their operation in respect of forestry land or business access areas in relation to forestry land are invalid because they impermissibly burden the implied freedom of political communication contrary to the Commonwealth Constitution.

3. Who should pay the costs of the Special Case?

   Answer: The defendant should pay the plaintiffs' costs.

GAGELER J.

The analytical framework

155 The Attorney-General of the Commonwealth submits without demur from any party or other intervener that the second and third of the questions stated at the beginning of the reasons for judgment of the plurality in *McCloy v New South Wales*[91] should be reformulated to conform to the second step in the analytical framework set out in *Lange v Australian Broadcasting Corporation*[92] and refined in *Coleman v Power*[93]. I agree. For good measure, the first question there stated should also be reformulated to conform to the first step in the same analytical framework.

156 The result is to restate the analytical framework for determining whether a Commonwealth, State or Territory law contravenes the implied freedom of political communication, set out in *Lange* and refined in *Coleman*, in terms of three questions. They are to the following effect:

1. Does the law effectively burden freedom of political communication?

2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?

3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?

If the first question is answered "yes", and if either the second question or the third question is answered "no", the law is invalid.

157 The Attorney-General of Queensland submits that the present opportunity should also be taken to put paid to the notion that the last of those questions must always or sometimes be answered through application of three-staged "proportionality testing", which the explanation at the beginning of the reasons for judgment of the plurality in *McCloy* went on to outline[94]. Again, I agree.

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91 (2015) 257 CLR 178 at 194-195 [2]; [2015] HCA 34.

92 (1997) 189 CLR 520 at 567-568; [1997] HCA 25.

93 (2004) 220 CLR 1 at 51 [95]-[96], 77-78 [196], 82 [211]; [2004] HCA 39.

94 (2015) 257 CLR 178 at 195 [2].

158 Three-staged proportionality testing was not sought to be characterised in *McCloy* as anything more than a tool of analysis[95], not to be confused with the constitutional principle it served[96]. The plurality did not suggest that its adoption is compelled by the reasoning which supports the implication of the freedom of political communication as authoritatively expounded in *Lange*[97]. The plurality also disavowed any suggestion that "it is the only criterion by which legislation that restricts a freedom can be tested"[98].

159 The point is therefore not one of reopening and overruling *McCloy*: nobody has suggested that *McCloy* was wrongly decided; *McCloy* does not elevate three-staged proportionality testing to the level of constitutional principle; and *McCloy* does not endow it with precedential status. The point is one of emphasising that the tool is, at best, a tool. For my own part, I have never considered it to be a particularly useful tool.

160 Though it originated within a civil law tradition, three-staged testing for proportionality ("Verhältnismäßigkeit") has been found by some courts applying the methodology of the common law to be useful when undertaking constitutionally or statutorily mandated rights adjudication. The structure it imposes is not tailored to the constitutional freedom of political communication, which is not concerned with rights, and which exists solely as the result of a structural implication concerned not with attempting to improve on outcomes of the political process but with maintaining the integrity of the system which produces those outcomes. The first stage – "suitability" ("Geeignetheit") – can be quite perfunctory if confined to an inquiry into "rationality". The second – "necessity" ("Erforderlichkeit") – is too prescriptive, and can be quite mechanical if confined to an inquiry into "less restrictive means". The third stage – "adequacy of balance" ("Zumutbarkeit") – even if the description of it as involving a court making a "value judgment"[99] conveys no more than that the judgment the court is required to make can turn on difficult questions of fact and degree[100], is too open-ended, providing no guidance as to how the

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95 (2015) 257 CLR 178 at 213 [68], 215 [73], 216 [77], 217 [78]. See also at 235 [144], quoting *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at 790-791 [74].

96 (2015) 257 CLR 178 at 213 [68].

97 (2015) 257 CLR 178 at 214-215 [70]-[72].

98 (2015) 257 CLR 178 at 215-216 [74].

99 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2], 216 [74]-[75].

100 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 588 [149]; [1999] HCA 27.

incommensurables to be balanced are to be weighted or as to how the adequacy of their balance is to be gauged[101].

161 Tinkering by introducing refinements, distinctions, exceptions or qualifications into each of the three stages would only compound a more basal problem. Constitutional adjudication within our tradition occurs through the elaboration of considerations seen in the light of history, of precedent and of contemporary circumstances to bear on the resolution of matters in issue. Constitutional analysis within that tradition cannot be reduced to the application of some pre-determined all-encompassing algorithm, and the inappropriateness of attempting to construct such an algorithm cannot be overcome by increasing its complexity.

162 For reasons I have attempted to explain in the past[102], the entirety of the analytical framework set out in *Lange* and refined in *Coleman* needs to be understood as a reflection of the underlying reason for the implication of freedom of political communication. The reason for the implication lies in the protection of political communication on which depends the efficacy of electoral accountability for the exercise of legislative and executive power within the constitutionally prescribed national system of representative and responsible government to which there is added a mechanism for constitutional change in which electors through referenda participate directly in the legislative process. The first question is directed to determining whether the law imposes a meaningful constraint on political communication. The second and third questions, as now restated, are directed in sequence to determining whether the particular constraint identified in answer to the first question can be explained, and can be justified, as compatible with the maintenance of that constitutionally prescribed system of government which the constitutional freedom exists to protect.

163 Expression of the third question in terms no more prescriptive than whether the law is reasonably appropriate and adapted to advance its legitimate purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government has the benefit of avoiding limiting or ordering in advance the considerations which might legitimately bear on the justification for a particular constraint on political communication. The terms of the question do not deny that, as with all constitutional adjudication, patterns emerge as

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101 See Schauer, "Proportionality and the Question of Weight", in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, (2014) 173 at 177-178, 180.

102 *Tajjour v New South Wales* (2014) 254 CLR 508 at 576-581 [139]-[152]; [2014] HCA 35; *McCloy v New South Wales* (2015) 257 CLR 178 at 222-230 [100]-[124].

precedents accumulate. What they do deny is that the analysis appropriate to be brought to bear on the determination of rights in controversy in a particular case can or should be constrained in the abstract.

164 Expression of the third question in those terms has the additional benefit of allowing for acknowledgement of gradations in the measure of appropriateness and adaptedness. Again for reasons I have attempted to explain in the past[103], not every law which effectively burdens freedom of political communication poses the same degree of risk to the efficacy of electoral accountability for the exercise of legislative and executive power. For that reason not every law which effectively burdens freedom of political communication in pursuit of a legitimate purpose demands the same degree of justification, and concomitantly not every law which effectively burdens freedom of political communication needs to be subjected to the same intensity of judicial scrutiny. The measure of the justification needs to be "calibrated to the nature and intensity of the burden"[104].

165 The answer to the initial question of burden within the restated analytical framework accordingly informs the intensity of the scrutiny appropriate to be brought to bear in answering the ultimate question of justification. Where a law effectively burdens freedom of political communication, and does so in pursuit of a legitimate purpose, the degree of fit between means (the manner in which the law pursues its purpose) and ends (the purpose it pursues) needed to conclude that the law is reasonably appropriate and adapted to advance its purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government needs to be calibrated to the degree of risk which the burden imposed by the means chosen poses to the maintenance of representative and responsible government.

166 That is the analytical framework to which I propose to adhere in examining the impugned provisions of the *Workplaces (Protection from Protesters) Act* 2014 (Tas) ("the Protesters Act").

The impugned provisions

167 The provisions of the Protesters Act the validity of which are called into question by the circumstances of the plaintiffs disclosed in the special case are quite limited.

168 The principal provisions impugned are ss 6, 8, 11 and 13(3), in their application to "business premises" comprised of "forestry land" that is Crown

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103 *Tajjour v New South Wales* (2014) 254 CLR 508 at 580-581 [151]-[152]; *McCloy v New South Wales* (2015) 257 CLR 178 at 238-239 [151]-[152].

104 *Tajjour v New South Wales* (2014) 254 CLR 508 at 580 [151].

land declared to be "permanent timber production zone land" under the *Forest Management Act* 2013 (Tas) ("the Management Act") and that is managed and controlled by Forestry Tasmania, and in their application to "business access areas" in relation to business premises comprised of such forestry land. Forestry land relevantly comprises any area of permanent timber production zone land on which "forest operations" (being work comprised of or connected with, relevantly, harvesting trees or with land clearing in preparation for planting trees) are being carried out[105]. A business access area in relation to such an area of forestry land comprises so much of any area of land, including any road or public place, outside the area of forestry land as is reasonably necessary to enable ingress to and egress from the area of forestry land[106]. The circumstances of the plaintiffs disclosed by the special case illustrate that the imprecision of those definitions means that difficulty can occur in working out the metes and bounds of the geographical areas within which ss 6, 8, 11 and 13(3) have application. That difficulty does not play any part in my reasoning.

169 Impugned as well are provisions within Pt 4, which in their relevant application provide for the prosecution and consequences of conviction of offences against ss 6(4) and 8(1). Those additional provisions are of adjectival significance and raise no separate issue.

170 The plaintiffs seek also to challenge the validity of s 7. The special case, however, discloses no basis for inferring that the plaintiffs have engaged in conduct prohibited by that section or that they might seek to do so in the future. Notwithstanding that the defendant has chosen to concede standing, the absence of facts making it necessary to decide the validity of s 7 in order to determine the rights of the parties makes it inappropriate to address that question[107].

171 Pivotal to the operation of each of ss 6, 8, 11 and 13(3) is the definition of a "protester". By virtue of that definition, a person answers that description if, but only if, the person is engaging in "a protest activity"[108]. Apart from an added geographical requirement that the activity occur relevantly on forestry land or on a business access area in relation to forestry land, the defining characteristic of a protest activity is that it is an activity in furtherance of or for the purpose of

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105 Section 3 of the Protesters Act, definitions of "forest operations" and "forestry land".

106 Section 3 of the Protesters Act, definition of "business access area".

107 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Duncan v New South Wales* (2015) 255 CLR 388 at 410 [52]; [2015] HCA 13; *Knight v Victoria* (2017) 91 ALJR 824 at 830-831 [33]; [2017] HCA 29.

108 Section 4(1) of the Protesters Act.

promoting awareness or support for "an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue"[109]. Rarely, if ever, would an activity answering that statutory description not amount to political communication within the protection of the implied freedom. An activity which would otherwise answer that description is nonetheless excluded from the statutory definition of a protest activity in a number of circumstances. One is where it is protected industrial action within the meaning of the *Fair Work Act* 2009 (Cth) or part of lawful industrial action undertaken by a State Service officer or State Service employee[110]. Another relevantly is where Forestry Tasmania has given its expressed or implied consent to the activity[111].

172 Important also to the operation of each of ss 6, 8, 11 and 13(3) are the definitions of "business activity" and "business occupier"[112]. Business activity encompasses any lawful activity carried out by Forestry Tasmania or carried out on or in relation to forestry land by another entity or person who is a business occupier. The designation of business occupier is applicable to Forestry Tasmania, its employees and its contractors.

173 Central to the operation of the remainder of each of ss 6, 8, 11 and 13(3) are prohibitions to which s 6(1), (2) and (3) give expression. Section 6(1) and (2) each prohibit a protester from engaging in specified conduct which "prevents, hinders or obstructs" the carrying out of a business activity by a business occupier in circumstances where the protester knows, or ought reasonably to be expected to know, that the conduct is likely to have that effect. The conduct specified in s 6(1) is entering or remaining on business premises or a part of business premises. The conduct specified in s 6(2) is doing an act on business premises or on a business access area in relation to business premises. Section 6(3) prohibits a protester from doing any act that "prevents, hinders, or obstructs" access to an entrance to or an exit from business premises or a business access area, in circumstances where the protester knows, or ought reasonably to be expected to know, that the act is likely to prevent, hinder or obstruct such access.

174 The width of the collocation "prevents, hinders or obstructs" within each of s 6(1), (2) and (3) is given emphasis by s 6(7). Section 6(7) makes clear that the collocation is not limited to but encompasses any act which prevents, hinders or obstructs the use, by a business occupier in relation to business premises, of

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109 Section 4(2) of the Protesters Act.

110 Section 4(7) of the Protesters Act.

111 Section 4(5) of the Protesters Act.

112 Section 3 of the Protesters Act.

any object on the business premises that belongs to, is in the possession of, or is to be used by, a business occupier in relation to the business premises, as well as any act which causes a risk to the safety of a business occupier in relation to the business premises. The word "hinder" in such a context cannot be confined to physical interference and must rather encompass any significant adverse affecting of a usual way of doing that which is hindered[113].

175 Without more, a protester in contravention of s 6(1), (2) or (3) has committed no offence. To see how a contravention, or a possible past contravention or possible future contravention, of s 6(1), (2) or (3) can have a legal consequence, it is necessary to turn to ss 11 and 13(3).

176 Section 11 confers three distinct discretions on a police officer. The first, conferred by s 11(1), empowers a police officer to direct a person who is on business premises to leave immediately "if the police officer reasonably believes that the person has committed, is committing, or is about to commit ... a contravention of section 6(1), (2) or (3)". The second, conferred by s 11(2), empowers a police officer in equivalent circumstances to issue an equivalent direction in respect of a person who is in a business access area. The third, conferred by s 11(6), empowers a police officer who gives a direction under s 11(1) or (2) to include in that direction a requirement that the person must not, in the period of three months after the date on which the direction is issued, commit an offence against the Protesters Act or contravene s 6(1), (2) or (3). A direction under s 11(1) or (2) can be issued to a person or to a group[114], and if issued to a group is to be taken to have been issued to each member of the group who ought reasonably to be expected to have heard the direction[115].

177 The statutory consequence of a police officer giving a direction under s 11(1) or (2) is to trigger the operation of s 8. Section 8(1)(a) makes it an offence for a person to remain on a business access area in relation to business premises after having been directed by a police officer under s 11(2) to leave that business access area. Section 8(1)(b) makes it an offence for a person to enter a business access area in relation to business premises within four days after having been directed by a police officer under s 11(1) to leave those business premises or under s 11(2) to leave a business access area in relation to those

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113 See *Australian Builders' Labourers' Federated Union of Workers – Western Australian Branch v J-Corp Pty Ltd* (1993) 42 FCR 452 at 459-460.

114 Section 11(7) of the Protesters Act.

115 Section 11(8) of the Protesters Act.

business premises. An offence against s 8(1) is punishable, in the case of an individual, by a fine of up to $10,000[116].

178 The additional statutory consequence of a police officer including within a direction under s 11(1) or (2) a requirement under s 11(6) that the person or group directed must not in the period of three months after the date on which the direction is issued contravene s 6(1), (2) or (3), is to trigger the operation of s 6(4). Section 6(4) makes it an offence for a person to contravene a requirement under s 11(6). The offence is punishable, in the case of an individual, by a fine of up to $10,000[117]. By operation of s 6(5), however, a person does not commit an offence against s 6(4) by reason only of taking part in a procession (or march, or event) that passes business premises or along a business access area "at a reasonable speed, once on any day".

179 Section 13(3) empowers a police officer to remove from business premises or from a business access area a person "who the police officer reasonably believes is committing, or has committed" a contravention of s 6(1), (2) or (3). Section 13(4) qualifies that power by subjecting removal to the further condition that the police officer reasonably believes that it is necessary to do so for any of a number of specified purposes. Those purposes include "to preserve public order", as well as "to prevent the continuation or repetition of an offence" relevantly against s 6(4) or s 8(1), and "for the safety or welfare of members of the public or of the person". The police officer is entitled to use reasonable force to effect removal[118].

The burden

180 Whether, and if so how and how intensely, a law effectively burdens freedom of political communication is a qualitative question to be answered by reference to the legal operation and practical effect of the law[119]. The expression "effectively burden[s]" has been recognised to mean "nothing more complicated

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116 Section 8(1) of the Protesters Act.

117 Section 17(2)(a) of the Protesters Act.

118 Section 14 of the Protesters Act.

119 *Tajjour v New South Wales* (2014) 254 CLR 508 at 578 [145]. See also *Wotton v Queensland* (2012) 246 CLR 1 at 15 [25], [28]-[29]; [2012] HCA 2.

than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications"[120].

181 The effect of a law on the making or content of political communications is in turn gauged by nothing more complicated than comparing: the practical ability of a person or persons to engage in political communication with the law; and the practical ability of that same person or those same persons to engage in political communication without the law. In *Australian Capital Television Pty Ltd v The Commonwealth*[121], for example, the relevant burden on political communication resulting from prohibitions on broadcasting political advertising imposed on licensed broadcasters was found in the practical effect of excluding persons who would otherwise have done so from using radio and television as a medium of political communication during election periods.

182 Since *Levy v Victoria*[122] was decided contemporaneously with *Lange*, there can have been no doubt that political communications include non-verbal political communications and that non-verbal political communications include assembly and movement for the purpose of political protest[123]. A law which has the direct and substantial effect of prohibiting or limiting assembly and movement for the purpose of political protest is accordingly a law which effectively burdens freedom of political communication.

183 The laws found in *Levy* effectively to burden freedom of political communication were regulations which prohibited persons who did not hold valid game licences from entering an area of Crown land designated as a hunting area within a period designated as an open season for hunting, and from approaching within a distance of less than five metres any holder of a valid game licence who was actually hunting in that area during that period. The finding that the laws effectively burdened freedom of political communication was unanimous. McHugh J alone added a qualification. Noting that the implied freedom of political communication does not create rights but merely invalidates laws, and that the implied freedom therefore "gave the protesters no right to enter the hunting area", his Honour suggested that unless the protesters had a legal

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120 *Monis v The Queen* (2013) 249 CLR 92 at 142 [108]; [2013] HCA 4. See *Unions NSW v New South Wales* (2013) 252 CLR 530 at 574 [119]; [2013] HCA 58; *McCloy v New South Wales* (2015) 257 CLR 178 at 230-231 [126].

121 (1992) 177 CLR 106; [1992] HCA 45.

122 (1997) 189 CLR 579; [1997] HCA 31.

123 See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 115; [1997] HCA 27; *Tajjour v New South Wales* (2014) 254 CLR 508 at 577-578 [142]-[143].

right to enter the hunting area "it was the lack of that right, and not the [r]egulations, that destroyed their opportunity to make their political protest"[124].

184 Notwithstanding a concession on the part of the defendant that the impugned provisions of the Protesters Act effectively burden freedom of political communication, the qualification McHugh J expressed in *Levy* looms large in the argument of the defendant and interveners in the present case. The qualification expressed by his Honour therefore requires careful consideration.

185 His Honour's notation that the implied freedom does not create an affirmative right to engage in political communication is uncontroversial. It was confirmed in *McClure v Australian Electoral Commission*[125]. It has often since been repeated[126].

186 His Honour's addition of the suggestion that the implied freedom may not have been burdened in the absence of the protesters having a legal right to enter the hunting areas needs to be treated with caution. Understood against the background of the observation in *Lange* that "[u]nder a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law'"[127], the point of general significance his Honour can be seen to have been making was that an impugned law cannot have the effect of constraining the ability of persons to engage in a form of political communication if those persons would be prohibited by some other valid law from engaging in that form of political communication in any event. That must ordinarily be so, and that is as far as his Honour's suggestion can be taken. His Honour's suggestion would not accurately reflect the nature of the implied freedom were it treated as a suggestion that political communications protected by the implied freedom are limited to those in which persons have some pre-existing legally enforceable right to engage.

187 *Mulholland v Australian Electoral Commission*[128] cannot be read as having taken his Honour's suggestion to that extreme. The different conclusions

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124 (1997) 189 CLR 579 at 626.

125 (1999) 73 ALJR 1086; 163 ALR 734; [1999] HCA 31.

126 Eg *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [30], 554 [36]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 569 [104], 593-594 [198]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30].

127 (1997) 189 CLR 520 at 564, quoting *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 283.

128 (2004) 220 CLR 181; [2004] HCA 41.

expressed in *Mulholland* as to whether freedom of political communication was burdened need to be understood in the context of the argument there advanced. The argument was that statutory restrictions on registration of a political party, imposed by the "500 rule" and the "no overlap rule", had the practical effect of precluding that form of communication with voters about the party affiliation of a candidate which occurs as a result of the performance by the Australian Electoral Commission of its statutory function of causing the name of a registered political party to be printed on a ballot paper. Gleeson CJ and Kirby J, who concluded that there was a burden on freedom of political communication, compared the communication which would occur in that form without the 500 rule and the no overlap rule and the absence of communication which would occur in that form with those restrictions[129]. McHugh J, Gummow and Hayne JJ and Callinan J, who, like Heydon J, concluded that there was no burden on freedom of political communication, compared the communication which would occur in that form with and without the entirety of the statutory regime for the registration of political parties of which the 500 rule and the no overlap rule were treated as forming inseverable parts[130].

188 The considerations identified in *Lange* which support the implication of freedom of political communication cannot justify confining its protection to political communications in which persons seeking to communicate have a legally enforceable right to engage. Political communication, on which electoral accountability for the exercise of legislative and executive power within our constitutionally prescribed system of representative and responsible government has always depended, has never in practice been so confined. Political communication has rather in practice occurred through a range of media which have varied through time and space according to their practical availability and technological feasibility. Political communication has also occurred within a system of laws which have imposed any number of constraints on the making and content of communications. Some of those constraints have been imposed as a means of rationing limited public resources which have from time to time provided platforms for political communication, ranging from physical spaces[131] to the electromagnetic spectrum[132]. Others have been imposed to protect

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129 (2004) 220 CLR 181 at 195-196 [28], 200-201 [41], 276-277 [280].

130 (2004) 220 CLR 181 at 223-224 [107], 224 [110], 247 [186]-[187], 298 [337].

131 See *Muldoon v Melbourne City Council* (2013) 217 FCR 450 at 527 [379]-[380]; *Thomas v Chicago Park District* 534 US 316 at 322 (2002).

132 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169, referring to *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 567, 591, 597-598, 629-630; [1986] HCA 60 and *Red Lion Broadcasting Co Inc v Federal Communications Commission* 395 US 367 at 375-377 (1969). See also

(Footnote continues on next page)

compatible yet competing public interests, including but not limited to the protection of property, of safety, of reputation, of amenity and of privacy. Accepting that some other laws (including, as the outcome in *Lange* illustrates, some legal rules of long standing) might themselves need to be adjusted to accommodate to the implied freedom[133], the impact of any given law on political communication (and in turn on electoral accountability for the exercise of legislative and executive power) lies in the incremental effect of that law on the real-world ability of a person or persons to make or to receive communications which are capable of bearing on electoral choice. Therein lies its relevant burden.

189 Nothing therefore turns on whether or not a protester has a legally enforceable right to enter or remain on Crown land declared to be permanent timber production zone land. There are, as the special case reveals, approximately 800,000 hectares of permanent timber production zone land in Tasmania. Historically, members of the public have in fact enjoyed access to that land. Continuation of that public access is facilitated by the general statutory obligation of Forestry Tasmania under the Management Act to "perform its functions and exercise its powers so as to allow access to permanent timber production zone land for such purposes as are not incompatible with the management" of that land under that Act[134]. Without concern for Hohfeldian classification, the second reading speech for the Bill for the Management Act adopted the language of everyday life in describing "the people of Tasmania" as having a "right to access the land" which would "continue so long as the access does not interfere with the management of the land"[135].

190 Nor does anything turn on the detail of the statutory functions of managing permanent timber production zone land and of undertaking forest operations on permanent timber production zone land which the Management Act confers on Forestry Tasmania or on the details of the statutory powers which the Management Act confers in support of those functions. Forestry Tasmania is specifically empowered "for the purposes of discharging its responsibilities or in the interests of safety" to erect a sign on permanent timber production zone land

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Federal Communications Commission v League of Women Voters of California 468 US 364 at 377 (1984).

133 See also *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-557 [43]-[45]; [2010] HCA 42.

134 Section 13 of the Management Act.

135 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 24 September 2013 at 40.

or on or in respect of a forest road[136], or to erect a sign or barricade closing a forest road[137], with the consequence that any person by failing to comply with a direction on a sign that has been erected or by driving or being on a forest road that has been closed commits an offence punishable by a fine of up to $3,180. Irrespective of whether such a sign or barricade has been created, an authorised employee of Forestry Tasmania who forms an opinion that any person's entry, presence or action "has prevented or is about to prevent [Forestry Tasmania] from effectively or efficiently performing its functions" can request the person not to enter or to leave, or to stop some activity on, permanent timber production zone land or a forest road, with the consequence that a person who fails to comply with the employee's request commits an offence also punishable by a fine of up to $3,180[138]. In addition, a police officer can give directions to persons on permanent timber production zone land or a forest road, with the consequence that a person who fails to comply with the police officer's direction commits an offence also punishable by a similar fine[139]. No party or intervener submits that the impugned provisions depend for their relevant operation on the prior exercise of any one or more of those statutory powers under the Management Act. Each of those statutory powers is in any event itself limited by the implied freedom with the consequence that an issue of validity would arise were any of them exercised purportedly to impede political communication[140].

191 More significant to an assessment of the relevant burden imposed by the impugned provisions is the long history of political protest on Crown land in Australia. Most significant is the history of on-site political protests on Crown land in Tasmania, directed to bringing about legislative or regulatory change on environmental issues, beginning with the protest activity between 1981 and 1983 which preceded enactment of the *World Heritage Properties Conservation Act* 1983 (Cth). The special case reveals that, since 2006, 37 protests have taken place in Tasmania in areas that have subsequently been granted legislative or regulatory environmental protection. The communicative power of on-site protests, the special case emphasises and common experience confirms, lies in the generation of images capable of attracting the attention of the public and of politicians to the particular area of the environment which is claimed to be threatened and sought to be protected.

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136 Section 21 of the Management Act.

137 Section 23 of the Management Act.

138 Section 22(1)-(5) of the Management Act.

139 Section 22(6) of the Management Act.

140 *Wotton v Queensland* (2012) 246 CLR 1 at 9-10 [9]-[10], 14 [22]-[23], 16 [31].

192 The nature and intensity of the burden imposed on political communication by the impugned provisions of the Protesters Act fall therefore to be considered against a background of historical and continuing public access to permanent timber production zone land, of limited statutory regulation of that public access, and of historical and likely continuing on-site political protests directed to bringing about legislative or regulatory change on environmental issues on Crown land in Tasmania.

193 The nature of the burden imposed on political communication by the impugned provisions is that the burden can be expected to fall in practice almost exclusively on on-site political protests of that description. Not only are the provisions targeted by the definition of protester to political communication, but they are targeted by the same definition to political communication occurring at particular geographical locations. Given those geographical locations, and given the history of on-site protests in Tasmania, it would be fanciful to think that the impugned provisions are not likely to impact on the chosen method of political communication of those whose advocacy is directed to bringing about legislative or regulatory change on environmental issues and would have little or no impact on political communication by those whose advocacy is directed to other political ends.

194 The intensity of the burden which the impugned provisions impose on political communication by protesters – their real-world impact on the making and receipt of communications capable of bearing on electoral choice – cannot be gauged by treating s 6(1), (2) and (3) as if they were self-executing prohibitions and by treating ss 6(4), 8(1), 11 and 13(3) as if they were merely ancillary to the enforcement of s 6(1), (2) and (3). That is not the legislative design.

195 The extent of the practical constraint on the making and receipt of communications capable of bearing on electoral choice is rather to be seen in the ambit of the discretions conferred on police officers by ss 11 and 13(3) and in the consequences which flow from the exercise of those discretions.

196 Once exercised to direct a group to leave a business access area in relation to forestry land, for example, the discretion conferred by s 11(2) results in each person within the group committing an offence against s 8(1)(a) if that person does not leave immediately. And once exercised to direct a group to leave forestry land or a business access area in relation to forestry land, the discretions conferred by s 11(1) and (2) each have the result that each person within the group will commit an offence against s 8(1)(b) if that person enters the same area of forestry land or any business access area in relation to that forestry land at any time during the next four days. Upon the exercise of police discretion to give a direction under s 11(1) or (2), the particular protest in which the group was engaged must for most practical purposes be at an end. The immediacy and the continuity are lost.

197 An exercise of discretion under s 11(6) will have the added result of inhibiting the group from renewing that protest or from engaging in any other protest for the next three months. It will do so by exposing each member of the group to the jeopardy of potentially committing the considerably more serious offence created by s 6(4) if the members choose to protest on any forestry land or any business access area in relation to any forestry land by engaging in any protest activity other than marching as a group outside forestry land or along a business access area in relation to forestry land at reasonable speed once a day.

198 There is an overlap, although not a precise overlap, between forestry land or a business access area in relation to forestry land on which only a protester might incur a fine of up to $10,000 by failing to comply with a direction given by a police officer under s 11(1) or (2) and on which only a protester might incur a fine of up to $10,000 by contravening a requirement that has in the previous three months been included in such a direction under s 11(6), on the one hand, and an area of permanent timber production zone land or a forest road on which any person might incur a fine of up to $3,180 under the Management Act by failing to obey a direction on a sign erected by Forestry Tasmania or by failing to comply with a direction by a police officer or with a request made by an authorised employee of Forestry Tasmania, on the other hand. The overlap does not diminish the discriminatory operation of the Protesters Act, but rather accentuates that discriminatory operation. Protesters, as protesters, are alone put twice in jeopardy, and are put in the greater jeopardy.

199 The burden on political communication imposed by the impugned provisions is, as the plaintiffs correctly submit, direct, substantial and discriminatory – facially against political communication and in its practical operation more particularly against political communication expressive of a particular political view.

The calibration

200 In *Australian Capital Television*, Deane and Toohey JJ presciently observed that "a law whose character is that of a law with respect to the prohibition or restriction of [political] communications … will be much more difficult to justify … than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications"[141].

201 Noting that their Honours' observation had been accepted and applied in a number of subsequent cases, before and after *Lange*, I sought to expand on that observation in *Tajjour v New South Wales* when I referred to the level of scrutiny

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141 (1992) 177 CLR 106 at 169.

appropriate to be brought to bear on a law which imposes a burden on political communication as lying within a spectrum. Using language drawn from the analyses of Gaudron J in *Levy*[142] and of Gleeson CJ in *Mulholland*[143], I said[144]:

> "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."

202 Because it is a factor which bears on the degree of risk that political communications unhelpful or inconvenient or uninteresting to a current majority might be unduly impeded, the extent to which the legal operation or practical effect of a law might be capable of being seen to be discriminatory – against communications, against political communications, or against political communications expressing particular political viewpoints – bears correspondingly on where within that spectrum the level of scrutiny appropriate to be brought to bear on that law is located. Of course, the measure is not scientific. It can itself be nothing more than a heuristic tool. But it is a tool custom-made to place the question of the justification for the particular burden which the law imposes on political communication on a scale which reflects the reason why the question is asked.

203 Given that they operate in their terms to target action engaged in for the purpose of political communication, and given that they can be expected to operate in practice to impose a significant practical burden on political communication which is the expression of a particular political viewpoint, the impugned provisions demand very close scrutiny.

204 To be justified as reasonably appropriate and adapted to advance a legitimate purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government, in my opinion, the purpose of the impugned provisions must be able to be seen to be compelling and the

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142 (1997) 189 CLR 579 at 618-619.

143 (2004) 220 CLR 181 at 200 [40].

144 (2014) 254 CLR 508 at 580-581 [151] (footnote omitted).

provisions must be able to be seen to be closely tailored to the achievement of that purpose in the sense that the burden they impose on political communication in pursuit of the purpose can be seen to be no greater than is reasonably necessary to achieve it.

205 That level of scrutiny, it must be noted, is somewhat more stringent than was warranted by the circumstances in *Levy*, where the regulation in question did not discriminate facially against persons engaged in political communication but was rather in the form of a blanket prohibition on all persons other than those holding valid game licences entering designated areas of Crown land within a designated period. Even so, it ought also to be noted, the regulation in question in *Levy* would undoubtedly have withstood the intense level of scrutiny I consider to be warranted here. The statutorily identified purpose of the regulation – to "ensure a greater degree of safety of persons in hunting areas during the open season for duck" – was unanimously accepted to be the true purpose of the regulation, and was undoubtedly compelling. The manner in which the regulation sought to advance that purpose, having regard to the manner of its identification of the characteristics of persons caught by its prohibition and having regard to the precision of its geographical and temporal operation, was closely tailored to achievement of that purpose. There was, to use language drawn from the statement of conclusion by Toohey and Gummow JJ, "no greater curtailment of the constitutional freedom than was reasonably necessary to serve the public interest in the personal safety of citizens"[145].

206 The requisite analysis therefore appropriately proceeds to an examination of whether the impugned provisions might be explained as having a compelling purpose, and then to an examination of whether the burden they impose on political communication in pursuit of such a purpose might be justified as no greater than is reasonably necessary to achieve such a purpose.

The possible explanation

207 For a purpose to be legitimate, it must be seen to be a purpose that is compatible with the maintenance of the constitutionally prescribed system of government. For a legitimate purpose to be compelling, it must be seen to be protective of a public interest of sufficient importance reasonably to warrant that label.

208 Determination of the purpose of a law has sometimes been said to be a question of construction. That description is not inaccurate insofar as it conveys that the purpose of a law cannot be equated with the subjective purpose of a law-maker and is instead a question to be answered objectively by reference to the

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145 (1997) 189 CLR 579 at 614.

text and context of the law. The description would be inaccurate were it to be taken to suggest that the question is confined to attributing meaning to the statutory text. The correct understanding is that "[t]he level of characterisation required by the constitutional criterion of object or purpose is closer to that employed when seeking to identify the mischief to redress of which a law is directed"[146].

209 The purpose of a law is the "public interest sought to be protected and enhanced" by the law[147]. The purpose is not what the law does in its terms but what the law is designed to achieve in fact[148]. The purpose can sometimes be found spelt out in the text of the law. More often than not, the purpose will emerge from an examination of its context.

210 The defendant argues that the purpose of the impugned provisions is to "ensure that protesters do not prevent[,] impede, hinder or obstruct the carrying out of [lawful] business activities on business premises or business access areas". That composite description of purpose is problematic. To constrain the conduct of protesters as protesters is to limit freedom of political communication. To limit freedom of political communication is simply not a purpose that is compatible with the maintenance of the constitutionally prescribed system of government. To constrain the conduct of protesters as protesters may be a means to a legitimate end, but it cannot be a legitimate end in itself.

211 Seizing on that weakness, the plaintiffs argue that the purpose of the impugned provisions should be identified as nothing more than the prevention of on-site protests – a purpose plainly antithetical to the maintenance of representative and responsible government.

212 Coming to the defendant's rescue, the Attorney-General for Victoria argues that the overall purpose of the impugned provisions – what they are designed to achieve in fact – is "to protect businesses in Tasmania from conduct that seriously interferes with the carrying out of business activity, or access to business premises on which that business activity is conducted". In their relevant application, the purpose of the provisions is on that view to protect Forestry Tasmania from conduct that seriously interferes with carrying out forest operations on forestry land and from conduct that seriously interferes with access to forestry land on which those forest operations are being carried out.

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146 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; [2005] HCA 44.

147 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300; [1994] HCA 44.

148 *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132].

213 There could be no question that such a purpose is compatible with the maintenance of the constitutionally prescribed system of government. Although they would dispute that a purpose of protecting Forestry Tasmania from a minor or transient interference would be enough, the plaintiffs do not argue that the purpose identified by the Attorney-General for Victoria would not be sufficiently protective of an important public interest to justify the impugned provisions were they reasonably appropriate and adapted to advance that purpose compatibly with the maintenance of the constitutionally prescribed system of government.

214 The plaintiffs' rejoinder is that the singling out of protest activity shows that the impugned provisions are so ill-adapted to the protection of Forestry Tasmania's forest operations that protection of Forestry Tasmania's forest operations cannot be concluded to have been their true purpose[149].

215 Where determination of the purpose of a law is controversial, resolution of that controversy can be assisted by considering how closely the legal operation of the law conforms to an asserted purpose. In an extreme case, the disconformity might be so great as to admit of the conclusion that the law cannot be explained as having the asserted purpose.

216 Where an asserted purpose is plausible, however, examination of how well the legal operation of the law conforms to that purpose can sometimes more profitably be left to be examined at the stage of asking whether the law is reasonably appropriate and adapted to advance that purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government. If the answer is that the law is not reasonably appropriate and adapted to advance the asserted purpose, the controversy as to whether the law can be explained as having the asserted purpose or is better explained as having some other purpose will have become redundant[150].

217 The explanation of the purpose of the impugned provisions advanced by the Attorney-General for Victoria being plausible, I do not think it incumbent to reach a conclusion as to whether the purpose of the impugned provisions might better be characterised (as the plaintiffs would have it) as the prevention of on-site protests. Analysis of the compatibility of the impugned provisions' burden on freedom of political communication with the maintenance of the constitutionally prescribed system of government can proceed to the final step in the *Lange* analysis on the assumption that the purpose of the provisions in their

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149 See *Unions NSW v New South Wales* (2013) 252 CLR 530 at 559-560 [59]-[60], 561 [64]. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 232-233 [133].

150 Cf *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 480 [113]; [2008] HCA 11.

relevant application is to protect Forestry Tasmania from conduct that seriously interferes with carrying out forest operations on forestry land or with access to forestry land on which those forest operations are being carried out.

The attempted justification

218 The determinative question, then, is whether the impugned provisions can be justified as compatible with maintenance of the constitutionally prescribed system of representative and responsible government on the basis that the burden they impose on freedom to engage in political communication constituted by on-site political protests is no greater than is reasonably necessary to achieve the postulated legislative purpose of protecting Forestry Tasmania from conduct that seriously interferes with carrying out forest operations on forestry land or that seriously interferes with access to forestry land on which those forest operations are being carried out.

219 The question might be addressed in different ways. For my own part, I think it useful to isolate and consider first those respects in which the impugned provisions might be seen to be framed in terms that are narrower than reasonably necessary to achieve the postulated purpose by failing to prevent conduct that might seriously interfere with carrying out forest operations on forestry land or that might seriously interfere with access to forestry land. I think it then useful to go on to consider some significant respects in which the impugned provisions might be seen to be framed in terms that are broader and more burdensome on freedom of political communication than is reasonably necessary to achieve that purpose, in that they have the effect of penalising on-site protest activity which is plainly harmless or which, although it might reasonably be thought to interfere with the carrying out of forest operations or with access to forestry land, would not in fact do so.

220 The narrowness – underinclusiveness – inherent in the definition of protester is stark. Particularly is that so when the targeted nature of the prohibitions in ss 6(1), (2), (3), (4) and 8(1)(a) and (b) is contrasted with the comprehensive coverage of the prohibition in *Levy* and with the comprehensive coverage of prohibitions that can be put in place under the Management Act by Forestry Tasmania erecting a sign or closing a forest road for the purposes of discharging its responsibilities or in the interests of safety.

221 Two groups of persons walk along a forest road, which has not been closed by Forestry Tasmania but which provides access to an area of land within permanent timber production zone land on which Forestry Tasmania is harvesting timber. One is a group of protesters. The other is a group of school children on an excursion, or of recreational walkers on an organised hike. Or it might be a group of local residents rallying in support of the forest operations with the support of Forestry Tasmania. Or perhaps it is even a group of disgruntled employees of Forestry Tasmania engaged in lawful industrial action.

Each group has the same non-trivial adverse effect on the movement of logging vehicles entering and exiting the area: the vehicles need to proceed with much more caution; they need to slow and they may even need to detour or to stop. The one group is subject to the strictures imposed by the impugned provisions. The other is not.

222 Underinclusiveness need not be fatal to the validity of a law which burdens political communication. The upholding in *McCloy* of the prohibition on political donations by property developers illustrates that the implied freedom does not operate to produce the result that a legislature addressing a mischief needs always to find a solution to the whole of that mischief. Underinclusiveness which results in a legislative burden falling unevenly on political communication is nevertheless a factor which weighs against the conclusion that a law is reasonably necessary to achieve its postulated purpose, for the same reason that discrimination against political communication warrants heightened scrutiny.

223 Where underinclusiveness is especially problematic is where it occurs in combination with other factors which tend to indicate that the targeting of one of a number of sources of a postulated problem results in a burden on political communication by a targeted segment of the population which is more extensive or more severe than might be expected had a more comprehensive solution been sought. That was not the situation in *McCloy*. It is the situation here.

224 The main overreaching of the impugned provisions is in the breadth and severity of the consequences which flow not from contravention by a protester of a prohibition in s 6(1), (2) or (3), but from the exercise of the police discretions under ss 11(1), (2) and (6) and 13(3), each of which turns simply on a police officer having a reasonable belief that a protester or a group of protesters is in contravention of a prohibition in s 6(1), (2) or (3).

225 Whether the group of protesters remains on the forest road or moves onto the area on which harvesting is being carried out, each protester within the group is liable without warning to be removed under s 13(3). The trigger for removal is not contravention of a prohibition in s 6(1), (2) or (3), but a police officer reasonably believing that the protester to be removed has committed or is committing such a contravention and reasonably believing, sufficiently, that removal is necessary to preserve the public order. The police officer's belief, although reasonable, might be wrong. The removal is still lawful.

226 If the group of protesters remains on the forest road, the group can be given a direction under s 11(2), not if any one or more of them has contravened a prohibition in s 6(1), (2) or (3), but if a police officer reasonably believes that they have committed, are committing, or are about to commit such a contravention. If they do not immediately move off the road, each protester within the group is liable for an offence against s 8(1)(a), not because he or she has contravened a prohibition in s 6(1), (2) or (3), but because he or she has

failed to comply with the direction. Again, the police officer's belief, although reasonable, might be wrong. The offence is still committed.

227 If the group of protesters has moved from the forest road onto the area on which harvesting is being carried out, the group can be given a direction under s 11(1), again not if any one or more of them has contravened a prohibition in s 6(1), (2) or (3), but if a police officer reasonably believes that they have committed, are committing, or are about to commit such a contravention. Yet again, the police officer's belief, although reasonable, might be wrong.

228 The criminal consequences which then follow automatically under s 8(1) from an exercise of discretion under s 11(1) or (2) travel well beyond protecting the operations of Forestry Tasmania which the police officer reasonably believed had been, were being, or were about to be prevented, hindered or obstructed at the time of exercising the discretion. So much is that so, that visiting those consequences could not even be described as using a blunt instrument to achieve that purpose. The lack of fit has a temporal dimension and a geographical dimension. Irrespective of whether the protesters would or might prevent, hinder or obstruct harvesting operations or access to the area on which forest operations are being carried out, none of them can return to that area or to any forest road providing access to that area for an arbitrary period of four days. Each protester would commit an offence merely by his or her presence.

229 The choice of a police officer, when giving a direction under s 11(1) or (2), to add a requirement under s 11(6) is again a matter of discretion. Inexplicably, in spite of the severe criminal consequences which flow under s 6(4) from the adding of such a requirement, the police officer is not required to form any additional belief before exercising that additional discretion.

230 The criminal consequences which flow under s 6(4) from the adding of a requirement under s 11(6) travel so far beyond protecting the operations of Forestry Tasmania which the police officer when giving a direction under s 11(1) or (2) reasonably believed had been, were being, or were about to be prevented, hindered or obstructed, as to lack even the most tenuous connection. They are nothing short of capricious in their temporal duration of three months and nothing short of punitive in their geographical coverage and intensity.

231 During the wholly arbitrary period of three months, any protest activity in which the group or any of its members engages on or near any permanent timber production zone land which turns out to be in contravention of a prohibition in s 6(1), (2) or (3), and which in the absence of a requirement under s 11(6) being added to a direction under s 11(1) or (2) would have attracted no criminal sanction, becomes criminal activity attracting a severe penalty. By virtue only of the requirement having been imposed under s 11(6), each protester within the group who finds himself or herself in contravention of s 6(1), (2) or (3) within that three month period can be arrested and prosecuted for an offence against

s 6(4) without any warning needing to be given, in circumstances where anyone else engaging in exactly the same activity would escape criminal liability entirely. With Pythonesque absurdity, however, the group is permitted by s 6(5) to march along a forest road once a day, provided they do so at a reasonable speed and irrespective of whether or not in doing so they would prevent, hinder or obstruct access to the area on which forest operations are being carried out.

232 The burden the impugned provisions impose on freedom to engage in political communication constituted by on-site political protests is greater than is reasonably necessary to protect Forestry Tasmania from conduct that seriously interferes with carrying out forest operations on forestry land or with access to forestry land on which those forest operations are being carried out.

The result

233 It follows that, assuming the second question in the *Lange* framework can be answered "yes", the third question must be answered "no".

234 Sections 6, 8, 11 and 13(3), in their application to business premises comprised of forestry land which is Crown land declared to be permanent timber production zone land under the Management Act and in their application to business access areas comprised of land which is reasonably necessary to enable ingress to and egress from such forestry land, together with those provisions of Pt 4 which provide for the prosecution and consequences of conviction of offences against ss 6(4) and 8(1) in that application, are invalid. That conclusion should not be understood to involve any conclusion about the severability of the impugned provisions, in their relevant operation, from the remainder of the Act. No issue of severability has been raised.

235 The parties have chosen to state three questions in the special case. The first question no longer arises because the defendant has conceded that the plaintiffs have standing. As to the remaining questions, I am content to join in the formal answers proposed by Kiefel CJ, Bell and Keane JJ.

236 NETTLE J. I have had the advantage of reading in draft the reasons for judgment of Kiefel CJ, Bell and Keane JJ and, with respect, I substantially agree with their Honours' conclusions. I also gratefully adopt their Honours' summary of the way in which the *Workplaces (Protection from Protesters) Act* 2014 (Tas) ("the Protesters Act") came to be applied to the plaintiffs in this case. Inasmuch, however, as I am not persuaded that the Protesters Act is shown to be lacking in its necessity, but I consider that, in some respects, it is not adequate in its balance, in the sense in which those expressions are used in *McCloy v New South Wales*[151], it is appropriate that I state my own reasons for concluding that the Protesters Act is not reasonably appropriate and adapted to advancing a legitimate legislative end and therefore impermissibly burdens the implied freedom of political communication[152].

The burden on the implied freedom

237 A law is taken to impose an effective burden on the implied freedom of political communication if it at all prohibits or limits political communication, unless perhaps the prohibition or limitation is so slight as to have no real effect[153]. Whether the terms, operation or effect of the Protesters Act so burden the implied freedom is to be assessed by reference to the freedom of political communication generally as opposed to any notion of an individual's right to communicate[154]. Questions of the extent of the burden assume principal significance in relation to the assessment, to be undertaken later in these reasons, of whether the law is appropriate and adapted to its purpose[155]. As Gageler J

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151 (2015) 257 CLR 178 at 193-195 [2] per French CJ, Kiefel, Bell and Keane JJ; [2015] HCA 34.

152 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568; [1997] HCA 25.

153 *Monis v The Queen* (2013) 249 CLR 92 at 142 [108] per Hayne J, 212-213 [343] per Crennan, Kiefel and Bell JJ; [2013] HCA 4; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 574 [119] per Keane J; [2013] HCA 58; *Tajjour v New South Wales* (2014) 254 CLR 508 at 569-570 [105]-[107] per Crennan, Kiefel and Bell JJ; [2014] HCA 35; *McCloy* (2015) 257 CLR 178 at 230-231 [126] per Gageler J.

154 *Lange* (1997) 189 CLR 520 at 567; *Wotton v Queensland* (2012) 246 CLR 1 at 30 [78], 31 [80] per Kiefel J; [2012] HCA 2; *Unions NSW* (2013) 252 CLR 530 at 548-549 [19], 553-554 [35]-[36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 572 [112], 578 [135], 586 [166] per Keane J.

155 *Unions NSW* (2013) 252 CLR 530 at 555 [40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *McCloy* (2015) 257 CLR 178 at 218 [83], [86] per French CJ, Kiefel, Bell and Keane JJ.

observed in *McCloy*[156], however, the first stage of analysis is not perfunctory: the careful identification of the burden upon the implied freedom is the foundation for any posterior analysis of its justification. Acknowledging that the test of an effective burden at this first stage of the analysis is qualitative, not quantitative[157], it is necessary in what follows to describe the terms, operation and effect, both legal and practical, of the Protesters Act.

(i) The relevance to federal and State politics of environmental issues relating to Tasmania's forests

238 The facts stated in the Special Case make clear that Tasmania's environmental issues are of significant relevance to both federal and State politics and to the choice afforded to the people by the Constitution in respect of federal elections[158]. There has been a Commonwealth Minister for the Environment since 1971. The Minister is responsible, inter alia, for the administration of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth). The Commonwealth and each of the State governments are also signatories to the National Forest Policy Statement, the foreword to which records:

> "The Commonwealth, State and Territory Governments attach the utmost importance to sustainable management of Australia's forests. In order to achieve the full range of benefits that forests can provide now and in the future, the Governments have come together to develop a strategy for the ecologically sustainable management of these forests. The strategy and its policy initiatives will lay the foundation for forest management in Australia into the next century."

239 In previous federal election campaigns, public debate about environmental issues in Tasmania has featured prominently. In 1983, the future of the Franklin River and protests against its damming were major federal election issues. In the last fortnight of the campaign in 2004, the Opposition Leader and the Prime Minister flew to Tasmania to announce their parties' respective policies relating to forests and logging. In 2007, one of the two issues which dominated the federal election campaign in Tasmania was the proposed Gunns pulp mill for the Tamar Valley, for which the feedstock was in part to be sourced from Tasmania's native forests. In 2011, the Prime Minister and the Tasmanian Premier signed the Tasmanian Forests Intergovernmental Agreement 2011, which gave interim

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156 (2015) 257 CLR 178 at 231 [127]-[128].

157 *Tajjour* (2014) 254 CLR 508 at 578 [145] per Gageler J.

158 See generally *Unions NSW* (2013) 252 CLR 530 at 549-550 [21]-[25], 551 [27] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

protection from logging to places adjacent to the Tasmanian Wilderness World Heritage Area to enable an independent verification process to be undertaken to assess the area's value and available timber resources. In 2013, the extension to the Tasmanian Wilderness World Heritage Area was a federal election issue. Consequently, it is apparent that Tasmania's forests are a significant matter of government and politics in Australia.

(ii) The history of protests against forest operations in Tasmania

240 As is also apparent from the Special Case, there is a long history of environmental protests in Australia, especially in Tasmania, aimed at influencing public and governmental attitudes towards logging and the protection of forests. In the experience of the first plaintiff, on-site protests against forest operations and the broadcasting of images of parts of the forest environment at risk of destruction are the primary means of bringing such issues to the attention of the public and parliamentarians. Media coverage, including social media coverage, of on-site protests enables images of the threatened environment to be broadcast and disseminated widely, and the public is more likely to take an interest in an environmental issue when it can see the environment sought to be protected. On-site protests have thus contributed to governments in Tasmania and throughout Australia granting legislative or regulatory environmental protection to areas not previously protected. Since 2006, 37 protests have taken place in Tasmania in areas that have subsequently been granted legislative or regulatory environmental protection. Most of those areas were included in an extension, by some 170,000 hectares, to the Tasmanian Wilderness World Heritage Area which was approved by the World Heritage Committee in June 2013. The Tasmanian Wilderness World Heritage Area comprises approximately 1.6 million hectares.

(iii) Freedom to protest against forest operations in Tasmania

241 Forestry Tasmania has undertaken forest operations in the Lapoinya Forest, which is the area the subject of the Special Case, since mid-2014. Forestry Tasmania, a Tasmanian Government Business Enterprise, was established as the Forestry corporation under the now repealed *Forestry Act* 1920 (Tas) and continues in existence under s 6 of the *Forest Management Act* 2013 (Tas) ("the FMA"). Perforce of s 7 of the FMA, the Forestry corporation is the Forest Manager for "permanent timber production zone land". Permanent timber production zone land is defined in s 3 of the FMA as Crown land declared to be permanent timber production zone land under s 10; any land purchased by the Forestry corporation under s 12; and certain State forest land as listed in Sched 2. A "forest road" is defined as any road constructed or maintained by or for the Forest Manager either inside or outside permanent timber production zone land and any other road on permanent timber production

zone land other than a State highway, subsidiary road or local highway[159]. Under s 8 of the FMA, the Forest Manager has the functions of managing and controlling all permanent timber production zone land and of undertaking forest operations on permanent timber production zone land for the purpose of selling forest products. Perforce of s 9, the Forest Manager has such powers as are necessary to enable it to perform its functions, including power to grant to a person a permit, licence, lease or other occupation right in relation to permanent timber production zone land. There are approximately 800,000 hectares of permanent timber production zone land in Tasmania.

242 Section 13 of the FMA requires the Forest Manager to perform its functions and exercise its powers so as to allow access to permanent timber production zone land for such purposes as are not incompatible with the management of the land. Consistently with that provision, and as appears from the second reading speech relating to the Forest Management Bill 2013 (Tas)[160], it has for a long time been accepted that members of the public are free to enter upon and enjoy permanent timber production zone land, including by way of conducting protests on such land in a manner that is not incompatible with the Forest Manager performing its functions.

243 The freedom so to access and protest on permanent timber production zone land is, however, not unqualified. Axiomatically, it is subject to general law proscriptions of unlawful conduct and to the specific provisions of the FMA. Under s 21 of the FMA, the Forest Manager may erect signs on or in respect of forest roads or permanent timber production zone land for the purposes of discharging its responsibilities or in the interests of safety, and, in the event that such signs are erected, a person must not without lawful excuse undertake an activity or engage in conduct on the forest road or permanent timber production zone land contrary to the directions expressed on the signs. Failure to comply is an offence punishable by a fine not exceeding 20 penalty units[161]. Under s 22 of the FMA, a person appointed by the Forest Manager as an authorised officer may request that: a person not enter permanent timber production zone land or a forest road; a person leave permanent timber production zone land or a forest road; or a person cease to undertake an activity or engage in conduct on the land or road if, in each case, the authorised officer is of the opinion that the entry or presence of that person, or his or her activity or conduct, is preventing, has

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159 See *Roads and Jetties Act* 1935 (Tas), s 3, Pt II; *Local Government (Highways) Act* 1982 (Tas), s 4.

160 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 24 September 2013 at 40.

161 *Forest Management Act*, s 21(3). See *Penalty Units and Other Penalties Act* 1987 (Tas), s 4A. In January 2016, the value of 20 penalty units was $3,080.

prevented or is about to prevent the Forest Manager from effectively or efficiently performing its functions. Failure to comply is an offence punishable by a fine not exceeding 20 penalty units[162]. Under s 23 of the FMA, the Forest Manager may, by sign or barricade, or both, close a forest road or any section of forest road either permanently or temporarily to all traffic, or to a class of traffic, if the Forest Manager considers that the closure is necessary or expedient for the purposes of discharging its responsibilities or in the interests of safety. A person who passes over a forest road that has been so closed is guilty of an offence punishable by a fine not exceeding 20 penalty units[163]. It is not suggested that any applicable general law proscription of unlawful conduct or any restriction imposed by the FMA is invalid.

(iv) Unlawful protests against forest operations in Tasmania

244 As further appears from the Special Case, there is a substantial history of unlawful protests against forest operations in Tasmania. Between 1981 and 1983, there was considerable protest activity concerning the proposal by the Tasmanian government and the Hydro-Electric Commission to construct a dam on the Gordon River below its junction with the Franklin River. That protest action included a blockade of an area of the Franklin River near the dam site which was intended to obstruct development works for the dam. The proposal became an election issue at the federal election called for 5 March 1983. Protests on Hydro-Electric Commission land continued with 77 protesters evicted from a State reserve on 23 February 1983 and 231 protesters arrested on 1 March 1983. More than 1,000 people were arrested over the course of the protests. It was alleged that the protest activity included vandalism of Hydro-Electric Commission premises and other damage to equipment. Following the election, the *World Heritage Properties Conservation Act* 1983 (Cth) was enacted for the purpose of preventing further work on the dam.

245 A good deal of the protest activity against forest operations in Tasmania has consisted of the obstruction of equipment used in those operations. A number of prosecutions have been brought on that basis. In *Ward v Visser*[164], a protester locked herself on to a boom gate and subsequently to a vehicle to obstruct logging operations. In *Smith v Visser*[165], a protester occupied a tree-house for the purpose of preventing the felling of trees. In March 2007, protesters were charged with offences arising out of protest activities at Arve

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162 *Forest Management Act*, s 22(5).

163 *Forest Management Act*, s 23(4).

164 [1999] TASSC 68.

165 [2000] TASSC 44.

Road near Tahune which involved blocking a forest road with a large tripod in order to obstruct access to forest operations. Between January and May 2009, protesters committed offences at the Upper Florentine Valley, including tree-sitting and locking on to, or attempting to lock on to, devices so as to prevent the removal of the protesters from the area.

246 Additionally, there have been a number of police and media reports of protest activity directed to obstructing logging and forest operations, including protests in the Styx Valley in March and May 2006; in the Weld Valley in November 2006; in the Florentine Valley in February 2007; in the Upper Florentine Valley in April 2009; in the Weld Valley in July 2010; and in the Huon Valley between July and October 2013. In May 2012, there were further protests which saw protesters board a cargo ship on the Hobart Waterfront in order to obstruct the export of veneer timber from Tasmania, and in July 2013 there were media reports of protests at timber mills in Smithton and in the Huon Valley at which protesters chained themselves to machinery and blocked access to the mill.

247 It is apparent from the extrinsic material[166] that the Protesters Act was enacted to address increasing concerns about this unlawful protest activity in respect of the forestry industry.

(v) Relevant provisions of the Protesters Act

248 A person is a protester for the purposes of the Protesters Act if he or she is engaging in a protest activity that takes place on business premises or on a business access area in relation to business premises and is undertaken in furtherance of, or 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[167]. "Business premises" are defined by s 5(1)(b) of the Protesters Act as including "forestry land". "Forestry land" is defined in s 3 as including "an area of land on which forest operations are being carried out". "Forest operations" are defined as work comprised of, or connected with, seeding and planting trees, managing trees before they are harvested and harvesting, extracting or quarrying forest products, including any related land clearing, land preparation, burning-off or access construction.

249 "Business access area" is defined in s 3 of the Protesters Act in relation to business premises as including so much of an area of land outside business premises as is reasonably necessary to enable access to an entrance to or exit

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166 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 26 June 2014 at 27.

167 *Workplaces (Protection from Protesters) Act*, s 4.

from the business premises. "Business occupier" is defined as including a "business operator" and a "business worker" in relation to business premises. "Business operator" is defined as including a government entity in which business premises are vested or that has management or control of the premises; 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 a business operator in relation to the business premises; and 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. For present purposes, it is sufficient to note that forestry land will constitute business premises; parts of permanent timber production zone land and forest roads may constitute business access areas in relation to forestry land; and Forestry Tasmania, as the Forest Manager, may constitute a business operator in respect of forestry land and therefore a business occupier.

250 Section 6(1) of the Protesters Act prohibits a protester from entering business premises, or a part of business premises, where, by so entering or remaining on the premises, the protester prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier in relation to those premises and the protester either knows or ought reasonably to be expected to know that his or her presence is likely to have that effect. Section 6(2) prevents a protester from doing an act on business premises, or on a business access area in relation to business premises, if the act prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier and the protester knows or ought reasonably to be expected to know that the act is likely to have that effect. Section 6(3) prohibits a protester from doing any act that prevents, hinders or obstructs access by a business occupier to an entrance to, or exit from, business premises or a business access area in relation to the premises, if the protester knows or ought reasonably to be expected to know that his or her act is likely to have that effect. Section 6(1), (2) and (3), however, are not offence provisions. As will be explained, the enforcement of those prohibitions depends on the operation of other provisions of the Protesters Act.

251 Section 7(1) and (2) of the Protesters Act prohibit a protester from doing an act that causes damage to business premises or a business-related object that is on business premises or is being taken to or from the premises via a business access area, if the protester knows or ought reasonably to be expected to know that the act is likely to cause such damage. Section 7(3) prohibits persons from issuing a threat of damage in relation to business premises in furtherance of, or 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. A contravention of those prohibitions is an offence punishable on conviction by a fine of up to $250,000 in the case of a body corporate and $50,000 or a sentence of imprisonment for a term not exceeding five years, or both, in the case of an individual.

252 Section 11(1) and (2) authorise a police officer to direct a person who is on business premises or a business access area to leave the premises or area without delay if the police officer reasonably believes that the person has committed, is committing or is about to commit a contravention of s 6(1), (2) or (3) or an offence against the Protesters Act. If the person fails to comply with a direction to leave the business access area, he or she is guilty of an offence which, perforce of s 16(1), is an indictable offence punishable upon conviction under s 8(1)(a) by a fine of up to $100,000 in the case of a body corporate and $10,000 in the case of an individual.

253 Section 8(1)(b) provides that, once a person has been directed under s 11 to leave business premises or a business access area, the person is prohibited for the next four days from entering any business access area relating to the business premises – and so, in most cases, also from entering the business premises – whether or not the person's later entry on the business access area (or business premises) would have any effect at all on the business activity there conducted. And, if the person does within those four days enter the business access area (or business premises), the person is guilty of an offence for which he or she would be liable upon conviction to a fine of $100,000 in the case of a body corporate or $10,000 in the case of an individual.

254 In addition, s 11(6) provides that, when a police officer gives a direction under s 11(1) or (2), the police officer may add a requirement that the person not contravene s 6(1), (2) or (3) or commit an offence against the Protesters Act for the next three months. If the person fails to comply with that requirement, by contravening s 6(1), (2) or (3), he or she commits an offence under s 6(4) and is liable under s 17(2)(a) to a fine not exceeding $10,000. If the person then commits a further offence under s 6(4), he or she is liable to be punished for that offence under s 17(2)(b) by a fine not exceeding $10,000 or a term of imprisonment not exceeding four years, or both.

255 Section 11(7) provides that a police officer may give a direction of the kind provided for in s 11(1) and (2) (including any further requirement under s 11(6)) to a "group of persons" and s 11(8) provides that such a direction is taken to be given to each person who is a member of the group to whom the direction is issued and who ought reasonably to be expected to have heard the direction. Although contestable, it appears that, because s 11(7) provides that a "direction may be issued under this section to a person *or* to a group of persons" (emphasis added), and s 11(1) and (2) require the police officer to form a belief as to *a* person only, such a direction could be issued to a group of persons in circumstances where only one or some of the group were reasonably believed by the police officer to have committed, to be committing or to be about to commit a contravention of s 6(1), (2) or (3) or an offence against the Protesters Act.

(vi) The effect of the Protesters Act on protests against forest operations in Tasmania

256 As was earlier noticed, prior to the enactment of the Protesters Act, protesters were free to conduct protests on permanent timber production zone land in a manner that was not incompatible with the Forest Manager performing its functions[168]. It is also possible that there were circumstances in which protesters were free to conduct protests on permanent timber production zone land where those protests were incompatible with the Forest Manager performing its functions but where the incompatibility was not apparent. For example, if protesters had passed along a forest road or through permanent timber production zone land at a time when the Forest Manager was proposing to make use of the road for access to logging operations, or was proposing to conduct clearing operations on part of the land, but had not begun to do so, the protesters' conduct may not have been conceived of as prohibited unless and until the Forest Manager erected a sign under s 21 of the FMA prohibiting use of the forest road or land, or issued a direction under s 22 requiring the protesters not to enter or to depart the area, or closed the forest road under s 23. But, in the scheme of things, such instances would have been rare. In most cases where protest activity was incompatible with the Forest Manager performing its functions, the incompatibility would have been readily apparent and, presumably, the steps available under the FMA to prevent or dissolve the activity would have been taken. Accordingly, if s 6(1), (2) and (3) of the Protesters Act stood alone in prohibiting disruptive conduct by protesters in respect of forestry land (being business premises) and business access areas in relation to forestry land, the effect upon lawful protest activities against forest operations would not have been significant.

257 As has been seen, however, s 6(1), (2) and (3) do not stand alone. They operate in conjunction with the parts of the Protesters Act providing for police directions to leave business premises or a business access area (s 11(1) and (2)); an automatic four day exclusion from a business access area in relation to the business premises upon the issuance of a police direction (s 8(1)(b)); a further police direction prohibiting contraventions of the Protesters Act for a three month period (s 11(6)); and the application of such directions to groups of persons (s 11(7) and (8)). Collectively, these provisions markedly extend the restrictions on otherwise lawful protest activities and, because of the broad application of the definitions of "business premises" and "business access area" in relation to forestry land and forest operations, it is apparent that the restrictive effects of s 6(1), (2) and (3), taken in conjunction with ss 11(1) and (2), 8(1)(b) and 11(6), (7) and (8), are significant.

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168 See [242] above. See and compare *Director of Public Prosecutions v Jones* [1999] 2 AC 240.

(vii) Burden on the implied freedom

258 Identifying a burden on the implied freedom of political communication that results from restrictions on lawful protest activities requires consideration of both the range and extent of the restrictions and the role of the restricted protest activities in the communication of the protesters' message. It is not enough of itself to constitute a burden on the implied freedom of political communication that a restriction on protest activities prevents protesters pursuing their preferred mode of protest[169]. As Hayne J observed in *APLA Ltd v Legal Services Commissioner (NSW)*[170], because the implied freedom of political communication is a limitation on legislative power, as opposed to an individual right, the question is what the impugned law does in terms of its effect on political communication, as opposed to its effect on a particular individual's preferred mode of communication. But equally it does not follow that, just because restrictions on a particular form of political communication leave those who are affected free to pursue other forms of political communication, the restrictions will not impose a burden on the implied freedom of political communication[171]. As Mason CJ emphasised in *Australian Capital Television Pty Ltd v The Commonwealth*[172], if a restriction on a preferred mode of communication significantly compromises the ability of those affected to communicate their message, it may not be an answer that they are left free to communicate by other, less effective means. And as McHugh J recognised in *Levy v Victoria*[173], in circumstances not dissimilar to those of the present case, legislative restrictions on the ability of protesters to stage their protests in close proximity to the subject of protest may so deprive the protesters of the ability to generate the type of attention most likely to sway public opinion that the

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169 *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741; [1999] HCA 31; *Hogan v Hinch* (2011) 243 CLR 506 at 544 [50] per French CJ; [2011] HCA 4; *Unions NSW* (2013) 252 CLR 530 at 554 [36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 574 [119] per Keane J; *McCloy* (2015) 257 CLR 178 at 266-267 [248] per Nettle J, 283 [317] per Gordon J.

170 (2005) 224 CLR 322 at 451 [381]; [2005] HCA 44.

171 See, for example, *Levy v Victoria* (1997) 189 CLR 579 at 609 per Dawson J, 613-614 per Toohey and Gummow JJ, 617 per Gaudron J, 625 per McHugh J, 647-648 per Kirby J; [1997] HCA 31.

172 (1992) 177 CLR 106 at 145-146; [1992] HCA 45. See also at 173 per Deane and Toohey JJ.

173 (1997) 189 CLR 579 at 623-624, 625.

legislation does impose a significant burden on the implied freedom of political communication.

259 At the same time, it is necessary to bear in mind that, although the freedom of political communication is essential to the maintenance of representative democracy, it is not "so transcendent a value as to override all interests which the law would otherwise protect"[174]. As was emphasised in *Levy*[175], the implied freedom of political communication is a freedom to communicate by lawful means, not a licence to do what is otherwise unlawful. Hence, in this context, it does not authorise or justify trespass to land or chattels, nuisance or the besetting of business premises, or negligent conduct causing loss[176]. If and insofar as an act of protest on forestry land or a related business access area amounts to a trespass, nuisance, besetting, actionable negligence, or contravention of a provision of the FMA, or is otherwise unlawful[177], the fact that a provision of the Protesters Act also prohibits that act of protest cannot logically be regarded as burdening, or adding to the burden on, the implied freedom of political communication. So, too, the fact that contravention of the Protesters Act may result in the imposition of a penalty greatly in excess of the penalties that might otherwise have been imposed under the FMA or another law, or pursuant to a common law cause of action, does not mean that a burden is thereby imposed on the implied freedom of political communication. As has been emphasised[178], the freedom is concerned with burdens upon political

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174 *ACTV* (1992) 177 CLR 106 at 159.

175 (1997) 189 CLR 579 at 625-626. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 224-225 [109]-[112] per McHugh J, 246-248 [184]-[188] per Gummow and Hayne JJ, 298 [337] per Callinan J, 303-304 [354] per Heydon J; [2004] HCA 41.

176 See *Jones* [1999] 2 AC 240 at 257-258, 259 per Lord Irvine of Lairg LC, 280-281 per Lord Clyde, 288, 293 per Lord Hutton.

177 See, for example, *Police Offences Act* 1935 (Tas), ss 13, 14B, 15B, 37; *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383 at 388; *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51 at 59; *Australian Builders' Labourers' Federated Union of Workers – Western Australian Branch v J Corp Pty Ltd* (1993) 42 FCR 452 at 456-458 per Lockhart and Gummow JJ; *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250 at 282-283 [126].

178 *APLA* (2005) 224 CLR 322 at 451 [381] per Hayne J; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 89 [220] per Crennan and Kiefel JJ (Bell J agreeing at 90 [224]); [2013] HCA 3; *Unions NSW* (2013) 252 CLR 530 at 554 [36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 574 [119] per Keane J.

communication, not burdens upon communicators. As such, what is relevant is the restriction of political communication by the prohibition of prescribed conduct and not the penalties imposed on persons contravening that prohibition. Where, therefore, an act of communication is prohibited independently of the Protesters Act, and the independent prohibition is not itself constitutionally invalid, it cannot be that the act of communication does or could contribute to the system of representative and responsible government in such a way that its further prohibition by the Protesters Act would compromise the freedom or flow of political communication generally. And here, since the prohibitions in s 6(1), (2) and (3) are not engaged unless a protester's presence on forestry land or a related business access area is such not only as in fact to prevent, hinder or obstruct forest operations, or access to or from forestry land, but also that the protester ought reasonably to be expected to know that his or her presence has that effect, there would be few, if any, acts of protest to which s 6(1), (2) or (3) apply that were not acts of trespass, nuisance, besetting or actionable negligence, or otherwise unlawful.

260 At one point in the course of argument, counsel for the plaintiffs suggested that s 7 of the Protesters Act burdens the implied freedom by prohibiting the doing of acts that cause damage to business premises or a business-related object where the person knows or ought reasonably to be expected to know that the act is likely to cause such damage. Despite the innate unlawfulness of the proscribed conduct, it was contended that s 7 burdens the implied freedom because in terms it targets protesters and therefore is aimed at political communication.

261 That contention must be rejected. To repeat, the implied freedom of political communication is not a licence to commit trespass to land or chattels. Section 7(3) may remove a "rhetorical device"[179] of protesters by prohibiting threats of damage to business premises. But to engage in conduct of the kind proscribed is tantamount to making unwarranted demands with menaces, or, in other words, blackmail[180]. The idea that the implied freedom of political communication somehow frees protesters to engage in conduct of that kind is altogether misconceived.

262 Laws which make it more difficult to engage in political communication, as for instance by imposing requirements of permission[181] or the payment of

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179 *Hogan v Hinch* (2011) 243 CLR 506 at 544 [50] per French CJ.

180 *Criminal Code* (Tas), s 241.

181 For example, *Wotton* (2012) 246 CLR 1 at 15 [28]-[29] per French CJ, Gummow, Hayne, Crennan and Bell JJ, 33 [88] per Kiefel J; *Adelaide City Corporation*

(Footnote continues on next page)

fees[182], may in some circumstances impose a burden on the implied freedom of political communication. But the implied freedom bestows no affirmative right of individual expression[183]. The law relating to the implied freedom of political communication thus knows nothing of the United States constitutional doctrine of "chilling effects" on free speech[184]. Generally speaking, where the legislature has seen fit to prohibit certain forms of communication, and there is no challenge to that existing prohibition, the implied freedom is not to be regarded as restraining legislative power to do again what has already been done, by doubly prohibiting certain acts of communication or by imposing greater penalties than already apply.

263 So to conclude, however, is not the end of the matter. For, apart from prohibiting what would be otherwise unlawful conduct, the most significant effect of the Protesters Act is the result of the way in which s 6(1), (2) and (3) operate in conjunction with ss 11(1) and (2), 8(1)(b) and 11(6), (7) and (8). More specifically, whereas s 6(1), (2) and (3) are not engaged unless a protester's presence or conduct on forestry land or a related business access area in fact prevents, hinders or obstructs the carrying out of or access to forest operations and the circumstances connote that the protester ought reasonably to be expected to know that his or her presence or conduct has that effect, under s 11(1) and (2) a police officer can give a direction to a person to leave forestry land or a related business access area, whether or not the person's presence or conduct is in fact preventing, hindering or obstructing forest operations on or access to the land, if the officer forms a reasonable belief that the person's presence or conduct is preventing, hindering or obstructing forest operations or access thereto, is about to do so or has done so at some unspecified time in the past. And, if the person fails to comply with a direction to leave the business access area, he or she will be guilty of an offence under s 8(1)(a) punishable by a fine of up to $10,000.

(2013) 249 CLR 1 at 44 [67] per French CJ, 86 [209] per Crennan and Kiefel JJ (Bell J agreeing at 90 [224]).

182 For example, *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 301 per Mason CJ; [1994] HCA 44.

183 *Cunliffe* (1994) 182 CLR 272 at 327 per Brennan J; *Lange* (1997) 189 CLR 520 at 567; *Unions NSW* (2013) 252 CLR 530 at 554 [36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 574 [119] per Keane J; *McCloy* (2015) 257 CLR 178 at 202-203 [29]-[30] per French CJ, Kiefel, Bell and Keane JJ.

184 See *Dombrowski v Pfister* 380 US 479 at 486-487 (1965); *Ashcroft v Free Speech Coalition* 535 US 234 at 244, 255 (2002); *Citizens United v Federal Election Commission* 558 US 310 at 324, 326-327, 328-329 (2010).

264 Possibly it might not often happen that, although a protester is not in fact preventing, hindering or obstructing forest operations or access to forestry land, a police officer could nevertheless properly form the requisite reasonable belief under s 11(1) or (2) that the protester is preventing, hindering or obstructing forest operations or access thereto. But, given the history of protests against forest operations earlier referred to, it is by no means unlikely that there could arise situations where a protester who is otherwise lawfully on forestry land or a related business access area, and is not preventing, hindering or obstructing forest operations or access thereto, could be required to leave the forestry land or business access area because a police officer forms a reasonable belief that the protester has at some unspecified time in the past prevented, hindered or obstructed forest operations or access thereto, or seems likely to do so at some point in the near future. And that could be so even if the protester has never in fact done so and has no intention of doing so. Hence the restrictions potentially imposed by s 11(1) and (2) on otherwise lawful protest activities are substantial.

265 Section 8(1)(b) then adds to the extent of the restrictions on protest activities that would otherwise be lawful by providing that, once a person has been directed to leave the forestry land or business access area (noting again that that may occur even though the person is not in fact preventing, hindering or obstructing forest operations or access thereto, and is not about to do so), the person is prohibited for the next four days from entering any business access area in relation to the forestry land (and so, in most cases, also from entering the forestry land) whether or not the person's entry onto the business access area (or forestry land) would have any effect at all on the forest operations or access to and from those operations. If the person contravenes that prohibition, he or she is guilty of an offence punishable by a fine of up to $10,000.

266 Section 11(6) of the Protesters Act adds further again to the restrictions on protest activities that would otherwise be lawful by providing that, when a police officer gives a direction under s 11(1) or (2), the police officer may add a requirement that the person not contravene s 6(1), (2) or (3) or commit an offence under the Act for a period of three months. That has the capacity to produce very far-reaching consequences. By way of illustration, "an offence against a provision of this Act" in s 11(6) would include an offence under s 8(1)(a) of failing to comply with a direction under s 11(2), even where the direction was given on the basis of no more than a police officer having formed a reasonable belief that the person was about to prevent, hinder or obstruct forest operations or access to or from the forestry land, or that at some unspecified time in the past the person's presence on the forestry land had somehow prevented, hindered or obstructed forest operations or access to or from the forestry land. And as has been emphasised, such a direction could be given even though the person was not in fact preventing, hindering or obstructing forest operations or access to or from the forestry land, had not previously done so and was not about to do so. Yet, even in such circumstances, failure to comply with a further requirement under s 11(6) not to contravene s 6(1), (2) or (3) would constitute an offence under

s 6(4) punishable under s 17(2)(a) by a fine of up to $10,000, and any further offence committed under s 6(4) by that person following conviction would be punishable by the same fine or up to four years' imprisonment, or both[185].

267 Contrary to Tasmania's submissions, such a restriction is hardly alleviated by the exception in s 6(5) for passing the forestry land or along a related business access area at a reasonable speed once a day. That exception leaves protesters deprived of the capacity for effective protest by way of a sustained presence in opposition to an activity[186]. Nor is the restrictive effect of ss 11(6) and 6(4) much alleviated by the defence of "lawful excuse" provided for in s 6(6): for the reason that it is implicit in the contextual relativity of s 6(5) and s 6(6) that any form of protest other than passing by once a day at a reasonable speed as provided for in s 6(5) would *not* constitute a "lawful excuse" within the meaning of s 6(6).

268 There is also s 11(7), which it will be recalled empowers a police officer to give a direction of the kind provided for in s 11 (including a further requirement under s 11(6)) to a "group of persons", and s 11(8), which provides that such a direction is taken to be given to each person who is a member of the group to whom the direction is given and who ought reasonably to be expected to have heard the direction, possibly in circumstances where only one or some of the group were reasonably believed by the police officer to be preventing, hindering or obstructing forest operations on the subject forestry land or access to the land, or to have done so previously or to be about to do so. As such, an individual protester may be subject to the restrictive provisions of the Protesters Act regardless of whether that protester's conduct has any effect on forest operations.

269 For these reasons, the operation of ss 11(1) and (2), 8(1)(b) and 11(6), (7) and (8), coupled with the prohibitions in s 6(1), (2) and (3), comprise a substantial restriction on otherwise lawful protest activities. Taken together, they confer on police what amounts in effect to a broad-ranging discretionary power to exclude protesters and groups of protesters from forestry land and related business access areas for extended periods of time in a manner which, to a significant extent, is unconfined by practically examinable and enforceable criteria. Granted, courts must proceed upon the assumption that, properly construed, the legal effect of those provisions is certain[187]. But, in this context,

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185 *Workplaces (Protection from Protesters) Act*, s 17(2)(b).

186 *Levy* (1997) 189 CLR 579 at 625 per McHugh J. See also *ACTV* (1992) 177 CLR 106 at 146 per Mason CJ, 173 per Deane and Toohey JJ, 236 per McHugh J.

187 *Wotton* (2012) 246 CLR 1 at 9-10 [10] per French CJ, Gummow, Hayne, Crennan and Bell JJ; *Adelaide City Corporation* (2013) 249 CLR 1 at 64 [139]-[140] per

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the requisite analysis looks to the burden on communication imposed by a law in its legal *or practical* operation[188]: its "terms, operation or effect"[189]. And, for the reasons already explained, the terms of the Protesters Act are of such breadth that the likelihood of them so operating in practice as to burden the implied freedom to a significant extent cannot be discounted.

270 Given, therefore, the long history of protests against forest operations in Tasmania, the political response to such protests as reflected in legislative protections subsequently enacted, and the apparent importance to protesters of the ability to protect in close proximity to forest operations in order effectively to convey to the public and parliamentarians their opposition to those activities, it should be accepted, as it was by Tasmania, that the Protesters Act imposes an effective burden, in the sense of having a real or actual effect[190], upon the implied freedom of political communication.

Reasonably appropriate and adapted to serve a legitimate purpose

271 As the plurality stated in *McCloy*[191], the test of whether a law which effectively burdens the implied freedom of political communication is reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the constitutionally prescribed system of representative and responsible government is to be understood as comprised of two arms: (1) whether the law pursues a legitimate legislative purpose compatible with the system of representative and responsible government; and (2) if so, whether the law is reasonably appropriate and adapted to advancing that purpose.

Hayne J. See generally *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529 at 562 per Windeyer J; [1972] HCA 20.

188 *Coleman v Power* (2004) 220 CLR 1 at 49-50 [91] per McHugh J, 89 [232] per Kirby J; [2004] HCA 39; *Tajjour* (2014) 254 CLR 508 at 548 [33], 551 [38] per French CJ, 558-559 [60]-[61] per Hayne J, 578 [145] per Gageler J; *McCloy* (2015) 257 CLR 178 at 230-231 [126] per Gageler J, 258 [220] per Nettle J.

189 *Lange* (1997) 189 CLR 520 at 567; *Unions NSW* (2013) 252 CLR 530 at 553 [35] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *McCloy* (2015) 257 CLR 178 at 194 [2] per French CJ, Kiefel, Bell and Keane JJ.

190 *Monis* (2013) 249 CLR 92 at 142 [108] per Hayne J, 212-213 [343] per Crennan, Kiefel and Bell JJ; *Unions NSW* (2013) 252 CLR 530 at 555 [40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 574 [119] per Keane J; *McCloy* (2015) 257 CLR 178 at 230-231 [126]-[127] per Gageler J.

191 (2015) 257 CLR 178 at 193-195 [2] per French CJ, Kiefel, Bell and Keane JJ.

(i) Legitimate legislative purpose

272 According to the long title of the Protesters Act, its purpose is "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". Tasmania contended that the purposes of the Act also include providing for the safety of business operators on business premises[192], maintaining economic opportunities for business operators of certain businesses carried out within the State of Tasmania[193] and preserving public order. In Tasmania's submission, all of those are legitimate purposes which are compatible with the system of representative and responsible government.

273 The plaintiffs argued to the contrary that, on the proper construction of the Protesters Act, its purposes, or at least the means adopted to achieve those purposes[194], are not compatible with the system of representative and responsible government. In the plaintiffs' submission, it is apparent from the way that the prohibitions, preventative and coercive powers, and penalties operate exclusively on those who are engaged in protest that they target protesters and are "directed to the freedom"[195] of political communication. In effect, it was submitted, the Protesters Act discriminates against particular points of view and prevents political communication causing no more than "transient and insubstantial disruptions" to business activity in circumstances where some disruption to business activity is a necessary and accepted incident of the exercise of the freedom of political communication constituted of protest.

274 That argument should be rejected. Trivial or transient disruptions to business may be put aside. Certainly, lawful protest activities may sometimes result in trivial or transient disruptions to lawful business activities or impede access to business premises in some trivial or transient way. For example, a lawfully constituted street march might temporarily halt the flow of traffic along the street or access to premises along the way. But, as the Solicitor-General of Tasmania accepted, s 6(1), (2) and (3) should not be construed as prohibiting trivial or transient disruptions of that kind. They are to be read as one with s 3 of

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192 See *Workplaces (Protection from Protesters) Act*, ss 6(7), 7(4) and (6).

193 See Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 26 June 2014 at 27.

194 *Coleman* (2004) 220 CLR 1 at 50-51 [93]-[96] per McHugh J.

195 *ACTV* (1992) 177 CLR 106 at 143 per Mason CJ, 234-235 per McHugh J. See also *Cunliffe* (1994) 182 CLR 272 at 299 per Mason CJ; *Adelaide City Corporation* (2013) 249 CLR 1 at 33 [46] per French CJ; *Monis* (2013) 249 CLR 92 at 215 [349] per Crennan, Kiefel and Bell JJ.

the *Acts Interpretation Act* 1931 (Tas) as confined to substantive preventions, hindrances and obstructions of business activities and access to and egress from business premises.

275 There should also be no doubt that the purpose of ensuring that protesters do not substantively prevent, impede or obstruct the carrying out of business activities on business premises and do not damage business premises or business-related objects is a purpose compatible with the system of representative and responsible government. The implied freedom of political communication is a freedom to communicate ideas to those who are willing to listen, not a right to force an unwanted message on those who do not wish to hear it[196], and still less to do so by preventing, disrupting or obstructing a listener's lawful business activities. Persons lawfully carrying on their businesses are entitled to be left alone to get on with their businesses and a legislative purpose of securing them that entitlement is, for that reason, a legitimate governmental purpose.

276 The plaintiffs' submission that the Protesters Act is otherwise inconsistent with the constitutionally prescribed system of representative and responsible government because it discriminates against or targets protesters involves more complex considerations, but should also be rejected. Logically, whatever the degree of discrimination, it cannot change a purpose which is *ex hypothesi* consistent with the constitutionally prescribed system of representative and responsible government into one that is not. Granted, it is conceivable in principle that a law which prevents certain kinds of conduct may be so focussed on protesters as to imply that the true purpose of the law is to prevent protest as opposed to preventing the proscribed conduct[197]. But, in point of fact, that is not this case. It was not disputed that the Protesters Act was enacted in fulfilment of an election promise in response to a problem of preventions, hindrances and obstructions of business activities which Parliament perceived to be caused, particularly and uniquely, by protest activities. And given the relevantly limited nature of that problem, it does not appear unreasonable, or therefore indicative of an ulterior purpose, for the Parliament to enact the limited solution which it

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196 *McClure* (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741; *Mulholland* (2004) 220 CLR 181 at 245-246 [182] per Gummow and Hayne JJ; *Adelaide City Corporation* (2013) 249 CLR 1 at 37 [54] per French CJ; *Monis* (2013) 249 CLR 92 at 206-207 [324] per Crennan, Kiefel and Bell JJ. See and compare *Cox v Louisiana* 379 US 536 at 553-556 (1965); *Frisby v Schultz* 487 US 474 at 484-485 (1988); *Hill v Colorado* 530 US 703 at 715-718 (2000); *McCullen v Coakley* 189 L Ed 2d 502 at 531-532 (2014).

197 See *ACTV* (1992) 177 CLR 106 at 143-144 per Mason CJ.

did[198]. In such circumstances, Parliament may adopt laws to address the problems that confront it: the implied freedom of political communication does not require Parliament to regulate problems that do not exist[199].

277 The means adopted by the Protesters Act to achieve its purposes involves different considerations again. In *Coleman v Power*[200], McHugh J appears to have regarded means as a relevant consideration in the identification of legitimacy of purpose. As the Solicitor-General of the Commonwealth contended, however, consideration of means is logically something that falls to be undertaken at the later stage of determining whether a law which appears to have been enacted for a purpose that is not incompatible with the constitutionally prescribed system of representative and responsible government is appropriate and adapted to the advancement of that purpose. So much is implicit in the terms of the second *Lange* question, as modified by *Coleman*[201], of whether the law is reasonably appropriate and adapted to serving a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of government. Consideration of legislative means is better understood through a process of analysis that is not binary[202]. Consequently, I agree with Kiefel CJ, Bell and Keane JJ that the stages of analysis proposed in *McCloy* should be restated in the terms that their Honours propose.

(ii) Reasonably appropriate and adapted

278 In *McCloy*, the plurality posited that the determination of whether a law which effectively burdens the implied freedom of political communication is reasonably appropriate and adapted to advancing a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government may be assisted by the application of a three-part test of whether the law is suitable, necessary and adequate in its balance[203]. In form, the test so posited is analogous to the three

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198 See *Levy* (1997) 189 CLR 579 at 614-615 per Toohey and Gummow JJ, 619-620 per Gaudron J, 627-628 per McHugh J. See also *McCullen v Coakley* 189 L Ed 2d 502 at 517 (2014).

199 *McCloy* (2015) 257 CLR 178 at 251 [197] per Gageler J; *Burson v Freeman* 504 US 191 at 207 (1992).

200 (2004) 220 CLR 1 at 50 [92].

201 (2004) 220 CLR 1 at 51-52 [95]-[97] per McHugh J.

202 Cf *McCloy* (2015) 257 CLR 178 at 212-213 [67]-[68] per French CJ, Kiefel, Bell and Keane JJ.

203 (2015) 257 CLR 178 at 194-195 [2] per French CJ, Kiefel, Bell and Keane JJ.

steps of strict proportionality analysis applied in some European jurisdictions[204]. Importantly, however, as was stressed in *McCloy*[205], the test which their Honours posited is not the same as European proportionality analysis: it borrows in part from its analytical techniques but, in place of its three steps, the *McCloy* test adopts three criteria pertinent to the Australian constitutional context as tools for assessing appropriateness and adaptedness.

279 Following *McCloy*, in *Murphy v Electoral Commissioner*, French CJ and Bell J observed[206] that the mode of analysis adopted in *McCloy* is not necessarily applicable to all cases. By way of example, their Honours cited Kiefel J's observation in *Rowe v Electoral Commissioner*[207] that a test of reasonable necessity which focusses on alternative measures may not always be available or appropriate having regard to the nature and effect of the legislative measures in question. *Murphy* provides another example of where that may be so[208]. More generally, it may be observed that, although the question of whether a law is suitable will always arise, in cases where it is concluded that a law is not suitable the question of whether it is necessary will not arise. The fact that it is not suitable will dictate that it is not compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

280 Equally, in those cases where it is appropriate to consider whether a law is necessary, and it is determined that the law is not necessary, there will be no point in going on to consider the question of whether it is adequate in its balance. In such cases, the absence of necessity will dictate that the law is not reasonably appropriate and adapted to advancing a legitimate end. Generally speaking, therefore, whether a law is appropriate and adapted is more likely to turn on the

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204 See *McCloy* (2015) 257 CLR 178 at 217 [79] per French CJ, Kiefel, Bell and Keane JJ; Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality", (1997) 21 *Melbourne University Law Review* 1 at 4; Kiefel, "Proportionality: A rule of reason", (2012) 23 *Public Law Review* 85 at 87-88.

205 (2015) 257 CLR 178 at 195-196 [3]-[4], 200-201 [23], 215-216 [73]-[74] per French CJ, Kiefel, Bell and Keane JJ. See also *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at 1038-1039 [37] per French CJ and Bell J; 334 ALR 369 at 381; [2016] HCA 36.

206 (2016) 90 ALJR 1027 at 1038-1039 [37] per French CJ and Bell J; 334 ALR 369 at 381.

207 (2010) 243 CLR 1 at 136 [445]; [2010] HCA 46.

208 (2016) 90 ALJR 1027 at 1039 [39] per French CJ and Bell J, 1051 [109]-[110] per Gageler J, 1062 [202] per Keane J, 1072 [254] per Nettle J, 1079-1080 [297]-[303] per Gordon J; 334 ALR 369 at 382, 398, 413, 426-427, 436-437.

question of its suitability or necessity than on whether it is adequate in its balance. That follows from recognition that the stages of analysis posited in *McCloy* are not constituent parts of the second question posed in *Lange* but rather are tools for the assessment of whether a law is reasonably appropriate and adapted to serving a legitimate end as required by *Lange*[209]. In this case, however, as will be explained, it is the question of whether the Protesters Act is adequate in its balance that is determinative.

(1) Suitability

281 In the Australian constitutional context, a law may be regarded as suitable if it has a rational connection to the purpose of the law, and a law may be regarded as having a rational connection with such a purpose if the means for which it provides are capable of realising the purpose[210]. As Hayne J explained in *Tajjour v New South Wales*[211], once it is seen that an impugned law is rationally connected to a legitimate end, and in that sense capable of achieving that end, it is neither possible nor appropriate to attempt further assessment of the efficacy of the impugned law. Evidently the Protesters Act does have a rational connection with the purpose of ensuring 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. As such, the Protesters Act satisfies the test of suitability.

(2) Necessity

282 The test of what is necessary is not as clear cut as the test of suitability, for the reason that the Court has recognised that what is necessary is, to a large extent, within the exclusive purview of the Parliament[212]. More precisely, as

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209 *McCloy* (2015) 257 CLR 178 at 195-196 [3]-[4], 201 [23], 217 [78] per French CJ, Kiefel, Bell and Keane JJ.

210 *Unions NSW* (2013) 252 CLR 530 at 557-558 [50]-[55], 561 [64] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 579 [140]-[141] per Keane J; *McCloy* (2015) 257 CLR 178 at 217 [80] per French CJ, Kiefel, Bell and Keane JJ.

211 (2014) 254 CLR 508 at 563 [82].

212 *Levy* (1997) 189 CLR 579 at 598 per Brennan CJ; *Coleman* (2004) 220 CLR 1 at 52-53 [100] per McHugh J; *Unions NSW* (2013) 252 CLR 530 at 576 [129] per Keane J; *Tajjour* (2014) 254 CLR 508 at 550 [36] per French CJ; *McCloy* (2015) 257 CLR 178 at 217 [82] per French CJ, Kiefel, Bell and Keane JJ; *Murphy* (2016) 90 ALJR 1027 at 1039 [39] per French CJ and Bell J, 1051 [109]-[110] per Gageler J; 334 ALR 369 at 382, 398.

French CJ explained in *Maloney v The Queen*[213], the ascertainment of what is reasonably appropriate and adapted to the achievement of a legitimate end is not a prescription to engage in an assessment of the relative merits of competing legislative models. For the Court to engage in such a process would risk passing beyond the border of judicial power into the province of the legislature[214]. But it has been accepted that an impugned law should not be adjudged necessary if there exists such an obvious and compelling alternative of significantly lesser burden on the implied freedom of political communication as to imply that the impugned law was enacted for an ulterior purpose incompatible with the constitutionally prescribed system of representative and responsible government[215].

283 In this case, the plaintiffs contended that there are obvious and compelling alternatives capable of achieving the stated purpose of the Protesters Act with considerably less restrictive effect on the implied freedom of political communication. Counsel for the plaintiffs identified the provisions of the FMA to which reference has already been made as the most obvious example. Particular reliance was placed on: the prevention of conduct on a forest road or permanent timber production zone land contrary to directions of the Forest Manager expressed on a sign authorised under s 21; the capacity afforded to an authorised officer under s 22 to request a person not to enter permanent timber production zone land or a forest road, or to leave the land or road, or to cease to undertake an activity on the land or road, if the authorised officer is of the opinion that the presence or conduct of the person is preventing, has prevented or is about to prevent the Forest Manager from effectively or efficiently performing its functions; and the capacity of the Forest Manager to close forest roads under s 23 for the purposes of discharging its responsibilities.

284 Counsel for the plaintiffs also identified as an alternative the provisions of the *Police Offences Act* 1935 (Tas), in particular s 15B, which permits a police officer to direct a person to leave a public place for not less than four hours where the police officer is of the reasonable belief that the person has committed

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213 (2013) 252 CLR 168 at 183-185 [19]-[21]; [2013] HCA 28.

214 *Murphy* (2016) 90 ALJR 1027 at 1039 [39] per French CJ and Bell J; 334 ALR 369 at 382.

215 *Cunliffe* (1994) 182 CLR 272 at 388 per Gaudron J. See and compare *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 253-254 per Fullagar J; [1951] HCA 5; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 260-261 per Deane J; [1983] HCA 21; *Gerhardy v Brown* (1985) 159 CLR 70 at 148-149 per Deane J; [1985] HCA 11; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472-473 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 1.

or is likely to commit an offence (including an offence of unlawful entry on land under s 14B), is obstructing or likely to obstruct the movement of pedestrians or vehicles, is endangering or likely to endanger the safety of any other person, or has committed or is likely to commit a breach of the peace.

285 Counsel further submitted that other alternatives were to be found in legislation enacted or proposed to be enacted in a similar context in Western Australia and New South Wales[216]. In Western Australia, it is proposed to amend the *Criminal Code* (WA) 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[217]. In New South Wales, the *Inclosed Lands Protection Act* 1901 (NSW) has been amended to make it an offence for a person to enter or remain on inclosed lands without consent, or to interfere with or attempt or intend to interfere with the conduct of a business or undertaking conducted on those lands, or to do anything that gives rise to a serious risk to the safety of the person or any other person on those lands[218].

286 Arguably, there is some force in the plaintiffs' contention that the provisions of the FMA offer a credible legislative model for the achievement of the stated purpose of the Protesters Act in its application to forestry land and related business access areas with significantly less impact on the implied freedom of political communication. But it is to be remembered that the test of necessity is not a prescription to engage in a review of the relative merits of competing legislative models. To a large extent, determination of what is necessary for the achievement of a legislative purpose must be left to the Parliament, albeit that, in the ultimate analysis, it is for the court to determine whether the constitutional guarantee has been infringed[219]. And in this case, although it may be that the FMA offers a means of protecting forest operations from disruptions, it cannot be said that the legislative imperative of protecting business activities, including forest operations, from disruptions caused by protesters in particular is in the nature of an "imagined necessity"[220], or otherwise

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216 Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (WA); *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act* 2016 (NSW).

217 Criminal Code Amendment (Prevention of Lawful Activity) Bill, cl 4.

218 *Inclosed Lands Protection Act*, ss 4, 4B.

219 *ACTV* (1992) 177 CLR 106 at 144 per Mason CJ; *McCloy* (2015) 257 CLR 178 at 219-220 [89] per French CJ, Kiefel, Bell and Keane JJ.

220 *ACTV* (1992) 177 CLR 106 at 145 per Mason CJ.

that the Protesters Act falls beyond the "domain of selections" that is to be left to the legislature[221].

287 *A fortiori* in the case of the New South Wales and proposed Western Australian legislation, and the *Police Offences Act*. Although the common theme of the former legislative regimes is to apply to persons who act to prevent, hinder or obstruct an activity, neither focusses on protest activity as such or seeks to go as far in the attempt to prevent it in respect of business activity. The definition of the land to which the New South Wales legislation applies is more restricted than the scope of the Protesters Act[222]. The proposed Western Australian legislation is directed towards interference with any lawful activity and so does not deal with business premises or business-related objects. Similarly, although police powers for the dispersal of persons under s 15B of the *Police Offences Act* apply to public places as defined in s 3(1) of that Act, the offence of unlawful entry on land under s 14B would not apply to a large part of forestry land. By comparison, the definition of business premises under the Protesters Act is broad and expressly includes forestry land.

288 The plaintiffs submitted that the burden was on Tasmania to persuade the Court that there are no alternative means of lesser effect upon the implied freedom of political communication that would be as effective in meeting the purposes of the Protesters Act. Presumably, that contention was based upon comparable United States First Amendment jurisprudence[223]. But the submission should be rejected. There is nothing in principle or authority under our system of law to commend the view that a plaintiff should be relieved of the burden of persuasion as to an essential element of his or her cause of action. To the extent that there is a presumption of constitutionality[224], it would be illogical to require a defendant to negative an assertion of unconstitutionality. Forensically speaking,

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221 *McCloy* (2015) 257 CLR 178 at 217 [82] per French CJ, Kiefel, Bell and Keane JJ.

222 *Inclosed Lands Protection Act*, s 3(1) definitions of "Inclosed lands" and "prescribed premises".

223 See *Organization for a Better Austin v Keefe* 402 US 415 at 419-420 (1971); *United States v Playboy Entertainment Group Inc* 529 US 803 at 816-817 (2000); *Ashcroft v American Civil Liberties Union* 542 US 656 at 668-669 (2004).

224 See *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 528 per Murphy J; [1976] HCA 66; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 610-612 per Murphy J; [1977] HCA 60; *Gazzo v Comptroller of Stamps (Vict)* (1981) 149 CLR 227 at 252-254 per Murphy J; [1981] HCA 73; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 167 per Murphy J. See Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 697-698.

it would also be undesirable. To require a defendant to a proceeding of this kind to negative all possibility of an alternative measure of at least equal efficacy, but conceivably lesser restrictive effect upon the implied freedom of political communication, would necessitate detailed consideration of multiple possible alternatives with close examination of the properties of each of them, evidence as to the possible effects of at least some of them, and, ultimately, an assessment of the relative merits of the competing legislative models. That would add considerably to the length of proceedings and yet would be unlikely to add to the certainty of result[225]. It would require a defendant to advance, and the court to adjudicate, arguments as to contestable issues of policy[226]. And it must be kept in mind, too, that Parliament may act prophylactically or in response to inferred legislative imperatives[227]. In such circumstances it would be unrealistic and inappropriate to view a lack of direct evidence as to the legislative imperative as decisive.

289 In the result, it should be concluded that it is not demonstrated that there are such obvious and compelling alternatives of significantly less restrictive effect as to signify that the Protesters Act was enacted for an ulterior purpose incompatible with the constitutionally prescribed system of representative and responsible government. And, contrary to the plaintiffs' submissions, that conclusion is in effect reinforced, not diminished, by the fact that the operative provisions of the Protesters Act are tied to protest activities having been or being considered likely to have a detrimental effect on business activities. Those provisions cannot be said to be unnecessary in achieving a legislative purpose of preventing protests productive of detrimental effects on business activities.

(3) "Adequate in its balance"

290 The idea of a law being adequate in its balance in the Australian constitutional context is not yet fully resolved. It is to be observed, however, that, in contradistinction to the European conception – which asks where, in effect, the balance should lie – in the Australian constitutional context the description "adequate in its balance" is better understood as an outer limit beyond which the extent of the burden on the implied freedom of political communication presents as manifestly excessive by comparison to the demands

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225 Cf *McCloy* (2015) 257 CLR 178 at 200-201 [23], 215-216 [74] per French CJ, Kiefel, Bell and Keane JJ.

226 *Mulholland* (2004) 220 CLR 181 at 197 [32]-[33] per Gleeson CJ; *Monis* (2013) 249 CLR 92 at 151 [138] per Hayne J.

227 *McCloy* (2015) 257 CLR 178 at 261-262 [233] per Nettle J.

of legitimate purpose[228]. More precisely, and more consistently with the approach that has been taken to the application of express constitutional guarantees, such as s 92 of the Constitution, an impugned law that otherwise presents as suitable and necessary for the achievement of a legitimate purpose compatible with the constitutionally prescribed system of government should not be regarded as inadequate in its balance unless it so burdens the implied freedom of political communication as to present as "grossly disproportionate"[229] to, or as otherwise going "far beyond"[230], what can reasonably be conceived of as justified in the pursuit of the legitimate purpose. Thus, for the purposes of this case, the question may be posed in terms of whether, despite the apparent legitimacy of the purpose of the Protesters Act, and despite its suitability and necessity in the sense that has been explained, the Protesters Act so restricts protest activities on forestry land and related business access areas, and thereby so burdens the implied freedom of political communication, as to present as a manifestly excessive response to, as grossly disproportionate to, or as otherwise going far beyond, the legislative purpose of those restrictive measures.

291 For the reasons earlier set out, it does not appear that the restrictions imposed on protest activities by s 6(1), (2) and (3) of the Protesters Act, taken alone, are significantly greater than the restrictions imposed on protest activities by the FMA, and it is not suggested that the provisions of the FMA are invalid. But, as has been seen, when the restrictions imposed by s 6(1), (2) and (3) are combined with the effects of ss 11(1) and (2), 8(1)(b) and 11(6), (7) and (8), the result is a range of restrictions that go far beyond the restrictions imposed by the FMA. Consequently, although the Protesters Act does not target communication on the basis of its content[231] and, strictly speaking, regulates only the location of

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228 *McCloy* (2015) 257 CLR 178 at 219-220 [89]-[92] per French CJ, Kiefel, Bell and Keane JJ; Kiefel, "Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives", (2010) 36(2) *Monash University Law Review* 1 at 12.

229 *Davis v The Commonwealth* (1988) 166 CLR 79 at 99-100 per Mason CJ, Deane and Gaudron JJ (Wilson and Dawson JJ agreeing at 101); [1988] HCA 63.

230 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 78 per Deane and Toohey JJ, 101-102 per McHugh J; [1992] HCA 46; *Cunliffe* (1994) 182 CLR 272 at 324 per Brennan J, 340 per Deane J.

231 See *ACTV* (1992) 177 CLR 106 at 143 per Mason CJ, 234-235 per McHugh J; *Nationwide News* (1992) 177 CLR 1 at 76-77 per Deane and Toohey JJ; *Cunliffe* (1994) 182 CLR 272 at 299 per Mason CJ.

the relevant communication[232], the burden so imposed upon the implied freedom is substantial. The level of justification must rise to meet the extent of that burden[233].

292 To require a protester who, *ex hypothesi*, may not have committed any offence to stay off designated land for four days[234] for no better reason than that a police officer has formed a reasonable, but plausibly mistaken, belief that the protester is contravening, is about to contravene or did at some time in the past contravene s 6(1), (2) or (3), is on any reasonable view of the matter a very broad-ranging and far-reaching means of achieving the stated purposes of the Protesters Act. Still more so is it to provide that such a direction may be given to a "group of persons" under s 11(7), especially if it is considered that the direction may be given on no more substantial basis than the police officer's reasonable belief that only one or some of the group are contravening, are about to contravene or have at some time in the past contravened s 6(1), (2) or (3). And then to add a requirement that the protester, or group of protesters, do not for the next three months contravene s 6(1), (2) or (3) or commit an offence against the Protesters Act, in circumstances where an offence might comprise no more than failing to comply with the direction[235] that, again, might have been given on no more substantial basis than a police officer forming a reasonable, but conceivably false, belief as to the effect of the protester's past, present or future conduct on the forestry land or related business access area, is on any view of the matter a far-reaching means of attempting to achieve the stated purposes of the Protesters Act.

293 As was earlier explained, in order to determine whether a law is reasonably appropriate and adapted to the achievement of a legitimate purpose, the court must look to both the purpose of the law and the means adopted to achieve the purpose[236]. And where the means adopted is a power which turns upon the exercise of a discretion which is, in its terms, broad-ranging, it is the more likely that it will disproportionately burden the implied freedom even

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232 See, for example, *Levy* (1997) 189 CLR 579 at 614 per Toohey and Gummow JJ, 617-619 per Gaudron J, 648 per Kirby J; *Adelaide City Corporation* (2013) 249 CLR 1 at 64 [141] per Hayne J, 89 [219] per Crennan and Kiefel JJ.

233 *McCloy* (2015) 257 CLR 178 at 238-239 [150]-[152] per Gageler J, 259 [222], 267-270 [251]-[255] per Nettle J. See generally *Monis* (2013) 249 CLR 92 at 146-147 [124] per Hayne J.

234 *Workplaces (Protection from Protesters) Act*, s 8(1)(b).

235 *Workplaces (Protection from Protesters) Act*, s 8(1)(a).

236 *McCloy* (2015) 257 CLR 178 at 219 [87] per French CJ, Kiefel, Bell and Keane JJ.

though it might be said, or hoped, that the "actual application may be limited by the sensible exercise" of the discretion by the person or official to whom the discretion is granted[237]. As Brennan J observed in *Cunliffe v The Commonwealth*[238], where the validity of a law is attacked because it confers a discretion to refuse a licence to a person who may wish to exercise a freedom guaranteed by the Constitution, then, unless it can be said that the discretion is so confined by express terms or by the purpose for which it is conferred that it cannot be exercised to impair the freedom to which the applicant is entitled, and can only be exercised in aid of a constitutionally permissible purpose, it will be recognised that the discretionary power is inimical to the validity of the law that confers it. The jurisprudence governing comparable infractions of the United States First Amendment is not dissimilar[239].

294 In this case, because the breadth of the terms of the Protesters Act provides little by way of a clear standard to guide the exercise of the relevant powers, and is likely to frustrate reliance on judicial review in respect of that exercise, ss 11(1) and (2), 8(1)(b) and 11(6), (7) and (8), coupled with s 6(1), (2) and (3), place the freedom lawfully to protest on forestry land or related business access areas at the mercy of police officers' attempts to apply the Protesters Act and thereby risk the free exchange of communication on the undoubtedly political issue of the environment.

295 As the plurality reasoned in *McCloy*, whether such a risk is "undue" is to be assessed by weighing the consequent effect upon the implied freedom of political communication against the apparent public importance of the purpose sought to be achieved by the provisions[240]. Insofar as existing legislation, including the FMA, and existing common law causes of action, empower the Forest Manager to protect forest operations from most disruptions caused by protesters, the importance of the Protesters Act is considerably lessened. When that lessened level of importance is weighed in the balance against the extent of

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237 *Tajjour* (2014) 254 CLR 508 at 553 [44] per French CJ.

238 (1994) 182 CLR 272 at 331. See also at 302-303 per Mason CJ; *Adelaide City Corporation* (2013) 249 CLR 1 at 87-88 [213]-[216] per Crennan and Kiefel JJ (Bell J agreeing at 90 [224]).

239 See *Edwards v South Carolina* 372 US 229 at 236-237 (1963); *Adderley v Florida* 385 US 39 at 41-43, 54-56 (1966); *Forsyth County v Nationalist Movement* 505 US 123 at 131-133 (1992); *Thomas v Chicago Park District* 534 US 316 at 323-325 (2002); *Seattle Coalition to Stop Police Brutality v City of Seattle* 550 F 3d 788 at 798-799, 801-803 (2008).

240 (2015) 257 CLR 178 at 218-219 [86]-[87] per French CJ, Kiefel, Bell and Keane JJ.

the burden so identified, it is apparent that ss 11(1) and (2), 8(1)(b) and 11(6), (7) and (8) are grossly disproportionate to the achievement of the stated purpose of the legislation. Upon those bases, it should be held that ss 11(1) and (2), 8(1)(b) and 11(6), (7) and (8) are not appropriate and adapted to the legitimate purpose of ensuring that protesters do not prevent, hinder or obstruct the carrying out of forest operations or access to forestry land, or damage forestry land or business-related objects.

Severance

296 Were it possible to sever ss 11(1) and (2), 8(1)(b) and 11(6), (7) and (8), it would be appropriate to do so. As has been observed, standing by themselves, s 6(1), (2) and (3) do not greatly increase existing restrictions on protest activities against forest operations and for that reason they do not engage the constitutional protection of the implied freedom. But the difficulty with severing s 11(1), (2), (6), (7) and (8) is that, because of the way in which the Protesters Act is drafted, s 11(1), (2), (6), (7) and (8) are so interlinked with s 6(1), (2) and (3) that neither the former nor the latter make sense without the other. In particular, although s 6(1), (2) and (3) prohibit certain kinds of conduct, and those provisions are not objectionable in themselves, the only consequences of contravention of s 6(1), (2) or (3) are provided through s 11. Further, while requirements to leave forestry land or a related business access area under s 11(1) and (2) are not necessarily objectionable in themselves, and nor is the stipulation in s 8(1)(a) that a person must not remain on a business access area after being directed to leave, practically speaking none of those provisions has any further meaningful operation apart from the requirement to stay away for four days which is provided for in s 8(1)(b), and which, for the reasons previously stated, is objectionable in itself. In the result, it appears that the provisions are so interconnected that Parliament intended them to operate as a whole and in no other fashion. It is, therefore, not open to conclude that the Parliament would have adopted s 6(1), (2) or (3) in the absence of ss 8(1)(b) and 11(1), (2), (6), (7) and (8), and thus all must fail[241].

297 Finally, it is to be observed that Tasmania submitted in oral argument that, if the Court were of the view that the Protesters Act impermissibly burdened the implied freedom, the Court should seek to remove the Act's operation in respect of forestry land and forest operations by severing references to forests in ss 3

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241 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 26-27 per Griffith CJ, 35 per Barton J, 54-55 per Isaacs J; [1910] HCA 33; *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 698-699 per Griffith CJ, 701-702 per Barton J, 709 per O'Connor J, 713 per Isaacs J; [1910] HCA 77; *Strickland v Rocla Concrete Pipes Pty Ltd* (1971) 124 CLR 468 at 493 per Barwick CJ; [1971] HCA 40.

and 5. That submission must be rejected. As Gageler J observed in *Tajjour*, the Court cannot make a new law from the constitutionally unobjectionable parts of the old[242].

Conclusion

298 For these reasons, I am content to agree with the answers proposed by Kiefel CJ, Bell and Keane JJ to the questions stated in the Special Case.

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242 (2014) 254 CLR 508 at 586 [170].

GORDON J.

Introduction

299 The *Workplaces (Protection from Protesters) Act* 2014 (Tas) ("the Protesters Act") is "[a]n 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"[243].

300 Various provisions of the Protesters Act prohibit persons from engaging in certain *conduct* on business premises, or on a business access area in relation to business premises, that is *conduct* in furtherance of, or 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[244]. Broadly stated, the prohibitions apply where the *conduct* prevents, hinders or obstructs business activity or access to business areas, and where the *conduct* damages (or involves a threat to damage) business premises or a business-related object. "[B]usiness premises"[245] includes "forestry land"[246] – relevantly, land on which "forest operations"[247] are being carried out. A "business access area", in relation to business premises, relevantly means "so much of an area of land[248] … 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"[249].

301 The plaintiffs, Dr Robert Brown and Ms Jessica Hoyt, were each arrested and charged with offences under the Protesters Act in relation to their conduct in

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243 Long title of the Protesters Act.

244 See s 4(2) of the Protesters Act.

245 See par (b) of the definition of "business premises" in s 5(1) of the Protesters Act.

246 See par (a) of the definition of "forestry land" in s 3 of the Protesters Act.

247 See par (c) of the definition of "forest operations" in s 3 of the Protesters Act: "work comprised of, or connected with … harvesting, extracting or quarrying forest products" including "any related land clearing, land preparation, burning-off or access construction". See also the definition of "forest operations" in s 3 of the *Forest Management Act* 2013 (Tas).

248 Including but not limited to any road, footpath or public place: see par (a) of the definition of "business access area" in s 3 of the Protesters Act.

249 par (a) of the definition of "business access area" in s 3 of the Protesters Act.

opposing the logging of part of a coupe in the Lapoinya Forest in North West Tasmania. While forest operations were being conducted, neither plaintiff was permitted or authorised to re-enter the coupe or the Lapoinya Forest. And it was not in dispute that, but for the Protesters Act, and to the extent permitted by other laws, the plaintiffs would go back to the Lapoinya Forest to see, and raise public awareness of, logging in that forest.

302 The plaintiffs challenge the validity of ss 6, 7, 8, 11 and 13(3) and Pt 4 of the Protesters Act on the basis that those provisions are beyond the legislative power of the State of Tasmania because they impermissibly infringe the implied freedom of political communication, contrary to the Commonwealth Constitution.

Validity

303 In its operation in relation to forestry land[250], each impugned provision, other than s 8(1)(b) of the Protesters Act, burdens the implied freedom and is valid. With the exception of s 8(1)(b), each impugned provision is directed to serve a legitimate end (to protect the productivity, property and personnel of forest operations), and the means adopted to achieve that end (penalising conduct that would prevent, hinder or obstruct the carrying out of a business activity or access to business premises, or cause damage to business premises, and that would, so far as revealed in argument in this case, otherwise be unlawful) are not incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Six basic propositions

304 First, apart from s 8(1)(b), none of the impugned provisions makes unlawful what would otherwise be lawful. That is, the impugned provisions create and enforce rules of conduct that overlap with existing laws that prohibit the same conduct. To that extent, there is little or no change in what people may do. The impugned provisions prohibit particular *methods* of political communication: methods that, these reasons will show, are for all practical purposes otherwise unlawful. To hold the impugned provisions invalid would be to ignore the wider legal context in which the impugned provisions have their legal effect and practical operation.

305 Second, identifying that the impugned provisions are directed at protesters[251] or that what was otherwise unlawful has been made the subject of

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250 That is, in its operation in respect of forestry land and/or business access areas in relation to forestry land.

251 As defined in s 4 of the Protesters Act.

criminal sanction or increased penalties presents the question about the limitations that the implied freedom imposes on legislative power – it does not provide the answer. The impugned provisions are directed, and apply, to unlawful forms of protest – protest by methods that are contrary to otherwise generally applicable laws.

306 Third, it is no answer to these observations to say that the impugned provisions are complicated or drafted in a way that may initially leave a person unsure of their effect. A fundamental assumption of the Australian legal system is that statutes have a definite legal meaning. Australia knows no doctrine of statutory uncertainty.

307 Fourth, the critical starting point is the legal effect and practical operation of the impugned provisions. That inquiry involves questions of statutory construction. The "deterrent effect" of the provisions, if relevant at all, is to be measured only by reference to the legal effect[252] and practical operation of those provisions, not by reference to whether persons may choose through caution or ignorance to give the provisions an effect or operation wider than they permit, or by reference to an anticipation of some unlawful exercise of the powers conferred by those provisions. That is, the relevant practical operation of the provisions is the practical operation they have when applied according to their proper construction, not some operation hypothesised on there being some misapplication or misconstruction of the provisions or any one of them.

308 Fifth, the purpose and the legal effect and practical operation of the impugned provisions of the Protesters Act can properly be determined only by detailed reference to the impugned provisions. Further, as will later be explained, the intersection between the impugned provisions and the wider legal context in which the impugned provisions have their legal effect and practical operation can only be assessed after a detailed consideration of both the provisions and the context.

309 Sixth, to observe that there have been past political protests on Crown land in Tasmania serves only to identify the kind of conduct to which the impugned provisions (and much of the wider legal context) are directed. It cannot be assumed, without positive demonstration, that these protests were lawful. And if they were not lawful, the fact that they took place does not give rise to something resembling a right, acquired by prescription, to protest unlawfully.

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252 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]; [1998] HCA 28.

Exception

310 There is one exception to the conclusion that the impugned provisions are valid in their operation in relation to forestry land: s 8(1)(b), which provides for a blanket four day exclusion from a business access area, regardless of whether the person might engage in conduct of a particular kind in that area. It impermissibly burdens the implied freedom of political communication, contrary to the Constitution. It goes beyond penalising what was unlawful before the enactment of the relevant provisions. And the resulting burden on political communication goes beyond what is reasonably appropriate and adapted to serve the legitimate object of the Protesters Act.

Structure of reasons

311 These reasons are structured as follows:

(1) the implied freedom of political communication;

(2) the Protesters Act, including its legal effect and practical operation;

(3) the wider legal framework in which the Protesters Act, in its operation in relation to forestry land, sits and operates;

(4) the constitutional validity of the impugned provisions; and

(5) whether *McCloy v New South Wales*[253] should be reopened.

The facts are set out in the reasons of Kiefel CJ, Bell and Keane JJ. I gratefully adopt that summary.

Implied freedom of political communication

312 Freedom of communication on matters of government and politics is an indispensable incident of the system of representative and responsible government which the Constitution creates and requires[254]. The freedom is implied because ss 7, 24 and 128 of the Constitution (with Ch II, including ss 62 and 64) create a system of representative and responsible government[255]. It is an

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253 (2015) 257 CLR 178; [2015] HCA 34.

254 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138; [1992] HCA 45; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559; [1997] HCA 25; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44]; [2010] HCA 42.

255 See *Lange* (1997) 189 CLR 520 at 557-562.

indispensable incident of that system because that system requires that electors be able to exercise a free and informed choice when choosing their representatives, and, for them to be able to do so, there must be a free flow of political communication within the federation[256]. For that choice to be exercised effectively, the free flow of political communication must be between electors and representatives and "between all persons, groups and other bodies in the community"[257].

313 The implied freedom operates as a constraint on legislative and executive power[258]. It is a freedom from government action, not a grant of individual rights[259]. The freedom that the Constitution protects is not absolute[260]. The limit on legislative and executive power is not absolute[261]. The implied freedom does not protect all forms of political communication at all times and in all circumstances. And the freedom is not freedom from all regulation or restraint. Because the freedom exists only as an incident of the system of representative and responsible government provided for by the Constitution, the freedom limits legislative and executive power only to the extent necessary for the effective operation of that system[262].

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256 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [27], 571 [104]; [2013] HCA 58.

257 *ACTV* (1992) 177 CLR 106 at 139. See also *Unions NSW* (2013) 252 CLR 530 at 551-552 [28]-[30]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 577 [140]-[141]; [2014] HCA 35.

258 *Lange* (1997) 189 CLR 520 at 560; *Hogan v Hinch* (2011) 243 CLR 506 at 554 [92]; [2011] HCA 4; *Unions NSW* (2013) 252 CLR 530 at 554 [36]; *Tajjour* (2014) 254 CLR 508 at 558 [59], 577 [140].

259 See, eg, *Lange* (1997) 189 CLR 520 at 561, 567; *Unions NSW* (2013) 252 CLR 530 at 551 [30], 554 [36]; *McCloy* (2015) 257 CLR 178 at 202-203 [30], 228-229 [119]-[120], 258 [219], 280 [303].

260 *Lange* (1997) 189 CLR 520 at 561.

261 *Tajjour* (2014) 254 CLR 508 at 558 [59].

262 *Tajjour* (2014) 254 CLR 508 at 577 [140]-[141].

314 Further, the implied freedom operates on the common law[263]. The common law, as an organic, developing body of substantive law, must be consistent with, and develop consistently with, the Constitution[264].

315 In determining whether a law impermissibly burdens the implied freedom, two questions must be answered[265].

First question

316 The first question asks: does the law effectively burden the freedom of communication about government or political matters either in its terms, operation or effect? Answering that question necessarily involves construing the law[266]. That task is not a matter of evidence. It is a qualitative, not a quantitative, inquiry[267]. And because of the integration of social, economic and political matters across federal, State and local politics, the freedom of political communication may be burdened by a State law[268].

Second question

317 The second question asks: if the law effectively burdens the freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a

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263 *Lange* (1997) 189 CLR 520 at 568; *Coleman v Power* (2004) 220 CLR 1 at 50 [93], 77 [195]; [2004] HCA 39.

264 See *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 485-488; [1995] HCA 47; *Lange* (1997) 189 CLR 520 at 566, 568-569; *Coleman* (2004) 220 CLR 1 at 50 [93], 77 [195], 79 [199].

265 *Lange* (1997) 189 CLR 520 at 561, 567 as modified by *Coleman* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96]. See also *Unions NSW* (2013) 252 CLR 530 at 553 [35], 556 [44].

266 See, eg, *Coleman* (2004) 220 CLR 1 at 21 [3], 68 [158], 80-81 [207]; *Monis v The Queen* (2013) 249 CLR 92 at 154 [147]; [2013] HCA 4.

267 *Monis* (2013) 249 CLR 92 at 145-146 [118]-[122], 160-161 [173]; *Unions NSW* (2013) 252 CLR 530 at 555 [40]; *Tajjour* (2014) 254 CLR 508 at 578 [145].

268 See *Lange* (1997) 189 CLR 520 at 571-572; *Unions NSW* (2013) 252 CLR 530 at 549 [22].

manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government[269]?

318 There are two conditions that must be satisfied before the second question can be answered affirmatively[270].

(a) Legitimate end

319 The first condition is that there be an identifiable "legitimate end"[271]. The identification of a legitimate end is necessary to explain why the burden is imposed[272].

320 The "end" is the object or purpose of the law[273]. That object or purpose must be "legitimate"[274]. To be legitimate, the end "must itself be compatible with the system of representative and responsible government established by the Constitution"[275]. But that does not mean that the end must itself be the maintenance or enhancement of that system[276].

321 Laws may, and often do, pursue objects unrelated to the system of representative and responsible government[277]. It is therefore unnecessary,

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269 See *Wotton v Queensland* (2012) 246 CLR 1 at 15 [25]; [2012] HCA 2; *Monis* (2013) 249 CLR 92 at 129 [61]; *Unions NSW* (2013) 252 CLR 530 at 556 [44].

270 *Lange* (1997) 189 CLR 520 at 561-562; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 61-62 [131]; [2013] HCA 3; *McCloy* (2015) 257 CLR 178 at 231-232 [129]-[131], 284 [320], 285 [327]; see also at 212-213 [67]-[68].

271 *Unions NSW* (2013) 252 CLR 530 at 556 [44].

272 *McCloy* (2015) 257 CLR 178 at 231 [130].

273 See *McCloy* (2015) 257 CLR 178 at 231 [130], 284 [320].

274 *Monis* (2013) 249 CLR 92 at 148 [126].

275 *McCloy* (2015) 257 CLR 178 at 231 [130]. See also *Coleman* (2004) 220 CLR 1 at 50 [93].

276 *Monis* (2013) 249 CLR 92 at 148 [128].

277 See, eg, *Levy v Victoria* (1997) 189 CLR 579 at 627; [1997] HCA 31; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [29]; [2005] HCA 44; *Hogan* (2011) 243 CLR 506 at 544 [50], 556 [98]; *Wotton* (2012) 246

(Footnote continues on next page)

and often unhelpful, to identify a relationship between the object of the law and the maintenance of the system of representative and responsible government established by the Constitution. The question is whether the object of the law (whatever it is ascertained to be), and the means of achieving that object, are not incompatible with the maintenance of the system of representative and responsible government established by the Constitution. Identifying the object or purpose of the law is similar to identifying the "mischief" that the law is designed to address[278]. The object or purpose will be disclosed by the text, the context and, if relevant, the history of the law[279].

322 Care must be taken not to identify the object or purpose of the law too narrowly. To do so would have flow-on consequences for "the scope, utility and transparency" of the subsequent reasonably appropriate and adapted analysis, such that the reasoning process that might otherwise be undertaken at that later stage "is disguised in conclusions about statutory purposes"[280]. The two steps would "collapse into one"[281]. In other words, it is important to separate the means adopted by a law from the end that it is designed to pursue. As Gageler J explained in *Tajjour v New South Wales*[282]:

> "Means which come at too great a cost to the system of representative and responsible government established by the Constitution must be abandoned or refined. Means which are overbroad may need to be narrowed. This consequence of the implied freedom cannot be avoided by an analysis which seeks to circumvent its application by characterising means adopted by the law which burden communication on governmental or political matter as the end the law pursues."

323 In assessing this first condition, it is also relevant to determine whether the legal operation of the law is rationally connected to the end that it purportedly

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CLR 1 at 16 [31]-[32]; *Adelaide City Corporation* (2013) 249 CLR 1 at 90 [221]; *Monis* (2013) 249 CLR 92 at 215 [349]; *Tajjour* (2014) 254 CLR 508 at 571 [111]-[112].

278 *McCloy* (2015) 257 CLR 178 at 232 [132] quoting *APLA* (2005) 224 CLR 322 at 394 [178].

279 *McCloy* (2015) 257 CLR 178 at 284 [320]; see also at 212-213 [67], 232 [132]; *Unions NSW* (2013) 252 CLR 530 at 557 [50].

280 Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 592-593.

281 cf *Monis* (2013) 249 CLR 92 at 134 [74].

282 (2014) 254 CLR 508 at 584 [163].

serves[283]. If that connection is lacking, then the law will be invalid[284]. If the law is not rationally connected to the identified legitimate end, then the burden imposed by the law will be inexplicable[285].

(b) Reasonably appropriate and adapted

324 The second condition is that the law be reasonably appropriate and adapted to serve the identified legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government[286]. If this condition is not satisfied, then the burden imposed by the law will not be justified[287].

325 In addressing this condition, the nature and the extent of the burden are relevant. Those considerations are relevant because they directly affect whether the law is reasonably appropriate and adapted to serve the identified end. Where, as here, the conduct that is burdened is otherwise not lawful conduct, then the required justification is less and the operation of the law is more readily justified.

The Protesters Act

326 As has already been said, it is necessary to give a detailed description of, and to construe[288], the relevant provisions of the Protesters Act. They are complicated both in their terms and in the way in which each provision operates in relation to other relevant legislation.

Key concepts and definitions

327 As seen earlier, the long title of the Protesters Act is: "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" (emphasis added).

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283 *McCloy* (2015) 257 CLR 178 at 284 [320].

284 See, eg, *Unions NSW* (2013) 252 CLR 530 at 557-561 [50]-[65].

285 See *McCloy* (2015) 257 CLR 178 at 232 [132].

286 *McCloy* (2015) 257 CLR 178 at 231-232 [131], 285 [327].

287 *McCloy* (2015) 257 CLR 178 at 231-232 [131].

288 *Coleman* (2004) 220 CLR 1 at 21 [3], 68 [158]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4.

328 Section 4(1) provides that, for the purposes of the Protesters Act, "a person is a protester if the person is engaging in a protest activity". Section 4(2) identifies what is "a protest activity" by providing that:

> "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*." (emphasis added)

The balance of s 4 sets out circumstances in which a person is engaging in a protest activity[289] or is not to be taken to be engaging in a protest activity[290].

329 The concept of "business premises"[291] lies at the heart of the applicability and operation of the Protesters Act. Relevantly, it includes premises that are "forestry land"[292], being an area of land on which "forest operations" are being carried out[293]. "[F]orest operations" relevantly means "work comprised of, or connected with … harvesting, extracting or quarrying forest products"[294], including "any related land clearing, land preparation, burning-off or access construction"[295]. But business premises are not limited to, or by reference to,

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289 s 4(3) and (4) of the Protesters Act.

290 s 4(5)-(8) of the Protesters Act.

291 s 5 of the Protesters Act.

292 s 5(1)(b) of the Protesters Act.

293 par (a) of the definition of "forestry land" in s 3 of the Protesters Act.

294 "[F]orest products" is defined to mean, among other things, a product of dead trees on or from forestry land: par (b) of the definition of "forest products" in s 3 of the Protesters Act.

295 See the definition of "forest operations" in s 3 of the Protesters Act. See also the definition of "forest operations" in s 3 of the Forest Management Act.

specific industries; for example, "premises used as a shop, market or warehouse" are also business premises[296].

330 Another important and related concept is "business access area". A business access area, in relation to business premises, relevantly means "so much of an area of land[297] … 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"[298].

331 "[B]usiness activity" is defined to include a lawful activity carried out by a Government Business Enterprise[299], including Forestry Tasmania[300]. Where the "business premises" comprise, as they did here, Crown land that is permanent timber production zone land within the meaning of the *Forest Management Act* 2013 (Tas), the Forestry corporation (namely, Forestry Tasmania) is defined as "owner"[301]. Here, in relation to those business premises, Forestry Tasmania is also a "business operator" on two separate bases: first, because it is "an owner, … or lawful occupier, of the premises"[302]; and second, because it is "a government entity[303] ... that has management or control of the

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296 s 5(1)(e) of the Protesters Act. It will not be necessary to consider the operation of the Protesters Act other than in relation to forestry land: see [394] below.

297 Including but not limited to any road, footpath or public place: see par (a) of the definition of "business access area" in s 3 of the Protesters Act.

298 par (a) of the definition of "business access area" in s 3 of the Protesters Act.

299 par (b) of the definition of "business activity" in s 3 of the Protesters Act. "Government Business Enterprise" in the Protesters Act has the same meaning as in the *Government Business Enterprises Act* 1995 (Tas): see s 3 of the Protesters Act.

300 See Pt 1 of Sched 1 to the Government Business Enterprises Act; s 6 of the Forest Management Act.

301 par (a) of the definition of "owner" in s 3 of the Protesters Act.

302 par (a) of the definition of "business operator" in s 3 of the Protesters Act.

303 "[G]overnment entity" includes a statutory authority: s 3 of the Protesters Act. "[S]tatutory authority" relevantly includes an incorporated or unincorporated body which is established, constituted or continued under a Tasmanian Act, the governing authority of which, wholly or partly, comprises a person or persons appointed by a Minister of the Crown: see s 3 of the Protesters Act. Forestry Tasmania meets this definition as the chief executive officer of Forestry Tasmania is appointed by the Premier: see s 18(2) of the Government Business Enterprises Act.

premises"[304]. Because Forestry Tasmania is a business operator in relation to those business premises, it is also a "business occupier" in relation to the business premises[305].

332 The balance of the Protesters Act operates primarily by reference to those definitions. It is necessary to consider the impugned provisions in Pts 2, 3 and 4 separately. Those Parts deal with the protection of business from protesters, police powers and court proceedings respectively.

Part 2 – Protection of Business from Protesters (ss 6 to 9)

333 The plaintiffs challenged the validity of s 6 ("Protesters not to invade or hinder businesses, &c"), s 7 ("Protesters not to cause or threaten damage or risk to safety") and s 8 ("Persons must, at direction of police officer, leave and stay away from business access areas").

334 Section 6 places three distinct prohibitions on protesters. But it is not an offence to contravene any one of these prohibitions. The relevant offence (described later) depends on disobedience of a direction (in effect) to comply with the prohibition. The first two prohibitions are concerned with a protester engaging in certain conduct that "prevents, hinders or obstructs the carrying out of a business activity on [business premises] by a business occupier". The phrase "prevents, hinders or obstructs" is not defined.

335 The first prohibition concerns *entry* into *business premises*. Section 6(1) provides:

> "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." (emphasis added)

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304 par (b) of the definition of "business operator" in s 3 of the Protesters Act.

305 See par (a) of the definition of "business occupier" in s 3 of the Protesters Act.

336 The second prohibition concerns an *act done* on *business premises* or on a *business access area in relation to business premises*. Section 6(2) provides:

> "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." (emphasis added)

337 The third prohibition concerns a protester doing an *act* that *prevents, hinders or obstructs access* to *business premises*. Section 6(3) provides:

> "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." (emphasis added)

338 Section 7 also contains three prohibitions. Unlike the prohibitions contained in s 6(1), (2) and (3), contravention of any one of the prohibitions in s 7 is a criminal offence.

339 The first two prohibitions are contained in sub-ss (1) and (2) of s 7, which are concerned respectively with protesters doing an act that causes *damage* to *business premises* or to a *business-related object*:

> "(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.
>
> …
>
> (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."

340 A "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"[306]. 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, damage to the business premises, the object or any other business-related object, or cause a risk to the safety of a business occupier in relation to the business premises[307]. It is a defence to an offence against s 7(1) and (2) if the defendant proves that he or she had a lawful excuse for committing the offence[308].

341 The third prohibition, in sub-s (3) of s 7, must be read with sub-s (4) of s 7. Sub-sections (3) and (4) of s 7 are not concerned directly with "protesters". Those sub-sections make it an offence for a "person" to "issue a threat of damage in relation to business premises" in furtherance of, or 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". They provide:

"(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.

…

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306 s 3 of the Protesters Act.

307 s 7(6) of the Protesters Act, without limiting the generality of s 7(1) or (2).

308 s 7(5) of the Protesters Act.

(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."

342 The penalty under s 7(1), (2) and (3) is, in the case of a body corporate, a fine not exceeding $250,000 and, for an individual, a fine not exceeding $50,000 or imprisonment for a term not exceeding five years, or both.

343 It will be necessary to return to s 8. Section 9, which provides that a person must not prevent, hinder or obstruct a police officer from removing obstructions[309], is not challenged by the plaintiffs.

Part 3 – Police Powers (ss 10 to 15)

344 Part 3, headed "Police Powers", confers several powers on police that are enlivened by reference to the prohibitions contained in Pt 2. Section 11, headed "Police officer may direct person to leave business premises or business access area", was purportedly relied on by the police in respect of each plaintiff.

345 Sub-sections (1) and (2) of s 11 each confer a power on police to give certain directions to persons in certain circumstances. In each case, the power may be enlivened by reference to the prohibitions contained in s 6 and the offences created by s 7. Sections 11(1) and 11(2) provide:

> "(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." (emphasis added)

346 Sub-sections (7) and (8) of s 11, which concern directions to a group of persons, provide:

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

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309 See s 12 of the Protesters Act.

(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."

347 Pursuant to s 11(6), a direction issued under s 11 "may include a requirement that the person must not, in the period of 3 months after the date on which the direction is issued", either commit an offence against a provision of the Protesters Act or contravene s 6(1), (2) or (3)[310]. Section 6(4) makes it an offence to contravene such a requirement. One of the plaintiffs, Ms Hoyt, was charged with an offence against s 6(4).

348 Failure to comply with a direction given under s 11 may constitute an offence against s 8, contained in Pt 2. Section 8 is titled "Persons must, at direction of police officer, leave and stay away from business access areas" and s 8(1) relevantly provides:

"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."

It is a defence to an offence against s 8(1) if the defendant proves that he or she had a lawful excuse for committing the offence[311]. The penalty, in the case of a body corporate, is a fine not exceeding $100,000 and, for an individual, a fine not exceeding $10,000. Each plaintiff was charged with, or received an infringement notice for committing, an offence against s 8(1).

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310 Except in the case of a direction made under s 11(4), which is not presently relevant: see s 11(6)(b) of the Protesters Act.

311 s 8(2) of the Protesters Act.

349 Under s 13(3), a police officer also has the power to remove a person from business premises, or a business access area in relation to business premises, if the police officer reasonably believes that the person is committing, or has committed, an offence against a provision of the Protesters Act, or a contravention of s 6(1), (2) or (3), on or in relation to the business premises or a business access area in relation to the business premises.

Part 4 – Court Proceedings (ss 16 to 18)

350 The plaintiffs also challenged the validity of Pt 4. Relevantly, it provides that the relevant offences are indictable[312] but, with the consent of the prosecutor, can be heard and determined summarily[313]. Section 16(3) prescribes the maximum fine that may be imposed if an offence is dealt with summarily.

351 In relation to convictions of an offence under s 6(4), s 17 provides that if a court convicts a body corporate, the court may impose a fine not exceeding $100,000[314]. If the court convicts an individual, the court may impose a fine not exceeding $10,000 for a first offence and, in respect of a further offence, a fine not exceeding $10,000 or imprisonment for a term not exceeding four years, or both[315].

352 Section 18 empowers a court to order a person convicted of an offence against s 6 or s 7 to pay to a business operator the cost of repairing the damage to business premises[316] and the cost of repairing the damage to, or restoring or replacing, a business-related object[317]. Sub-sections (5) and (6) of s 18 empower a court to order a person convicted of an offence against s 6 to pay to the Crown the removal and repair costs in relation to an object that has been used, or an act that has been done, as part of the offence. Section 18(8) empowers a court to order a person convicted of an offence against s 6 or s 7 in relation to business premises or a business access area in relation to business premises to pay to a business operator the amount of financial loss suffered by that operator as "the natural, direct and reasonable consequence of the offence".

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312 s 16(1) of the Protesters Act.

313 s 16(2) of the Protesters Act.

314 s 17(1) of the Protesters Act.

315 s 17(2) of the Protesters Act.

316 s 18(1) of the Protesters Act.

317 s 18(2)-(4) of the Protesters Act.

Legal effect and practical operation of the Protesters Act

353 What are the legal effect and practical operation of the Protesters Act?

354 First, s 6(1), (2) and (3) and s 7(1) and (2) of the Protesters Act proscribe particular conduct on the part of persons engaging in a "protest activity". But for a person to be engaging in a "protest activity" within the meaning of the Protesters Act, the activity must take place on business premises or a business access area in relation to business premises[318]. As a result, a person does not contravene s 6(1), (2) or (3) or s 7(1) or (2) of the Protesters Act unless they are on or in such an area. And even if a person is on or in such an area, that person will not be taken to be engaging in a "protest activity" if they have the consent, whether express or implied, of a business occupier in relation to the business premises to be there and to engage in that activity[319].

355 Second, the prohibitions in s 6(1), (2) and (3) apply to conduct that "prevents, hinders or obstructs" particular activity on, or access to, business premises. The words "prevents, hinders or obstructs" are not defined. It is neither possible nor appropriate to define the outer limits of those words. However, as a matter of construction, those words – understood in their ordinary sense and in light of well-established interpretive principles[320] – do not refer to any conduct that might affect business activity or access in *any* way or to *any* extent, however trivial. That would be at odds with the nature and degree of the interference that each of those words naturally connotes. The words are limited in scope. As will be later explained, a consequence of those limits is that the words "prevents, hinders or obstructs" capture only what is otherwise unlawful.

356 Third, as the preceding analysis demonstrates, as a matter of statutory construction, the offences in ss 6(4) and 8(1) can only be committed *after* a police officer has given a valid direction under s 11. And an officer may only give such a direction to a person who is on business premises[321], or in a business access area[322]. No valid direction can be given to a person who is not on, or in,

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318 s 4(2)(a) of the Protesters Act.

319 s 4(5) of the Protesters Act.

320 See, eg, *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-592 [43]; [2011] HCA 10.

321 s 11(1) of the Protesters Act.

322 s 11(2) of the Protesters Act.

one of those areas[323]. Further, a police officer may only give such a direction if he or she has reasonable grounds to believe[324] that a person has committed, is committing, or is about to commit, an offence against a provision of the Protesters Act, or a contravention of s 6(1), (2) or (3) of the Protesters Act, on or in relation to the business premises or a business access area in relation to the business premises. There may be cases where that power is said to be exercised unlawfully. Those questions are not answered by reference to the implied freedom. They are questions about construction and application. So much was made clear by the plurality in *Wotton v Queensland*[325]:

> "(i) where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power; (ii) whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law; (iii) rather, the question is whether the repository of the power has complied with the statutory limits; (iv) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case … does not raise a constitutional question, as distinct from a question of the exercise of statutory power."

Wider legal framework

357 The Protesters Act, in its legal effect and practical operation in relation to forestry land, sits alongside, and operates in conjunction with, a wider legal framework that cannot be ignored or dismissed as irrelevant to the application of the impugned provisions. That wider legal framework includes, but is not limited to, the Forest Management Act, the *Forest Practices Act* 1985 (Tas), the *Criminal Code* (Tas), the *Police Offences Act* 1935 (Tas) and the common law. An examination of that wider legal framework demonstrates that the conduct that is addressed by the impugned provisions was and remains substantially unlawful conduct. None of the laws constituting this wider legal

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323 Subject to one presently irrelevant exception: see s 11(4) of the Protesters Act, which deals with the issuing of a direction to a business operator in relation to business premises.

324 See *George v Rockett* (1990) 170 CLR 104 at 112-113; [1990] HCA 26; *Gypsy Jokers* (2008) 234 CLR 532 at 557-558 [28]; *Prior v Mole* (2017) 91 ALJR 441 at 445 [4], 449 [24], 457 [73], 461 [99]-[100]; 343 ALR 1 at 5, 10, 21, 26; [2017] HCA 10.

325 (2012) 246 CLR 1 at 14 [22].

framework was challenged as being an impermissible burden on the implied freedom. That framework was and remains a constitutionally valid baseline.

(1) The Forest Management Act

358 Under the Forest Management Act, Forestry Tasmania[326], as the Forest Manager[327], has functions to "manage and control all permanent timber production zone land" and to "undertake forest operations on permanent timber production zone land for the purpose of selling forest products"[328].

359 Forestry Tasmania is a body corporate and may sue and be sued in its corporate name[329]. It has such powers as are necessary to enable it to perform its functions[330]. It also has powers as a Government Business Enterprise, including the power to acquire, hold, dispose of and otherwise deal with property[331]. As the Forest Manager, Forestry Tasmania may also "construct and maintain forest roads, works and other facilities" in permanent timber production zone land or "for access to" permanent timber production zone land[332].

360 It is therefore necessary to consider what are "permanent timber production zone land", "forest operations" and a "forest road" under the Forest Management Act. "[P]ermanent timber production zone land" is, relevantly, Crown land declared to be permanent timber production zone land pursuant to

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326 The "Forestry corporation" established by s 6(1) of the *Forestry Act* 1920 (Tas), and continued in existence by s 6 of the Forest Management Act. It is a "Government Business Enterprise" within the meaning of that term in the Government Business Enterprises Act: see s 3(1) and Pt 1 of Sched 1.

327 s 7(1) of the Forest Management Act.

328 s 8(a) and (b) of the Forest Management Act.

329 s 6(a) and (c) of the Government Business Enterprises Act.

330 s 9 of the Forest Management Act.

331 s 9(1)(a) of the Government Business Enterprises Act. See also s 7(2) of the Forest Management Act.

332 s 19 of the Forest Management Act.

s 10 of the Forest Management Act[333]. Such land remains Crown land but is not subject to the *Crown Lands Act* 1976 (Tas)[334].

361 "[F]orest operations" is defined in the Forest Management Act to mean[335]:

> "work 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*". (emphasis added)

The phrase has substantially the same meaning in the Protesters Act[336]. The nature, extent and timing of forest operations on particular permanent timber production zone land will be set out in a forest practices plan certified by the Forest Practices Authority under the Forest Practices Act[337]. A certified forest practices plan contains, among other things, specifications of the forest practices[338] to be carried out on the land in connection with the harvesting of timber or the clearing of trees[339]. A certified forest practices plan authorises the specified forest practices and associated operations[340].

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333 par (a) of the definition of "permanent timber production zone land" in s 3 of the Forest Management Act.

334 s 2A(b) of the Crown Lands Act. Except as otherwise provided, the Forest Management Act does not apply to Crown land that is reserved land within the meaning of the *Nature Conservation Act* 2002 (Tas): s 4(1) of the Forest Management Act.

335 s 3 of the Forest Management Act.

336 See the definition of "forest operations" in s 3 of the Protesters Act.

337 See Div 1 of Pt III of the Forest Practices Act.

338 See the definition of "forest practices" in s 3(1) of the Forest Practices Act.

339 See s 18(2)(a) of the Forest Practices Act. The specifications must be in accordance with the Forest Practices Code issued by the Authority: see s 18(3) and Pt IV of the Forest Practices Act. See also s 15 of the Forest Management Act.

340 s 20 of the Forest Practices Act.

362 Under the Forest Management Act, a "forest road" relevantly means[341]:

> "(a) *any road constructed or maintained by or for the Forest Manager either inside or outside permanent timber production zone land*; or
>
> …
>
> (c) any other road that is –
>
> (i) on Crown land; and
>
> (ii) being managed by a person for the purpose of timber production …" (emphasis added)

The forest practices plan will identify the nature, extent and timing of work to be done in relation to a forest road for the purposes of forest operations.

363 The Forest Manager must perform its functions and exercise its powers "so as to allow access to permanent timber production zone land *for such purposes as are not incompatible* with the management of permanent timber production zone land" under the Forest Management Act[342] (emphasis added). Far from assuming that the public has general access to forestry land, the Forest Management Act takes as its premise, and emphasises, that Forestry Tasmania controls access to the land it manages.

364 According to Forestry Tasmania's Forest Management Plan of January 2016, "[a]ctivities that are compatible with Forestry Tasmania's strategic objectives may be undertaken on [permanent timber production zone land]"[343] and include the use of dedicated recreation sites, organised events, recreational vehicle use, hunting and firearm use, fossicking and prospecting, firewood collection, the exercise of Indigenous use rights, and commercial or private access in the exercise of property rights or for beekeeping, mineral exploration and mining and tourism.

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341 s 3 of the Forest Management Act.

342 s 13(1) of the Forest Management Act. The Forest Manager may, with the approval of the Minister, charge a person or class of persons a fee for the right to access permanent timber production zone land or use a forest road for any purpose: s 14 of the Forest Management Act.

343 Forestry Tasmania, *Forest Management Plan*, (2016) at 62.

365 The Forest Management Act goes on to state that the access requirement does not prevent the Forest Manager from exercising its powers under ss 21, 22 and 23 of the Forest Management Act[344].

366 Under s 21(1), the Forest Manager may erect signs on or in respect of forest roads or on permanent timber production zone land "for the purposes of discharging its responsibilities or in the interests of safety". And it was common ground that, having regard to the use of heavy machinery in conducting forest operations in issue in this matter, Forestry Tasmania was under a duty of care and had statutory duties and obligations under the *Work Health and Safety Act* 2012 (Tas) to ensure, so far as was reasonably practicable, that the health and safety of persons was not put at risk from work carried out as part of the conduct of its business or undertaking[345]. Forestry Tasmania, as the person with management or control of a workplace, had like duties to ensure, so far as was reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace were without risks to the health and safety of any person[346]. Forestry Tasmania, as the person with management or control of plant at a workplace, had like duties to ensure, so far as reasonably practicable, that the plant was without risks to the health and safety of any person[347]. Finally, Forestry Tasmania had like duties to take reasonable care that its acts or omissions did not adversely affect the health and safety of other persons[348] and a tortious duty to take reasonable care not to expose persons to risk of harm at its workplace.

367 Under s 21(3) of the Forest Management Act, a person "must not, without lawful excuse, undertake an activity or engage in conduct on a forest road or other land in permanent timber production zone land contrary to the directions of the Forest Manager expressed on a sign authorised by the Forest Manager". In other words, *for the purposes of discharging its responsibilities or in the interests of safety*, the Forest Manager has the ability, by direction, to control the activities and conduct of persons on forest roads and other land in permanent

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344 s 13(2) of the Forest Management Act.

345 s 19(2) of the Work Health and Safety Act.

346 s 20(2) of the Work Health and Safety Act.

347 s 21(2) of the Work Health and Safety Act.

348 s 29(b) of the Work Health and Safety Act.

timber production zone land. And if a person contravenes s 21(3), the penalty is a fine not exceeding 20 penalty units[349].

368 In addition, a police officer who reasonably considers that a person is offending against s 21(3) may direct that person to leave the forest road or other land in permanent timber production zone land and a person given such a direction by a police officer must comply with that direction[350]. If a person fails to comply with that direction, it is an offence and the police officer may arrest that person, without warrant[351].

369 Under s 22(3), the Forest Manager may also, through an authorised officer[352], *request* a person:

> "(a) not to enter permanent timber production zone land or a forest road; or
>
> (b) to leave permanent timber production zone land or a forest road; or
>
> (c) to cease to undertake an activity conducted, or to cease to engage in conduct, on that land or road –
>
> if the authorised officer is of the opinion that the entry or presence of that person, or the activity conducted, or the conduct engaged in, by that person on the land or road *is preventing, has prevented or is about to prevent the Forest Manager from effectively or efficiently performing its functions*." (emphasis added)

The Forest Manager's functions are primarily concerned with *forest operations*, which include work connected with harvesting, extracting or quarrying forest products as well as any related land clearing, land preparation, burning-off or access construction[353].

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349 In the period from 1 July 2016 to 30 June 2017, the value of a penalty unit was $157: see s 4A(4) of the *Penalty Units and Other Penalties Act* 1987 (Tas).

350 s 21(5) and (6) of the Forest Management Act.

351 s 21(6) and (7) of the Forest Management Act.

352 s 22(2) and (3) of the Forest Management Act.

353 See par (c) of the definition of "forest operations" in s 3 of the Forest Management Act.

370 In addition, under s 22(4), the Forest Manager may also, through an authorised officer, *prohibit* a person from entering, or remaining in, an area of permanent timber production zone land in certain circumstances, including *in the interests of a person's safety*[354]. If a person fails to comply with a request under s 22(3) or (4), they are guilty of an offence[355].

371 Further, s 22(6) provides that "[a] person must not, without lawful excuse, undertake an activity or engage in conduct on permanent timber production zone land or a forest road contrary to the directions of a police officer". A person who fails to comply with such directions is guilty of an offence and may be arrested without warrant[356]. Of course, the exercise of that power is not at large. The exercise is informed and constrained by the subject matter, scope and purpose of the Forest Management Act – an Act to provide for the *management* of permanent timber production zone land, which includes forest operations[357].

372 Under s 23(2), the Forest Manager may also close a forest road or a section of forest road either permanently or temporarily to all traffic, or to a class of traffic, if the Forest Manager considers that the closure is necessary or expedient for the purposes of discharging its responsibilities or in the interests of safety[358]. And if a forest road or a section of forest road has been closed, a person must not drive or use a vehicle on it, or be on or otherwise use it[359]. If a person contravenes those prohibitions, they are guilty of an offence[360].

373 The position that prevailed prior to the enactment of the Protesters Act may relevantly be summarised as one where Forestry Tasmania (as the Forest Manager), having possession of permanent timber production zone land, was required to carry out forest operations on that land consistently with the certified forest practices plan and, while doing so:

(1) was obliged to perform its functions and exercise its powers so as to allow access to that land for such purposes as were not

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354 s 22(4)(c) of the Forest Management Act.

355 s 22(5) of the Forest Management Act.

356 s 22(6) and (7) of the Forest Management Act.

357 See the long title and s 8 of the Forest Management Act.

358 s 23(2) and (3) of the Forest Management Act.

359 s 23(4) of the Forest Management Act.

360 s 23(4) of the Forest Management Act.

incompatible with the forest operations on that land specified in the certified forest practices plan[361];

(2) could erect a sign on or in respect of a forest road or on permanent timber production zone land which contained directions that could restrict a person's activities or conduct[362];

(3) could request a person *not to enter* the land or forest road, *to leave* the land or road, or *to cease to undertake an activity conducted, or to cease to engage in conduct*, on that land or road, *if* an authorised officer was of the opinion that the *entry or presence* of that person on the land (not just where the forest operations were being conducted) or road, or the *activity conducted* or the *conduct engaged in* by that person on the land or road, "is preventing, has prevented *or is about to prevent* the Forest Manager from *effectively or efficiently performing its functions*"[363] (emphasis added);

(4) could, through an authorised officer, prevent a person from *entering*, or *remaining* in, an *area* of permanent timber production zone land (not just where the forest operations were being conducted), "in the interests of a person's safety"[364]; and

(5) could close a forest road or any section of forest road permanently or temporarily to all traffic or to a class of traffic if the closure was considered necessary or expedient for the purposes of discharging the Forest Manager's responsibilities or in the interests of safety[365].

374 The third matter – the power to make requests under s 22(3) – is instructive. A person who failed to comply with a request was guilty of an offence. The power in s 22(3), the evident purpose of which was to allow the Forest Manager to "effectively [and] efficiently perform[] its functions", would extend to preventing conduct that "prevents, hinders or obstructs the carrying out of a business activity" on the land.

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361 See s 13(1) of the Forest Management Act.

362 s 21 of the Forest Management Act.

363 s 22(3) of the Forest Management Act.

364 s 22(4)(c) of the Forest Management Act.

365 s 23(2) of the Forest Management Act.

375 At the same time, under s 22(6), a police officer could give directions that a person must not undertake an activity or engage in conduct on permanent timber production zone land or a forest road. And if, contrary to such directions, a person had undertaken an activity or engaged in conduct without lawful excuse, the police officer could arrest that person for failing to comply with a direction[366].

376 Police officers had other powers. A police officer who reasonably considered that a person, without lawful excuse, was undertaking an activity or engaging in conduct contrary to the directions on a sign authorised by the Forest Manager could direct that person to leave the forest road or the land and, if that person failed to comply with that direction, could arrest that person[367].

(2) Criminal law

377 It is next necessary to notice a number of relevant and generally applicable provisions of the criminal law of Tasmania including, in particular, those provisions of the Criminal Code and the Police Offences Act[368] that create offences for:

(1) unlawfully destroying or injuring property[369];

(2) unlawful entry on any land, building, structure or premises[370];

(3) committing a common nuisance which endangers the lives, safety, or health of the public, or which occasions injury to the person of any individual[371];

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366 s 22(7) of the Forest Management Act.

367 s 21(5)-(7) of the Forest Management Act.

368 Nothing in the Police Offences Act affects or applies to any right, title or interest of the Crown, or in any way limits the Royal Prerogative, or prejudices or affects the operation of the Criminal Code: s 73 of the Police Offences Act.

369 s 273 of the Criminal Code; s 37(1) of the Police Offences Act. See also s 276 of the Criminal Code, regarding written threats.

370 s 14B of the Police Offences Act.

371 s 141(1) of the Criminal Code. A common nuisance includes an unlawful act "which endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects": s 140(1) of the Criminal Code.

(4) causing public annoyance in a public place, including: behaving in a violent, riotous, offensive, or indecent manner; disturbing the public peace; engaging in disorderly conduct; jostling, insulting, or annoying any person; and committing any nuisance[372];

(5) failing to comply with a direction given by a police officer to leave a public place and not return for a specified period of not less than four hours if the police officer believes on reasonable grounds that the person: has committed or is likely to commit an offence; or 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; or has committed or is likely to commit a breach of the peace[373]; and

(6) organising or conducting various activities, including a demonstration or a procession, on a public street without a permit[374].

Under the Police Offences Act, police officers are given powers of arrest without warrant where a person is found offending against various provisions[375], including those described in points (4) and (5) above.

378 Although that list is necessarily incomplete, these provisions and powers demonstrate that the implied freedom, as a restriction on legislative power, does not protect all forms of communication at all times and in all circumstances. They illustrate that the freedom is not an absolute freedom from all regulation or restraint. They illustrate that some regulation is often necessary and beneficial for an end that is not the maintenance or enhancement of the constitutionally prescribed system of representative and responsible government but, at the same time, is not incompatible with the maintenance of that system.

(3) The common law and the implied freedom

379 The legal effect and practical operation of the impugned provisions must also be assessed against the background provided by the established principles of the common law, especially the law relating to trespass and nuisance.

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372 s 13(1)(a)-(e) of the Police Offences Act.

373 s 15B of the Police Offences Act.

374 s 49AB of the Police Offences Act.

375 s 55 of the Police Offences Act.

380 The law of trespass and nuisance must exist and develop in accordance with the implied freedom of political communication[376] because the common law, as an organic, developing body of substantive law, must be consistent with, and develop consistently with, the Constitution[377]. No party or intervener suggested that the law of trespass and nuisance is inconsistent with the implied freedom. More particularly, the implied freedom does not permit, and is not to be understood as permitting, persons to trespass upon the land of others only because the person entering the land wishes to make some political point or statement. The rights of the public to enter upon and use Crown land will inevitably turn on the proper construction of the particular statutory regime for Crown land in each State and Territory.

381 Here, the coupe in the Lapoinya Forest was and remains Crown land. That Crown land was not reserved for any public purpose. It was permanent timber production zone land within the meaning of the Forest Management Act.

382 What rights of action would Forestry Tasmania have at common law?

383 In an action for trespass to land, there must be direct interference, either intentional or negligent, with possession of the land without the plaintiff's consent or without other lawful authority[378]. The gist of the action is interference with possession. The right of possession of a freeholder (or a lessee) is sufficient, but is not necessary, to found an action in trespass[379]. Actual possession of land (as distinct from mere occupation in the sense of physical presence or use and enjoyment[380]) constitutes prima facie evidence of seisin in fee and is therefore sufficient to found a right of action in trespass against any person who is unable to show a better title: for instance, a defendant having no right of possession of their own.

384 Under the Forest Management Act, Forestry Tasmania had control over entry to the coupe sufficient for it to be in possession of the coupe and,

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376 *Monis* (2013) 249 CLR 92 at 141 [103].

377 See *Native Title Act Case* (1995) 183 CLR 373 at 485-488.

378 *Halliday v Nevill* (1984) 155 CLR 1 at 10-11; [1984] HCA 80; *Plenty v Dillon* (1991) 171 CLR 635 at 638-639, 647-649; [1991] HCA 5; *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 339 [23].

379 *Wheeler v Baldwin* (1934) 52 CLR 609 at 632; [1934] HCA 58; *Newington v Windeyer* (1985) 3 NSWLR 555 at 563.

380 See *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534 at 562 [102], 563 [106]. cf *Manchester Airport Plc v Dutton* [2000] QB 133.

in particular, the business premises on which it was conducting forest operations. It would have a right of action in trespass against any person whose conduct unlawfully interfered with that possession. That would capture conduct on those business premises that prevents, hinders or obstructs business activity or damages business premises.

385 An action for private nuisance may give a remedy to an occupier of land for certain interferences with the occupier's use or enjoyment of the land. The plaintiff must have a right over or an interest in the land that has been affected by the nuisance of which complaint is made[381]. The plaintiff must be more than a mere licensee[382] or a person merely present on the land[383]. For example, the plaintiff may have a right over the land as "owner or reversioner, or be in exclusive possession or occupation of [the land] as tenant or under a licence to occupy"[384]. There must be a material interference, beyond what is reasonable in the circumstances, with the plaintiff's use or enjoyment of the land or of the plaintiff's interest in the land[385]. The *effect* of the interference on that interest in land then provides a measure of damages regardless of whether the nuisance was by encroachment, direct physical injury or interference with the quiet enjoyment of the land[386]. Again, in relation to its use and enjoyment of land on which it conducts forest operations, Forestry Tasmania would have a right of action in nuisance to deal with persons whose conduct on business premises prevents, hinders or obstructs – interferes with – that business activity.

386 A forest road *outside* the permanent timber production zone land may not attract the same rights of possession. On the other hand, depending on the

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381 *Elston v Dore* (1982) 149 CLR 480 at 488; [1982] HCA 71; *Hunter v Canary Wharf Ltd* [1997] AC 655 at 724.

382 *Hunter* [1997] AC 655 at 692, 694-695.

383 *Hunter* [1997] AC 655 at 724.

384 *Hunter* [1997] AC 655 at 724; see also at 688: "an action of private nuisance will usually be brought by the person in actual possession of the land affected, either as the freeholder or tenant of the land in question, or even as a licensee with exclusive possession of the land".

385 See *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 504, 515-516, 524; [1937] HCA 45; *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903; *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760 at 768; *Elston* (1982) 149 CLR 480 at 487-488.

386 *Hunter* [1997] AC 655 at 724-725.

nature, place and effect of a person's conduct within and outside the permanent timber production zone land, an action in nuisance may be available. At common law, picketing is not necessarily a nuisance and unlawful unless it becomes obstruction and besetting[387]. So, for example, picketing outside a person's business premises which disrupts the operation of or supplies to that business, in order to compel the business operator to do or not to do what is lawful for that business operator not to do or to do respectively, would support an action for nuisance at common law. Again, in relation to its use and enjoyment of land on which it conducts forest operations, Forestry Tasmania would have a right of action in nuisance at common law to deal with persons whose picketing outside its business premises disrupted the operation of or supplies to those business premises in order to compel Forestry Tasmania not to do what is lawful – conduct forest operations.

387 Because Forestry Tasmania could bring an action for trespass or nuisance, it could sue for damages and, importantly, could seek an injunction to restrain threatened trespass or nuisance. If it obtained an order, breach of that order would attract serious penal consequences including, in an appropriate case, imprisonment.

388 In that context, it is useful to refer to *Grocon v Construction, Forestry, Mining and Energy Union*, a decision of the Supreme Court of Victoria[388]. Three companies, part of a larger group of companies engaged in the business of commercial building and construction, obtained temporary restraining orders against a trade union. The orders restrained the union from "preventing, hindering or interfering with free access to, and free egress from", certain of the group's building sites by any person or vehicle, and from "causing, inducing, procuring or inciting any person to do or attempt to do" any of those prohibited activities[389]. The underlying cause of action was one in nuisance. Charges of contempt of court were then brought against the union for allegedly breaching one or other of those orders on five separate days.

389 The Protesters Act is primarily concerned with conduct on business premises or a business access area in relation to business premises. The facts and circumstances considered in *Grocon* are instructive. The authorities relied upon by the primary judge concerned public nuisance, which in Tasmania is an offence under s 141 of the Criminal Code. It was observed in *Grocon* that an obstruction can be physical or can come in the form of intimidation and need not be total; and for something to be an obstruction, it would generally not need to be "tested"

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387 See *Sid Ross Agency* [1971] 1 NSWLR 760 at 767.

388 (2013) 234 IR 59.

389 *Grocon* (2013) 234 IR 59 at 62 [2].

to see if it could be safely overcome[390]. It was not doubted that the blocking by a third party of even one of multiple means of access to a building site could amount to preventing "free" access, especially when the entry point blocked was a normal entry point to the site[391], and there was no need for an attempt or a request to gain access to a site in order to establish an obstruction[392]. Indeed, as the primary judge observed, "free" access may be prevented, hindered or interfered with if access is made more difficult by an obstruction, even if persons might still be able to access the site[393].

390 Those observations provide a useful reminder of three points. First, the implied freedom cannot be, and is not, an absolute freedom from all regulation or restraint. Second, conduct comprising a protest is not uniform; each case requires a fact-specific inquiry.

391 Third, the observations also serve to reveal a deeper and more important point. Breach of the civil law may often, even usually, be remedied by an award of damages. But if an injunction to restrain a threatened breach of the civil law is granted, penal consequences will follow for contravention of that restraint. Observing that the impugned provisions engage penal consequences is, of course, important and relevant to the consideration of the implied freedom. But where, as here, the conduct that is penalised by the impugned provisions is conduct otherwise contrary to law and may be enjoined by court order, the impugned provisions (other than s 8(1)(b)), in practical effect, do no more than provide that a particular form of conduct is generally prohibited on pain of penalty. And no party or intervener submitted that an injunction could not or should not be granted to prevent trespass or nuisance simply because the trespasser or person committing a nuisance sought to make a political point by acting in breach of the rights of another, whether that other is a private individual or, as here, a Government Business Enterprise.

392 Hence, to ask whether a person has a right to be in a particular place at a particular point in time is to ask the wrong question. Any question about the lawfulness of a person's *conduct* requires consideration of the legal context in which that conduct takes place. The legal context will necessarily include the existing legal framework governing society.

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390 (2013) 234 IR 59 at 100-101 [332] citing *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250 at 281-282 [121]-[124] and *Haywood v Mumford* (1908) 7 CLR 133 at 138; [1908] HCA 62.

391 *Grocon* (2013) 234 IR 59 at 102 [335].

392 *Grocon* (2013) 234 IR 59 at 100 [330].

393 *Grocon* (2013) 234 IR 59 at 102 [336].

393 Any challenge to the validity of legislation (including legislation that is targeted to a group, as the impugned provisions are) directs attention to what that law does over and above the existing legal framework. There may be cases where legislation or a set of provisions alters that framework in ways that are, or to an extent that is, not compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. That is not this case.

(4) Broader operation of the Protesters Act

394 As seen earlier, "business premises" are not limited to or by reference to specific industries. For example, "premises used as a shop, market or warehouse" are business premises[394], as are "premises used for manufacturing, building, or construction, for the purposes of a business activity"[395], "premises used for agriculture [or] horticulture … or as an abattoir"[396] and premises on which mining within the meaning of the *Mineral Resources Development Act* 1995 (Tas) is being or is authorised to be carried out under an Act[397]. In relation to each of those business premises (and the business activity conducted on them), the Protesters Act will inevitably sit alongside, and operate in conjunction with, a different legal framework which cannot be ignored or dismissed as irrelevant. For those reasons, it is neither necessary nor appropriate to consider the constitutional validity of the Protesters Act other than in relation to forestry land.

Constitutional validity of the impugned provisions

First question

395 The first question asks: does the law effectively burden the freedom of communication about government or political matters either in its terms, operation or effect? A law will effectively burden the freedom of political communication if "the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications"[398].

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394 s 5(1)(e) of the Protesters Act.

395 s 5(1)(d) of the Protesters Act.

396 s 5(1)(c) of the Protesters Act.

397 s 5(1)(a) of the Protesters Act.

398 *Monis* (2013) 249 CLR 92 at 142 [108]; *Unions NSW* (2013) 252 CLR 530 at 574 [119]; *McCloy* (2015) 257 CLR 178 at 230-231 [126].

396 At the hearing of the special case, Tasmania conceded that the legal effect and practical operation[399] of the impugned provisions of the Protesters Act were to burden the implied freedom of political communication. That concession was properly made: in their operation in relation to forestry land, the impugned provisions burden the implied freedom and the first question should be answered "yes". Just how and to what extent the impugned provisions burden the implied freedom is conveniently identified and explained in the next section of these reasons.

Second question

397 In addressing the second question – whether the impugned law is reasonably appropriate and adapted to serve a legitimate end in a manner which is not incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government[400] – the nature and the extent of the burden are relevant. To the extent that the impugned law is congruent with the existing law, it is any incremental burden that needs justification[401].

398 Here, as the earlier analysis of the legal effect and practical operation of the impugned provisions demonstrates, the impugned provisions prescribe norms or punish classes of conduct which are addressed by the wider legal framework.

399 That proposition is made good in the following ways. Sections 6(1) and 6(2) – dealing with entry into business premises, and acts done on business premises or on a business access area in relation to business premises, where the conduct prevents, hinders or obstructs the carrying out of a business activity on the business premises by a business occupier in relation to those premises – identify conduct that was, and remains, unlawful and contrary to provisions such as s 14B of the Police Offences Act and the common law.

400 Section 6(3) – dealing with an act that prevents, hinders or obstructs access, by a business occupier in relation to business premises, to an entrance to or an exit from the business premises or a business access area in relation to the

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399 *Monis* (2013) 249 CLR 92 at 129 [63]; see also at 141 [105]. See also *Unions NSW* (2013) 252 CLR 530 at 553 [35].

400 *Lange* (1997) 189 CLR 520 at 567-568; *Coleman* (2004) 220 CLR 1 at 50 [93], 51 [95], 78 [198], 82 [211].

401 *Levy* (1997) 189 CLR 579 at 625-626; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 224 [108], 246 [184], 298 [337], 303-304 [354]; [2004] HCA 41.

business premises – identifies conduct that was, and remains, unlawful and contrary to the common law.

401 Sections 7(1) and 7(2) – concerning damage to business premises or a business-related object – penalise conduct that was, and remains, unlawful and contrary to s 273 of the Criminal Code, s 37 of the Police Offences Act and the common law. Sections 7(3) and 7(4) – concerning threats of damage in relation to business premises – penalise conduct that was, and remains, unlawful and contrary to provisions such as ss 241 (blackmail) and 276 (written threats to property) of the Criminal Code.

402 It should be kept in mind that the prohibitions in s 6 are not themselves criminal offences. They merely enliven other provisions of the Protesters Act. For instance, a person may simply be given a direction under s 11, as the plaintiffs were. It is only a subsequent failure to comply with that direction that amounts to a criminal offence under s 8(1). And it is a defence to an offence against that provision if the defendant proves that they had a lawful excuse for committing the offence. That reflects the fact that the prohibitions in s 6 are capable of capturing a very wide range of conduct. In contrast, the prohibitions in s 7 are criminal offences, reflecting their more serious nature. And ss 7(1) and 7(2) both have a lawful excuse defence[402].

403 Sections 11(1) and 11(2) – which provide that a police officer may direct a person to leave business premises, or a business access area in relation to business premises, without delay if the police officer reasonably believes that the person has committed, is committing, or is about to commit, an offence under s 7 of the Act or a contravention of s 6(1), (2) or (3) on or in relation to the business premises or a business access area in relation to the business premises – prevent, and enforce prohibitions on, conduct that is unlawful under ss 6 and 7.

404 Similarly, ss 11(7) and 11(8) – which provide that a direction under s 11 may be issued to a group of persons – prevent, and enforce prohibitions on, conduct that is unlawful under ss 6 and 7. Although the sub-sections allow a direction to be issued to a group, such a direction would only be valid if the condition in s 11(1) or (2) was met – that is, if a police officer has a reasonable belief that every member of the group has committed, is committing, or is about to commit, an offence under s 7 of the Protesters Act or a contravention of s 6(1), (2) or (3). So much is clear from the text and structure of s 11. It is sub-ss (1) and (2) which empower a police officer to issue a direction, provide for the content of the direction and identify the pre-conditions to its lawful issue. Sub-sections (7) and (8) confer no independent power to issue a direction: they do no more than clarify as a practical matter that, where a police officer

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402 s 7(5) of the Protesters Act.

forms the requisite reasonable belief about a group of persons, it is not necessary for the officer specifically to issue a direction to each person.

405 At first blush, these police powers under s 11 may appear to confer an unfettered discretion. They do not. The exercise of the discretion is necessarily limited by the subject matter, scope and purpose of the Protesters Act[403]. As the section itself provides, the giving of a direction under s 11(1) or (2) is conditioned on the police officer holding a reasonable belief that a person has committed, is committing, or is about to commit, an offence under s 7 of the Protesters Act or a contravention of s 6(1), (2) or (3). If the officer holds that reasonable belief, the officer can issue a direction with or without the added requirement that the person not, "in the period of 3 months after the date on which the direction is issued", commit an offence against a provision of the Act or a contravention of s 6(1), (2) or (3)[404]. In practical terms, the discretion of the officer to include a requirement that the person not commit an offence against a provision of the Act or contravene s 6(1), (2) or (3) is no more than a discretion to direct that, in the next three months, the person must not do what the Protesters Act already says the person must not do.

406 If an officer does not hold a reasonable belief that a person has committed, is committing, or is about to commit, an offence under s 7 of the Protesters Act or a contravention of s 6(1), (2) or (3), then the officer cannot issue the direction (and therefore cannot impose the additional three month requirement). And if the concern is that the discretion is exercised (or capable of being exercised) by an officer on the basis of an erroneous belief, then the question on review, in each case, would be whether objective circumstances exist sufficient to induce that state of mind in a reasonable person[405]. If such objective circumstances do not exist, then the direction would be held to be invalid.

407 The same analysis applies to s 13(3) – the power of a police officer to remove a person from business premises or a business access area – which is conditioned on the police officer forming a reasonable belief that the person is committing, or has committed, an offence against a provision of the Protesters

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403 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348-349 [23], 363-364 [67], 370-371 [90]; [2013] HCA 18. See also *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473; [1963] HCA 54.

404 Except in the case of a direction made under s 11(4), which is not presently relevant.

405 *George v Rockett* (1990) 170 CLR 104 at 112, 116; *Prior* (2017) 91 ALJR 441 at 445 [4], 449-450 [24]-[27], 457 [73], 460-461 [98]-[100]; 343 ALR 1 at 5, 10-11, 21, 26.

Act or a contravention of s 6(1), (2) or (3) on or in relation to the business premises or the business access area.

408 As was pointed out at the start of these reasons, the validity of the *law* must be tested against the legal effect and practical operation of the *law*[406]. It is not to be tested against the possibility that the law will be applied unlawfully, or against the possibility that persons may choose, for whatever reason, to give the law some effect or operation wider than the law permits. For that reason, it is not relevant to observe that the geographical bounds of the area within which the provisions operate may be difficult to determine or that there may be cases where a power is said to be exercised unlawfully. The provisions can lawfully apply only where all of the relevant pre-conditions are met. For example, as just seen, as a matter of statutory construction, the offences in ss 6(4) and 8(1) can only be committed *after* a police officer has given a valid direction under s 11. And an officer may only give such a direction to a person who is on business premises[407], or in a business access area[408]. No valid direction can be given to a person who is not on, or in, one of those areas. Further, a police officer may only give such a direction if they have reasonable grounds to believe[409] that a person has committed, is committing, or is about to commit, an offence against a provision of the Protesters Act, or a contravention of s 6(1), (2) or (3) of the Protesters Act, on or in relation to the business premises or a business access area in relation to the business premises. Identification of the bounds of the area within which the provisions operate involves questions about construction and application, as was made clear by the plurality in *Wotton*[410].

409 It may be accepted that it is possible for a police officer to form a reasonable but factually wrong belief about the matters identified in ss 11 and 13(3). For example, the police officer might issue a direction under s 11 on the basis of a reasonable but mistaken belief that a person has committed a contravention of s 6(1). The direction would be lawful even though the person had not in fact contravened any prohibition in the Protesters Act. But two points must then be made. First, the reasonableness of a police officer's belief is

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406 cf *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 607, 622, 624; [1975] HCA 45.

407 s 11(1) of the Protesters Act.

408 s 11(2) of the Protesters Act.

409 See *George v Rockett* (1990) 170 CLR 104 at 112-113; *Gypsy Jokers* (2008) 234 CLR 532 at 557-558 [28]; *Prior* (2017) 91 ALJR 441 at 445 [4], 449 [24], 457 [73], 461 [99]-[100]; 343 ALR 1 at 5, 10, 21, 26.

410 (2012) 246 CLR 1 at 14 [22].

necessarily determined by reference to factual circumstances. That is, the factual circumstances, viewed objectively, must permit the formation of the belief. The requirement to form a reasonable belief does not grant to a police officer sweeping latitude to form factually wrong beliefs. Circumstances which are equivocal do not and will not permit the formation of the requisite belief.

410 Second, as already explained, any burden effected by ss 11 and 13(3) must be assessed against the existing legal framework. And the existing legal framework includes provisions which similarly condition the exercise of powers on the formation of a certain state of mind. For example, the power of an authorised officer to make a request of a person under s 22(3) of the Forest Management Act is conditioned on the "opinion" of the authorised officer about the effect or potential effect of the person's conduct on the ability of the Forest Manager to effectively or efficiently perform its functions. Similarly, under s 15B of the Police Offences Act, a police officer may direct a person to leave a public place if the officer "believes on reasonable grounds" that the person has engaged, or is likely to engage, in certain conduct.

411 The overlap between the conduct prohibited by the impugned provisions and the conduct prohibited by the existing wider legal framework may not be perfect. It is possible that there may be some marginal differences between what the impugned provisions prohibit and what was already prohibited under the existing wider legal framework (although none were identified in the course of argument). But the overlap not only exists; it is substantial and cannot be ignored. And because there is such an overlap, the incremental burden may be described as making what was otherwise unlawful the subject of criminal sanction or subject to increased penalties. If there are differences in the scope of the prohibitions, those may also be said to form part of the incremental burden, alongside the additional sanctions and increased penalties for existing prohibitions. What is presently relevant is that the incremental burden is small and it is the identification of that incremental burden that "serves to focus and to calibrate the inquiry" required in assessing the constitutional validity of a law[411].

Second question, first condition – legitimate end of the impugned law?

412 What then is the object or purpose of the Protesters Act? The Protesters Act (including the impugned provisions) creates a statutory scheme that may operate to prevent or terminate conduct that involves the presence[412] of protesters on business premises or on a business access area and that has as its aim the promotion of an opinion or belief in respect of a political, environmental, social, cultural or economic issue, *but only* where:

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411 See *Tajjour* (2014) 254 CLR 508 at 579 [147].

412 Albeit presence is not always relevant to s 7 of the Protesters Act: see s 7(3).

(1) a police officer has reasonable grounds to believe, among other things, that a person is engaging in a "protest activity" as that phrase is defined in the Protesters Act; and

(2) the conduct would prevent, hinder or obstruct the carrying out of a business activity or access to business premises, or cause damage to business premises or a business-related object.

413 The object of the Protesters Act, in relation to forestry land, is to protect the productivity, property and personnel of forest operations; in particular, to protect forest operations from activity that prevents, hinders or obstructs business activity or causes damage on business premises or in areas necessary to access business premises. That object is no more incompatible with the constitutionally prescribed system of representative and responsible government than the pre-existing wider legal framework alongside which the Protesters Act, in its operation in relation to forestry land, sits, and within which it operates.

414 The plaintiffs' contention that the "purpose and practical operation of s 6 and associated provisions … is to prevent onsite protests that … relate to 'political, environmental, social, cultural or economic issues', which are the key issues to which electors will have regard when choosing their representatives", should be rejected. It fails to consider both the text of and the context for the impugned provisions[413]. It identifies the object or purpose of the impugned provisions too narrowly. It incorrectly focuses on one aspect of the impugned provisions and ignores that the conduct sought to be addressed must have certain consequences for the carrying out of a business activity or access to business premises. These matters are central to identification of the object of the impugned provisions. And if the object is identified too narrowly, there will be flow-on consequences for "the scope, utility and transparency" of the subsequent reasonably appropriate and adapted analysis[414].

Second question, second condition – is the law reasonably appropriate and adapted to serve that legitimate end?

(a) Provisions are reasonably appropriate and adapted

415 Conduct involving the physical presence of protesters on business premises can constitute political communication[415]. But a law that prohibits

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413 See *McCloy* (2015) 257 CLR 178 at 284 [320]; see also at 212-213 [67], 232 [132]; *Unions NSW* (2013) 252 CLR 530 at 557 [50].

414 Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 592.

415 *Levy* (1997) 189 CLR 579 at 594-595, 613, 622-623.

conduct for a legitimate purpose other than the suppression of political communication is unaffected by the implied freedom "if the prohibition is [reasonably] appropriate and adapted to the fulfilment of that purpose"[416].

416 In particular, where conduct has effects beyond the communication of ideas or information, there are likely to be legitimate reasons to regulate that conduct. The fact that a law may prevent protesting in a manner that would achieve maximum publicity, and to that extent may curtail the implied freedom to a degree, does not itself provide an answer to the constitutional question of validity[417].

417 So, are the impugned provisions reasonably appropriate and adapted to serve the legitimate end?

418 Here, the prohibition of "protest activity" was not the object of the Protesters Act. The Act's object was to protect, relevantly, forest operations from activity that prevents, hinders or obstructs business activity or causes damage on business premises or in areas necessary to access business premises. The Protesters Act adopted means that were directed at what the legislature identified as the immediate or likely causes of hindrance or obstruction.

419 As the earlier analysis demonstrates, each impugned provision (except s 8(1)(b)) is directed to regulating effects beyond the communication of ideas or information[418]. The regulation of those effects is limited both in the location of its operation (business premises and business access areas) and in the conduct that it seeks to proscribe (conduct that "prevents, hinders or obstructs" the carrying out of business activity or access to business premises, or that causes damage to business premises or business-related objects). And, of course, it is not the impugned provisions but any incremental burden imposed by those provisions which must be justified.

420 To the extent that the incremental burden may be said to consist of the marginal extension of existing prohibitions, the impugned provisions (other than s 8(1)(b)) do no more than regulate the time, place and manner of a particular and narrowly confined form of political communication – a form of protest that is disruptive or causes damage. It is difficult to conceive of any form of political communication that is disruptive or causes damage, to the extent covered by the impugned provisions, but is nonetheless lawful.

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416 *Levy* (1997) 189 CLR 579 at 595.

417 See *Levy* (1997) 189 CLR 579 at 609.

418 See [326]-[356] above.

421 To the extent that the incremental burden may be said to consist of making what was otherwise unlawful the subject of criminal sanction or subject to increased penalties, and to be discriminatory because those criminal consequences or increased penalties apply only to protesters and not to others who undertake similar unlawful conduct, that discriminatory operation is not decisive.

422 The fact that the impugned provisions apply only to protesters and not to persons generally does not mean that the law is not reasonably appropriate and adapted. "The Parliament is not relegated by the implied freedom to resolving all problems" relating to a particular class of activity that might disrupt business "if it resolves any"[419]. It is open to the Parliament to "respond to felt necessities" and to target only some activities[420] – here, protest activity where the conduct has significant adverse consequences for the carrying out of a business activity or access to business premises.

423 Indeed, the plaintiffs' contention that the impugned provisions (especially Pt 4 of the Protesters Act) discriminate against protesters depends upon saying that the legislature has no power to target and deter particular kinds of unlawful conduct by prescribing criminal sanctions and punishment (or at least that such targeting is necessarily vulnerable to challenge). That premise is overbroad.

424 The law marks the boundary of what is, and what is not, permitted conduct. *Lange* itself shows that the demands of the implied freedom may modify the civil law: in that case, by modifying the defence of qualified privilege. In this case, no party or intervener suggested that the implied freedom requires some modification or qualification to the civil law of trespass or nuisance or the existing criminal law of Tasmania. Here, the legislative intervention is primarily directed to creating and enforcing rules of conduct that substantially overlap with existing laws that prohibit the same conduct. As said earlier, there is little or no change in what people may do. And the legislature has power to deter particular kinds of unlawful conduct by prescribing sanctions and penalties. Just because others engaging in similar unlawful conduct (but not protesting) are not subject to the same sanctions does not mean that this form of unlawful conduct cannot and should not attract the sanctions and penalties in Pt 4 of the Protesters Act.

425 Subject to s 8(1)(b), which is addressed later, the means adopted by the impugned provisions are both explained and justified by the Protesters Act's reasonable pursuit of a legitimate end – to protect the productivity, property and personnel of businesses from conduct that prevents, hinders or obstructs business

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419 *McCloy* (2015) 257 CLR 178 at 251 [197].

420 *McCloy* (2015) 257 CLR 178 at 251 [197].

activity or causes damage on business premises or in areas necessary to access business premises. The means adopted by the Protesters Act are capable of advancing that purpose: ss 6, 7, 8 (except for s 8(1)(b)) and 11 are directed to conduct of precisely that character. The other impugned provisions then go on to provide a means by which that conduct can be prevented or terminated. Each provision is rationally connected to that end: each advances the legitimate end of protecting the productivity, property and personnel of businesses from conduct that adversely affects business activity.

426 Once it is accepted that any burden imposed by the impugned provisions is minimal; that those provisions do no more than regulate the time, place and manner of a particular kind of political communication (specifically, a form of protest that is disruptive or causes damage); that those provisions seek to serve a legitimate end; and that those provisions are rationally connected to that end, it is difficult to see how the provisions are not reasonably appropriate and adapted to serving that end in a manner which is compatible with the system of government established by the Constitution.

(b) "Necessity"?

427 In the circumstances of this matter, it is not necessary (or helpful) to consider whether there are "obvious and compelling" and "reasonably practicable" alternatives to the Protesters Act. Indeed, there is a paradox in the plaintiffs' contention that the Forest Management Act – which contains wider, more general, less targeted prohibitions that, in some respects, have a greater potential to burden the implied freedom – is an alternative. The paradox lies in the suggestion that prohibitions wider than the impugned provisions are less constitutionally suspect. And the notion of necessity as a tool, or an aspect of a tool, of analysis is often imperfect. It cannot be, and is not, decisive of invalidity in every case in which it might be used[421].

(c) "Adequate in its balance"?

428 Nor is it necessary or appropriate to consider whether the impugned provisions are "adequate" in their "balance". It is necessary to say something further about this issue.

429 The plurality in *McCloy* said that "proportionality testing" in relation to an impugned law required asking three questions, the third being whether the law is "adequate in its balance"[422]. This was described as "a criterion requiring a value

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421 See *Tajjour* (2014) 254 CLR 508 at 581 [152]; *McCloy* (2015) 257 CLR 178 at 233 [135], 259 [222], 285 [328]; *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at 1080 [305]; 334 ALR 369 at 437; [2016] HCA 36.

422 (2015) 257 CLR 178 at 194-195 [2(B)(3)]; see also at 217 [79].

judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom"[423]. It was said that, if the law does not satisfy this criterion, it "will exceed the implied limitation on legislative power"[424].

430 Asking whether a law is "adequate in its balance" as part of an inquiry into its proportionality has always been controversial[425]. Professor Barak has suggested that "[t]he basic rule of balancing is too abstract"[426]. Sir Anthony Mason has described structured proportionality, and the balancing that it entails, as "a rather cumbersome edifice which at the end of the day, at the last step, delivers nothing more than a value judgment"[427]. There is also controversy about the role, if any, that the concept of balancing has to play in the specific context of the implied freedom of political communication. On one view, the cases leading up to *McCloy* "seem to illustrate a balancing of the freedom with other social goals"[428]. On another view, "no question of ad hoc balancing is involved" when applying the *Lange* questions[429].

431 The controversy about the relevance of balancing to the implied freedom can be explained, at least in part, by different understandings of the concept of balancing. But this case does not require delving into those different

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423 *McCloy* (2015) 257 CLR 178 at 195 [2(B)(3)]; see also at 219-220 [89].

424 *McCloy* (2015) 257 CLR 178 at 195 [2(B)(3)].

425 *McCloy* (2015) 257 CLR 178 at 236 [146].

426 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 542 quoted in *McCloy* (2015) 257 CLR 178 at 237 [146]. See also Tsakyrakis, "Proportionality: An assault on human rights?", (2009) 7 *International Journal of Constitutional Law* 468; Webber, *The Negotiable Constitution: On the Limitation of Rights*, (2009) at 87-115.

427 Mason, "The use of proportionality in Australian constitutional law", (2016) 27 *Public Law Review* 109 at 121.

428 Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 588. See also Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 681-682.

429 *Coleman* (2004) 220 CLR 1 at 48 [88]. See also *McCloy* (2015) 257 CLR 178 at 287-288 [336].

understandings[430]. The conclusion that the impugned provisions (save for one exception) are reasonably appropriate and adapted to serve a legitimate end can be, and is, reached without recourse to an assessment of their "balance". However, it is necessary to point to two fundamental difficulties with balancing as described in *McCloy*.

432 First, it remains unclear just how the value judgments that are a part of the balancing task described in *McCloy* are to be made. It is said that a balance must be struck between "the importance of the purpose and the extent of the restriction on the freedom"[431]. It is said that courts are permitted, and required, to "discern public benefits in legislation which has been passed"[432]. But what are the criteria for judging the importance of the legislative purpose? Without any principled answer to that question – and none is apparent – it is difficult to see how a court can undertake an objective analysis[433].

433 Second, the adoption of balancing does not account for the fact that the concept "has been developed and applied in a significantly different constitutional context"[434]. Unlike other countries in which "balancing" has been used, Australia does not have a Bill of Rights. The implied freedom of political communication is not a personal right[435]. Those very basic propositions highlight the importance of adopting criteria that are "sufficiently focused adequately to reflect the reasons for the implication of the constitutional freedom"[436]. If the criteria are not closely anchored to the rationale for the implied freedom, there is

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430 See also *Tajjour* (2014) 254 CLR 508 at 575 [133].

431 *McCloy* (2015) 257 CLR 178 at 219 [89].

432 *McCloy* (2015) 257 CLR 178 at 220 [90].

433 See Mason, "The use of proportionality in Australian constitutional law", (2016) 27 *Public Law Review* 109 at 121. See also Webber, *The Negotiable Constitution: On the Limitation of Rights*, (2009) at 94.

434 *Mulholland* (2004) 220 CLR 181 at 199 [38]. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178-179 [17]; [2007] HCA 43; *McCloy* (2015) 257 CLR 178 at 234 [139], 288-289 [339]; *Murphy* (2016) 90 ALJR 1027 at 1079 [296]; 334 ALR 369 at 435.

435 *Unions NSW* (2013) 252 CLR 530 at 554 [36]; *McCloy* (2015) 257 CLR 178 at 202-203 [29]-[30], 228-229 [119]-[120], 258 [219], 283 [317].

436 *McCloy* (2015) 257 CLR 178 at 236 [145]; see also at 238 [150].

a risk that "[t]he rules themselves [will] take over, ceasing to be a means to an end and becoming the end itself"[437].

434 The implied freedom exists because it is an indispensable incident of the system of representative and responsible government for which the Constitution provides[438]. The judicial role extends to ensuring that this system of government is not undermined by laws burdening political communication. But the judiciary faces a conundrum: that very role places a court in a position where it must exercise judgment about laws enacted by members of Parliament, who exercise legislative power as "representatives of the people"[439] and who are "accountable to the people for what they do"[440]. Unless a court exercises that judgment with a proper appreciation of the rationale for the implied freedom, it risks overstepping the boundaries of its supervisory role and, in doing so, undermining the very system of representative government which it is charged with protecting[441].

435 It was said in *McCloy* that "[t]he fact that a value judgment is involved [at the balancing stage] does not entitle the courts to substitute their own assessment for that of the legislative decision-maker"[442]. But a heightened danger of such encroachment is the precise consequence of an approach which requires the making of value judgments unguided by any clear principle.

436 In short, "[t]he balancing of the protection of other interests against the freedom to discuss governments and political matters is, under our Constitution, a matter for the Parliament to *determine* and for the Courts to *supervise*"[443] (emphasis added). However, the approach to balancing described in *McCloy* invites a court "to sit in judgment on the legislative decision, without having

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437 Twomey, "Proportionality and the Constitution", speech delivered at the ALRC Freedoms Symposium, 8 October 2015. See also *Murphy* (2016) 90 ALJR 1027 at 1050 [101]; 334 ALR 369 at 396.

438 *ACTV* (1992) 177 CLR 106 at 138; *Lange* (1997) 189 CLR 520 at 559.

439 *ACTV* (1992) 177 CLR 106 at 138.

440 *ACTV* (1992) 177 CLR 106 at 138.

441 See *McCloy* (2015) 257 CLR 178 at 238 [150]. See also *Unions NSW* (2013) 252 CLR 530 at 548 [17], 578 [135].

442 (2015) 257 CLR 178 at 219 [89].

443 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50; [1992] HCA 46. See also *Mulholland* (2004) 220 CLR 181 at 197 [32]; *McCloy* (2015) 257 CLR 178 at 229-230 [122]-[123].

access to all the political considerations that played a part in the making of that decision, thereby giving a new and unacceptable dimension to the relationship between the Court and the legislature"[444]. Courts are ill-equipped to make judgments of that kind, not least because judges have different "skills and professional habits" from members of the legislative and executive branches[445].

437 Moreover, as the plurality in *McCloy* recognised, the balancing stage "is regarded by the courts of some legal systems as most important"[446]. It has been suggested that, in Germany, it is this stage that has become "the most decisive"[447]. If the same pattern were to emerge in the application of the *McCloy* approach in Australia, it would mark a fundamental shift in the nature of the inquiry as to whether a law infringes the implied freedom of political communication.

438 It may be that, as the Attorney-General of the Commonwealth suggested, "balancing" of some description is relevant where a law has as its object the promotion, protection or enhancement of the constitutionally prescribed system of government. In those circumstances, a court will be directly concerned with balancing positive and negative effects on the system. It will not be called upon to examine the "importance" of a distinct legislative object. But this is not such a case.

(d) Conclusion

439 Subject to the exception identified earlier – being s 8(1)(b) – the impugned provisions are not beyond Tasmania's legislative power in their legal effect and practical operation in relation to forestry land. Each permissibly burdens the implied freedom and is valid.

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444 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473; [1990] HCA 1. See also *Leask v The Commonwealth* (1996) 187 CLR 579 at 615-616; [1996] HCA 29.

445 See *Murphy* (2016) 90 ALJR 1027 at 1080 [303]; 334 ALR 369 at 436-437 quoting *R v Davison* (1954) 90 CLR 353 at 381-382; [1954] HCA 46. See also Lord Sumption, "The Limits of Law", in Barber, Ekins and Yowell (eds), *Lord Sumption and the Limits of the Law*, (2016) 15 at 26.

446 (2015) 257 CLR 178 at 219 [87]; see also at 218 [84]-[86].

447 Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", (2007) 57 *University of Toronto Law Journal* 383 at 384; see also at 389, 393. See also Tsakyrakis, "Proportionality: An assault on human rights?", (2009) 7 *International Journal of Constitutional Law* 468 at 474.

Invalid provision of the Protesters Act – Question 2

440 Section 8(1)(b) is in a different category. It effectively burdens the implied freedom of political communication[448]. It goes beyond the legitimate object of the Protesters Act[449] and has no rational connection to that object.

441 Section 8(1)(b) provides that a person must not enter a business access area in relation to business premises *within four days* after having been directed by a police officer under s 11 to leave the business premises or a business access area in relation to the business premises. Section 8(1)(b), in its terms, does not prohibit conduct for a legitimate purpose other than the suppression of political communication. Section 8(1)(b) cannot be said to be directed to regulating effects of conduct beyond the communication of ideas or information – it does not have an object compatible with the maintenance of the constitutionally prescribed system of government. Why four days? Why prohibit a person from entering a business access area in relation to business premises irrespective of what that person intends to do by way of conduct in that area? Its legal effect and practical operation stand in stark contrast with s 6(1) (directed at regulating entry into business premises) and s 6(2) (directed at regulating acts on business premises or on a business access area in relation to business premises), which are enlivened where the specified conduct (the entry or the act) is conduct that prevents, hinders or obstructs the carrying out of a business activity on business premises by a business occupier in relation to the business premises.

442 Section 8(1)(b) goes beyond penalising what was unlawful before the enactment of the relevant provisions. The resulting burden on communication is beyond what is reasonably appropriate and adapted to serve the legitimate object of the Protesters Act.

Impugned provisions are not vague and uncertain

443 Although not expressly articulated in this way, the plaintiffs sought to contend that the Protesters Act burdened the freedom of communication about government or political matters because it was vague and uncertain. They submitted that the prohibitions under the Protesters Act "operate in such a sweeping and uncertain fashion [because] [w]hat is a 'business access area' and what is a 'business [premises]' are by no means clear in practice".

444 Similarly, during the course of the hearing, the plaintiffs submitted that "the uncertain boundaries" that the Protesters Act drew between a business access area and that area beyond a business access area had the effect of

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448 See [395]-[396] above.

449 See [397]-[414] above.

"exacerbating the burden". The basis upon which the burden might be exacerbated by uncertainty was not explained by the plaintiffs. In particular, the plaintiffs did not, in oral or written argument, appeal to any notion of deterrence or deterrent effect.

445 A related complaint made by the plaintiffs was that the impugned provisions permit, perhaps even encourage, arbitrary and discriminatory enforcement[450]. But if any statutory power, including any enforcement power, is so exercised, the exercise of that power will be subject to judicial review and would be found invalid[451]. It is true, as the plaintiffs submitted, that by the time this process occurs, the "protest will have been quelled and the time for the protest may well have passed". On that view, political communication will have been "burdened" as a consequence of the unlawful exercise of an enforcement power.

446 Although the plaintiffs did not contend that the impugned provisions were vague and therefore invalid per se, the plaintiffs' contentions about uncertainty and unlawful exercise had echoes of principles developed in the context of constitutional jurisprudence in the United States relating to requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution. That body of jurisprudence stands for the proposition that laws, and in particular penal laws, that are defined without "sufficient definiteness" may be invalid due to vagueness[452].

447 Vagueness is a distinct doctrine in United States constitutional law that has no equivalent in Australian constitutional law. In the United States, "[t]o satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.' The void-for-vagueness doctrine embraces these requirements"[453]. And the doctrine of vagueness applies to all penal statutes, not only those regulating freedom of speech or other constitutional rights[454]. It operates to invalidate statutes independently from the First Amendment.

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450 See, eg, *Smith v Goguen* 415 US 566 at 573 (1974).

451 See, eg, *Prior* (2017) 91 ALJR 441 at 464-465 [126]-[130]; 343 ALR 1 at 30-31.

452 See, eg, *Kolender v Lawson* 461 US 352 at 357 (1983); *Skilling v United States* 561 US 358 at 402-403 (2010).

453 *Skilling* 561 US 358 at 402-403 (2010) quoting *Kolender* 461 US 352 at 357 (1983). See also *Grayned v City of Rockford* 408 US 104 at 108-109 (1972).

454 See, eg, Nowak and Rotunda, *Constitutional Law*, 7th ed (2004) at 1158.

But where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms", the context in which the law is considered includes that "important value[]"[455].

448 There is no principle in Australian constitutional law that is equivalent to the United States constitutional law doctrine (or doctrines) about vagueness. And there is nothing to support the proposition that the assessment required by the *Lange* questions (or any modification of them) should take into account the notion that there is a chance a law might be enforced unlawfully. Unlike the United States, the Australian legal system does not consider that a vague law "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application"[456].

449 As Windeyer J said in *R v Holmes; Ex parte Altona Petrochemical Co Ltd*, "[c]ourts must wrestle, and are accustomed to wrestle, with difficult language. They are required to find its meaning, not permitted to abandon the task"[457]. Indeed, "[w]hatever the difficulties of construction may be, [a] [c]ourt is bound to give some meaning to the section, and upon no proper principles could a court ever hold that an Act of the legislature was to be regarded as a nullity because of the uncertainty of the language used"[458].

450 In *King Gee Clothing Co Pty Ltd v The Commonwealth*, which concerned the validity of delegated legislation rather than primary legislation, Dixon J made the following relevant observations[459]:

> "I should have thought that, in this matter, [the regulations] stood on the same ground as an Act of Parliament and were governed by the same rules of construction. I am unaware of any principle of law or of interpretation which places upon a power of subordinate legislation conferred upon the Governor-General by the Parliament a limitation or condition making

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455 See *Grayned* 408 US 104 at 108-109 (1972).

456 *Grayned* 408 US 104 at 108-109 (1972).

457 (1972) 126 CLR 529 at 562; [1972] HCA 20.

458 *Scott v Moses* (1957) 75 WN (NSW) 101 at 102. See also *Whittaker v Comcare* (1998) 86 FCR 532 at 543-544.

459 (1945) 71 CLR 184 at 195; [1945] HCA 23 (citations omitted). See also *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59 at 71; [1963] HCA 30. See also *R v Smith* [1974] 2 NSWLR 586 at 589. cf *R v Hughes* (2000) 202 CLR 535 at 575-576 [95]-[98]; [2000] HCA 22.

> either reasonableness or certainty indispensable to its valid exercise. Our Constitution contains no due process clause and we cannot follow the jurisprudence of the United States by saying that uncertainty violates a constitutional safeguard."

451 In *Cann's Pty Ltd v The Commonwealth*, Dixon J reiterated the view that he expressed in *King Gee* and, in the course of doing so, said[460]:

> "*The interpretation of all written documents is liable to be attended with difficulty*, and it is not my opinion that doubts and misgivings as to what the instrument intends, however heavily they may weigh upon a court of construction, authorize the conclusion that an order made under reg 23 is ultra vires or otherwise void. *If in some respects its meaning is unascertainable, then, no doubt, it fails to that extent to prescribe effectively rights or liabilities, but that is because no particular act or thing can be brought within the scope of what is expressed unintelligibly. But to resolve ambiguities and uncertainties about the meaning of any writing is a function of interpretation* and, unless the power under which a legislative or administrative order is made is read as requiring certainty of expression as a condition of its valid exercise ... *the meaning of the order must be ascertained according to the rules of construction and the principles of interpretation as with any other document*." (emphasis added)

452 These observations accord with the well-established approach to statutory construction: "the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have"[461]. That duty remains constant, regardless of whether the words of a statutory provision are uncertain or unclear[462]. Courts cannot abandon the task. "When inconsistencies or ambiguities appear they are dealt with by [c]ourts according to the established principles of statutory interpretation"[463].

453 Once it is accepted, as it must be, that Australia knows no doctrine of statutory uncertainty, there is no legal basis for importing a doctrine of vagueness by speaking of a law having "that quality".

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460 *Cann's* (1946) 71 CLR 210 at 227-228; [1946] HCA 5.

461 *Project Blue Sky* (1998) 194 CLR 355 at 384 [78].

462 See *Lee Vanit v The Queen* (1997) 190 CLR 378 at 393-394; [1997] HCA 51.

463 *Kennedy v Lowe; Ex parte Lowe* [1985] 1 Qd R 48 at 49.

454 To reason that a statute is invalid by reference to the case of a police officer having a reasonable, but factually unstable, belief of the matters required by the statute is in truth to say that reasonable belief is an impermissible or unworkable criterion for imposing restrictions on conduct. If that were so (and it is not) it would mean a court could not enjoin future conduct having reached a conclusion about what is reasonably threatened or likely to occur.

455 Moreover, despite the First Amendment, laws in the United States that have used language similar to that in the Protesters Act have survived vagueness challenges. In *Cameron v Johnson*, a law which prohibited "picketing ... in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any ... county ... courthouses" was held to be valid[464]. The Supreme Court concluded that the "statute clearly and precisely delineat[ed] its reach in words of common understanding"[465].

456 In *Grayned v City of Rockford*, an impugned ordinance provided that "no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof"[466]. The Supreme Court said[467]:

> "The words of the ... ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' ... but we think it is clear what the ordinance as a whole prohibits. Designed, according to its preamble, 'for the protection of Schools,' the ordinance forbids deliberately noisy or diversionary activity that disrupts or is about to disrupt normal school activities. It forbids this willful activity at fixed times – when school is in session – and at a sufficiently fixed place – 'adjacent' to the school."

The same kind of analysis can and should be adopted in relation to the impugned provisions.

Inapplicability of the United States "chilling effect" doctrine

457 In United States First Amendment jurisprudence, "[a] chilling effect occurs when individuals seeking to engage in activity protected by the first

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464 390 US 611 at 615-617 (1968).

465 *Cameron* 390 US 611 at 616 (1968).

466 408 US 104 at 107-108 (1972).

467 *Grayned* 408 US 104 at 110-111 (1972) (footnote omitted).

amendment are *deterred from so doing by governmental regulation* not specifically directed at that protected activity"[468] (emphasis added). "The very essence of a chilling effect is an act of deterrence"[469]. The concept of the "chilling effect" is reflected in, and relevant to the application of, the doctrine of vagueness in the First Amendment context[470].

458 The danger of the chilling effect has been explained in the following terms[471]:

> "Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, *and indeed, should*. This is to be feared not only because of the harm that flows from the non-exercise of a constitutional right, *but also because of general societal loss which results when the freedoms guaranteed by the first amendment are not exercised*." (emphasis added)

459 This explanation highlights, and reinforces, an important difference between the implied freedom of political communication under the Australian Constitution and the freedom of speech protected by the First Amendment to the United States Constitution. Because the implied freedom operates solely as a restriction on power[472] and only to the extent necessary to maintain the constitutionally prescribed system of government, the notion of speech as an affirmative value has no role to play.

460 In United States jurisprudence, the chilling effect, as a "specific substantive doctrine lying at the very heart of the first amendment"[473], acknowledges that the legal system is imperfect and that it is inevitable that

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468 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 693.

469 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 689.

470 See Farber, "Free Speech without Romance: Public Choice and the First Amendment", (1991) 105 *Harvard Law Review* 554 at 570.

471 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 693.

472 *Unions NSW* (2013) 252 CLR 530 at 554 [36]; *McCloy* (2015) 257 CLR 178 at 202-203 [29]-[30], 228-229 [119]-[120], 258 [219], 283 [317].

473 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 688.

errors will be made[474]. It is this "possibility of error and the consequent uncertainty which create the chilling effect"[475]. However, there are various types of error and uncertainty.

461 First, the machinery of the law makes mistakes – for example, the facts may be incorrectly determined or the law may be incorrectly applied to the facts[476]. In other words, the outcome of litigation can be unpredictable, and that might lead to persons being deterred from certain activity because they fear that conduct that is lawful may nonetheless be punished[477]. And the degree of fear may be influenced by the harshness of the penalty[478].

462 Second, there may be uncertainty in the minds of individuals about whether their intended behaviour is protected. This uncertainty might arise from a number of causes; "perhaps the most important is that it is often difficult to determine whether the contemplated conduct is covered by a regulating rule"[479].

463 As the Supreme Court of the United States has stated: "[u]ncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" ... than if the boundaries of the forbidden areas were clearly marked'"[480]. It is this type of uncertainty that is "the chief vice of vagueness", which one commentator has described in these terms[481]:

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474 See, eg, Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 689, 701.

475 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 694.

476 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 694-695.

477 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 695.

478 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 696.

479 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 698.

480 *Grayned* 408 US 104 at 109 (1972).

481 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 698 (footnote omitted).

> "If the terms of a statute or the concepts underlying a common-law principle are so amorphous as to create no crystalized view of what precise conduct is being regulated, an individual may be quite unsure whether his intended behavior is proscribed until after he has acted. Indeed, some legal concepts and language may be so incapable of precise definition and application that any real degree of certainty is unattainable."

464 The United States learning in this area then takes a further step – "to determine which of the various possible errors is the more harmful"[482]. This step assumes that one type of error is preferable to another type of error[483] – in particular, it assumes that there is a preference for errors made in favour of free speech[484]. One commentator has suggested that "a wrongful limitation of speech is *a priori* more serious than the erroneous overextension of free speech"[485]. The premise of that assumption is "the recognized preeminence of the first amendment"[486].

465 The implied freedom of political communication in Australia stands in stark contrast at many levels. It does not give political communication "transcendent value" equivalent to individual liberty[487]. It operates only to the extent necessary for the effective operation of the system of representative and responsible government established by the Constitution[488] and as a limitation on legislative and executive power. It does not confer a personal right. Individual or personal reactions to a restriction may be relevant to the ambit of a personal

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482 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 701.

483 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 689, 731.

484 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 704, 732.

485 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 701.

486 Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 704.

487 cf Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'", (1978) 58 *Boston University Law Review* 685 at 702, 704 citing *Speiser v Randall* 357 US 513 at 526 (1958).

488 *Lange* (1997) 189 CLR 520 at 561.

freedom. Individual or personal reactions to a restriction are not relevant to determining the ambit of legislative or executive power.

466 The differences between the implied freedom of political communication under the Australian Constitution and the freedom of speech protected by the First Amendment to the United States Constitution are too great, and too deeply entrenched, for any doctrines of vagueness, uncertainty or "chilling effect" in United States jurisprudence to be adopted directly or indirectly.

Certainty and the implied freedom

467 That the impugned provisions are not vague and uncertain, and that the United States chilling effect doctrine has no application when considering the implied freedom, both reflect fundamental aspects of the constitutional relationship in Australia between the judicial and legislative branches of government.

468 There may be a point at which a law appears to be expressed with such indefinite width, or to delegate power to such an extent[489], that it invites judicial consideration of questions of the kind discussed by the plurality in *Plaintiff S157/2002 v The Commonwealth*[490], including whether the law truly provides for "a rule of conduct or a declaration as to power, right or duty"[491]. But such questions do not arise in the present case, and they are not the concern of the implied freedom.

469 By way of further comparison, particular species of uncertainty have been the subject of consideration in the United Kingdom. In *AXA General Insurance Ltd v HM Advocate*, which concerned the powers of a devolved legislature, it was accepted that some provisions of the European Convention on Human Rights direct attention to the degree of certainty when determining whether an interference with a right is "lawful"[492]. It is enough to say that no individual right or freedom is at stake in this case, and inquiries of that kind are not relevant to the implied freedom.

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489 See generally *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; [1931] HCA 34.

490 (2003) 211 CLR 476 at 511-514 [98]-[104]; [2003] HCA 2.

491 *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82; [1943] HCA 47.

492 [2012] 1 AC 868 at 933-936 [116]-[123]. See also Art 1 of Protocol 1 to the European Convention on Human Rights.

470 In *R v Rimmington*, which concerned the scope of the common law offence of public nuisance, lack of clarity in the definition of a criminal offence was identified as a basis, at common law, for questioning the safety of a conviction[493]. Even then, it was recognised that absolute certainty was not possible and the question could only arise in "extreme" situations where the ingredients of the purported offence could not be discerned in advance[494]. In that case, as well as *AXA General Insurance*, the type of legal uncertainty under consideration was uncertainty that involved retrospectivity.

Reopen *McCloy*?

471 In *McCloy*, no party or intervener challenged the decision in *Lange* or sought to have the Court discard or modify the substance of the two questions identified in *Lange* as the questions that must be asked and answered in deciding whether a statutory provision is beyond power because it infringes the implied freedom[495]. They remain the questions to be asked and answered.

472 Indeed, as the Attorney-General of the Commonwealth submitted in this case, the *McCloy* approach does not alter the two questions identified in *Lange* that must be asked in determining whether an impugned law is contrary to the implied freedom of political communication[496]. Those questions capture the limits between legitimate judicial scrutiny and impermissible judicial encroachment on the legislative function.

473 The method of analysis adopted by the plurality in *McCloy* is *a* tool of analysis, not constitutional doctrine. It is not a "precedent-mandated analysis"[497]. And, if only for that reason, it is not necessary or appropriate to apply all aspects of that approach in every case.

474 The alternative view of the plurality's approach in *McCloy* – that, in each case involving the implied freedom, a cascading series of questions must be

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493 [2006] 1 AC 459 at 480-484 [32]-[37].

494 *Rimmington* [2006] 1 AC 459 at 482 [33] quoting *R v Misra* [2005] 1 Cr App R 328 at 339 [34].

495 See *McCloy* (2015) 257 CLR 178 at 281 [308]; see also at 234 [140], 259 [222], 282 [311].

496 *McCloy* (2015) 257 CLR 178 at 200-201 [23], 222 [98], 230 [124], 258 [220], 280-281 [306], 282 [311].

497 See *Tajjour* (2014) 254 CLR 508 at 578 [144].

answered, and the wrong answer to any one of them will result in invalidity[498] – suffers from at least two fundamental difficulties.

475 First, as Gageler J explained in *McCloy*, that approach assumes that "one size fits all"[499]. It is by no means apparent that a standardised formula of that kind is suitable to be applied to "every law which imposes a legal or practical restriction on political communication irrespective of the subject matter of the law and no matter how large or small, focused or incidental, that restriction on political communication might be"[500].

476 A "one size fits all" approach does not reflect the common law method of legal reasoning; rather, it involves "an abstracted top-down analysis" that reflects its civil law origins[501]. Because the extent and the nature of the burden on the implied freedom will be case specific, any analysis must likewise be case specific[502].

477 Just as this Court has never previously adopted a rigid analysis of the kind suggested by *McCloy*, "[n]or has it overtly adopted a categorical approach of the kind used in the United States" in relation to the First Amendment[503]. But there are elements of this approach latent in the existing authorities. This is not surprising – "[c]ategorisation is a traditional common law approach to the solution of legal problems"[504].

478 For example, it has been recognised that some laws "have only an indirect or incidental effect upon communication about matters of government and politics. Others have a direct and substantial effect. Some may themselves be characterised as laws with respect to communication about such matters"[505].

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498 See, eg, *Murphy* (2016) 90 ALJR 1027 at 1050 [99]; 334 ALR 369 at 396.

499 (2015) 257 CLR 178 at 235 [142].

500 *McCloy* (2015) 257 CLR 178 at 235 [142].

501 *Murphy* (2016) 90 ALJR 1027 at 1051 [109]; 334 ALR 369 at 398.

502 *McCloy* (2015) 257 CLR 178 at 288 [337].

503 *Tajjour* (2014) 254 CLR 508 at 580 [150].

504 Mason, "The use of proportionality in Australian constitutional law", (2016) 27 *Public Law Review* 109 at 121.

505 *Mulholland* (2004) 220 CLR 181 at 200 [40] citing *ACTV* (1992) 177 CLR 106 at 169. See also *Hogan* (2011) 243 CLR 506 at 555 [95]; *Wotton* (2012) 246 CLR 1

(Footnote continues on next page)

Depending on the category, a law may be more or less difficult to justify. Relevantly to this case, laws imposing restrictions on the time, place and manner of political communication have been understood as forming a category that requires a lesser justification[506]. However, it is neither necessary nor appropriate in any given case to seek to identify different categories exhaustively or the criteria that might apply to them. The common law approach "permits the development of different criteria for different constitutional contexts"[507].

479 Second, to treat some of the "tools of analysis" identified in *McCloy* as determinative of the validity of a law would mark a departure from the existing stream of authority. The "necessity" of a restriction, insofar as that directs attention to reasonably available alternative measures, is a matter that may inform the analysis – but it has not been treated as a matter that is decisive in every case[508]. And treating the "balancing" stage as decisive would only exacerbate the difficulties with that stage outlined earlier[509].

480 It is also necessary to say something about "compatibility testing" as that concept was described by the plurality in *McCloy*. As this case demonstrates, a time, place or manner prohibition on protest activity is not necessarily incompatible with the system of representative and responsible government for which the Constitution provides. The "legitimacy" of the means is determined not as part of a binary inquiry about "compatibility", but as part of a graduated inquiry involving "proportionality" to a legitimate end. The use of a structured approach to proportionality in *McCloy* must not shift or obscure those limits[510].

481 It is for that reason that, as the Attorney-General of the Commonwealth submitted, even if the *McCloy* approach is appropriate to be used as a tool of analysis, the second and third steps should be reformulated along the following lines:

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at 16 [30]; *Tajjour* (2014) 254 CLR 508 at 580-581 [151]; *McCloy* (2015) 257 CLR 178 at 238-239 [152], 268-269 [252]-[253].

506 See *Coleman* (2004) 220 CLR 1 at 49-50 [91].

507 *McCloy* (2015) 257 CLR 178 at 288 [337].

508 See *Tajjour* (2014) 254 CLR 508 at 581 [152]; *McCloy* (2015) 257 CLR 178 at 233 [135], 259 [222], 285 [328]; *Murphy* (2016) 90 ALJR 1027 at 1080 [305]; 334 ALR 369 at 437.

509 See [432]-[438] above.

510 (2015) 257 CLR 178 at 195-196 [4], 213 [68], 215 [72], 215-216 [74], 216 [77].

Step 2: "… is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of [representative and responsible] government?"

Step 3: "… is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of [representative and responsible] government?"

482 In those circumstances, it is unnecessary to consider whether to grant leave to reopen *McCloy*.

Conclusion

483 For those reasons, I would answer the questions of law stated by way of special case for the opinion of the Full Court under r 27.08.1 of the High Court Rules 2004 (Cth) as follows:

Question 1:	Do either or both of the plaintiffs have standing to seek the relief sought in the Amended Statement of Claim?
Answer:	Tasmania abandoned its challenge to the plaintiffs' standing. Question 1 therefore need not be answered.
Question 2:	Is [the Protesters Act], either in its entirety or in its operation in respect of forestry land or business access areas in relation to forestry land, invalid because it impermissibly burdens the implied freedom of political communication contrary to the Commonwealth Constitution?
Answer:	In its operation in respect of business access areas in relation to forestry land, s 8(1)(b) of the Protesters Act is invalid. The Protesters Act is not otherwise invalid in its operation in respect of forestry land or business access areas in relation to forestry land.
Question 3:	Who should pay the costs of the Special Case?
Answer:	Tasmania.

484 EDELMAN J. In an extrajudicial essay, Lord Sumption recently said that, "at the risk of sounding paradoxical", he wished to defend the "opacity, fudge or irrationality" that can characterise the political process[511]. These reasons likewise defend, from constitutional attack, legislation that was characterised by the plaintiffs in similar terms. A primary duty of a court is to construe relevant legislation. If legislation, properly construed, is consistent with the Constitution then it should not be held to be invalid even if it is perceived to be opaque, fudged, or irrational.

485 In 1857, Sedgwick wrote that "[w]hen a case of doubt arises in regard to a statute, the first duty of the judge is to ascertain [its] meaning"[512]. For nearly a century in Australia, a similar "longstanding instruction of this Court"[513] in cases of suggested constitutional invalidity has been repeated, again and again[514]. That instruction, in the words of French CJ, Kiefel and Bell JJ, is that[515]:

> "Before considering the constitutional validity of any statute, it is necessary to consider its construction and operation. Its construction will give effect to the ordinary meaning of its text in the wider statutory context and with reference to the purpose of the provision".

486 The foundation of this instruction lies in fundamental tenets of the separation of powers. Members of the public are not bound by the mere words of a statute. They are bound by the *meaning* of those words. Constitutional validity depends upon that meaning. The meaning of statutory words is expounded by the judiciary. No matter how ambiguous or uncertain the words of legislation

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511 Sumption, "The Limits of Law", in Barber, Ekins and Yowell (eds), *Lord Sumption and the Limits of the Law*, (2016) 15 at 24.

512 Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law*, (1857) at 293-294.

513 *Coleman v Power* (2004) 220 CLR 1 at 84 [220]; [2004] HCA 39.

514 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; [1948] HCA 7; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 152; [1983] HCA 21; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 352 [7]; [1998] HCA 22; *R v Hughes* (2000) 202 CLR 535 at 582-583 [117]; [2000] HCA 22; *R v Wei Tang* (2008) 237 CLR 1 at 39 [84]; [2008] HCA 39; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 519 [46]; [2009] HCA 4; *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 42 [23]; [2014] HCA 22.

515 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 581 [11]; [2015] HCA 41. See also at 625-626 [149].

may be, it is emphatically the province of the judiciary to explicate the meaning of legislation[516]. Legislation is never contrary to the Constitution, and invalid, merely because the Executive considers, or might consider, its words to have a particular meaning. Nor is the Executive afforded any deference to its preferred construction of legislation[517].

487 Since it is the meaning of statutory words that determines whether a legislative act complies with the Constitution, and since the task of determining meaning is the role of the judiciary, it is always necessary for the judiciary to construe the meaning of legislation before pronouncing upon whether that meaning is consistent with the Constitution. This case is a particularly apt illustration of the need to construe the meaning of legislation before finding a provision to be contrary to the Constitution, and therefore invalid. The essence of the submissions of the State of Tasmania, supported by the States of Victoria and South Australia, was that the *Workplaces (Protection from Protesters) Act* 2014 (Tas) ("the Protesters Act") imposes no relevant burden on political communication, because, properly construed in relation to forest operations and areas of access to, or exit from, those operations, the Protesters Act applies only to activity which is unlawful for reasons that are independent of the operation of the Act. Alternatively, those States submitted that the extent to which lawful conduct was burdened was minimal and justified. Without first ascertaining the proper construction of the challenged sections of the Protesters Act it is impossible to know whether those sections burden political communication and, if so, the extent of the burden.

488 Although none of the submissions in this case dealt with all of the construction permutations in detail, it is necessary to construe the legislation before assessing its constitutional validity. There are two possibilities as to how the construction of the Protesters Act should be approached in its application to the relevant circumstances of this case.

489 The first is that the Protesters Act is so uncertain, and so hopelessly vague, that it is impossible for any court to give it a construction that would permit the court to explain, and therefore any individual to know, whether and when many contraventions of the Protesters Act would occur in circumstances such as those that arise in this case. On this approach, the core concepts of "business premises" and "business access area" could, at any time, be almost anywhere within approximately 800,000 hectares of permanent timber production zone land

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516 *Marbury v Madison* 5 US 137 at 177 (1803); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35; [1990] HCA 21.

517 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 151-153 [40]-[43]; [2000] HCA 5.

accessible to the public, provided that forest operations are being undertaken somewhere within that vast region. In many situations an individual could never know if he or she were committing an indictable offence. More fundamentally, unless the Act were (absurdly) treated as deeming the whole of the permanent timber production zone land to be business premises or a business access area whenever forest operations were occurring, then a court would have no rule by which to determine the boundaries of any business premises or business access area. On this extreme approach, if it were concluded that Parliament's "attempt ... to frame a rule" had failed, then any attempt to construe the legislation by substituting some other rule might, in Sedgwick's words, require the judge to exercise "truly legislative power"[518]. That would raise a constitutional issue not explored in this case[519].

490 The second construction is that the Protesters Act, in the circumstances of this case, applies only to conduct that is independently unlawful under the *Forest Management Act* 2013 (Tas) ("the Forest Management Act"). On this construction, "business premises" and "business access areas" are those areas that have been marked by signs, barriers, or other notices prohibiting entry, or are the subject of oral notice from an authorised officer, in the exercise of the powers of the Forest Manager under the Forest Management Act. This construction should be preferred for four reasons. First, it gives a sensible and practical operation to the text of the Protesters Act. Secondly, it follows from the application of accepted tenets of statutory construction. One of those tenets is that, where reasonable to do so, legislation should be construed narrowly to minimise any interference with freedom of speech. Hence, it need not be, and often should not be, construed broadly and then struck down as unconstitutional due to the breadth of the interference. Thirdly, the construction is supported by the interaction between the Protesters Act and the Forest Management Act, from which crucial definitions applicable to this case were relevantly copied. Fourthly, the construction is consistent with statements by both the proponents and the opponents of the Workplaces (Protection from Protesters) Bill 2014 (Tas) ("the Protesters Bill") during its Second Reading Speech and debate. In law, as in life, Occam's razor is often the best approach.

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518 Cf Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law*, (1857) at 294.

519 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 164 per Latham CJ, 252 per Rich and Williams JJ, 372 per Dixon J; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 486-487; [1995] HCA 47; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [102]; [2003] HCA 2; *Thomas v Mowbray* (2007) 233 CLR 307 at 344-345 [71] per Gummow and Crennan JJ; [2007] HCA 33; *Momcilovic v The Queen* (2011) 245 CLR 1 at 174-175 [437]-[438] per Heydon J; [2011] HCA 34.

491 Properly construed, the Protesters Act therefore applies in the relevant circumstances of this case only to conduct that is already unlawful under the Forest Management Act. The freedom of political communication which is implied into the Commonwealth Constitution does not constrain legislation which imposes a burden on unlawful activity. Whatever it might mean to say that the Constitution is founded upon an assumption of the rule of law[520], that assumption does not permit the creation, by implication, of a sphere of freedom from legislative interference with illegal conduct.

492 My conclusion therefore is that the Protesters Act is valid in its entirety in the circumstances of this case. The reasons that follow explain this conclusion in detail. They are divided as follows:

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520 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; [1951] HCA 5.

F. Conclusion [567]

A. The facts and basis upon which the Special Case was conducted

493 On 19 January 2016, the second plaintiff, Ms Hoyt, entered the Lapoinya Forest at Broxhams Road. She passed two signs in the middle of the road. The first, a large yellow sign, read "ROAD CLOSED". The second, a large blue and white sign, read:

> "NOTICE OF ROAD CLOSURE
>
> Forestry Tasmania has closed this forest road to all unauthorised traffic, both vehicular, and pedestrian. Persons who use this road in contravention of this notice are liable to be convicted and fined."

494 Ms Hoyt continued into the forest. An employee of the Forest Manager, Forestry Tasmania, asked Ms Hoyt to wait while an excavator was moved away, which she did. Ms Hoyt later walked further into the forest. She was stopped by a police officer on the edge of the creek on the south western side of Maynes Road. The police officer directed her to leave the area. She refused to leave. The police officer removed her to the junction of Maynes Road with Lapoinya Road.

495 On 20 January 2016, Ms Hoyt went back into the forest with others to protest against the cutting down of trees in the coupe. She was seen by police walking through the bush about five to 10 metres away from, and to the south of, Maynes Road. She was arrested there by the police and taken to Burnie Police Station. Prior to her arrest she did not enter Maynes Road.

496 Ms Hoyt was given an infringement notice in respect of her conduct on 19 January 2016 and separately charged with failing to comply with a requirement made by a police officer on 19 January 2016 under s 11(6) of the Protesters Act in respect of her alleged conduct of going into the Lapoinya Forest on 20 January 2016.

497 On 25 January 2016, Dr Brown (the first plaintiff) and three others also entered the Lapoinya Forest at Broxhams Road. His intention was to (i) promote public awareness of logging of the Lapoinya Forest; (ii) express support for the local Lapoinya community's resistance to the logging proposed, and being carried out, by Forestry Tasmania; and (iii) raise public awareness of the environmental harm caused by the logging.

498 Video footage exhibited in this Court showed Dr Brown standing in front of the same two large signs that Ms Hoyt had passed on 19 January 2016. Dr Brown continued past those signs, and stepped over a metal chain suspended between red and yellow poles, blocking the forest road. He and his three

companions walked northwards along Broxhams Road for nearly a kilometre. Dr Brown was standing on the cleared part of Broxhams Road in the Reserve near where forest operations were being carried out when two police officers approached him. One of them said: "Do you realise you are getting close to impinging on forestry operations?" A police officer directed Dr Brown to leave the area. Dr Brown refused. He was arrested.

499 After the commencement of this proceeding, the State of Tasmania chose not to pursue the charges against Ms Hoyt and Dr Brown. The charges were subsequently dismissed and the infringement notice to Ms Hoyt was withdrawn. Despite the dismissals there is, rightly, no dispute that each has standing to challenge the validity of the Protesters Act. The plaintiffs are entitled to challenge the validity of laws which will govern their potential future conduct[521]. However, the focus on the plaintiffs' past and future conduct requires the Special Case to focus only upon the validity of the Protesters Act as it applies in relation to forestry land. Any burden that the Protesters Act imposes upon political communication, and whether that burden is reasonably appropriate and adapted, falls to be considered only in that context.

B. The application of the Protesters Act to the plaintiffs in summary

500 As I explain below, properly construed, the application of the Protesters Act to forestry land in respects relevant to this case concerns only activities upon that land which are unlawful. The relevant provisions of the Protesters Act apply only to activities that involve criminal trespass as a result of the operation of the Forest Management Act. The Forest Management Act effectively requires the erection of signs, barricades, or trenches that inform the public that entry is prohibited at places where forest operations are taking place and places where reasonable access to forest operations is required by those undertaking those operations. Even if these techniques of notice by signs, barricades, and trenches do not suffice to inform the public that entry is prohibited there is another mechanism of notice. Any authorised officer appointed by the Forest Manager can give a person oral notice not to enter or to leave an area of permanent timber production zone land. An authorised officer can request a person not to enter or to leave if the officer is of the opinion that the person's entry or presence or activity is preventing, has prevented, or is about to prevent the Forest Manager from effectively or efficiently performing its functions.

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521 *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570; [1945] HCA 15; *Croome v Tasmania* (1997) 191 CLR 119 at 137-139; [1997] HCA 5; *Kuczborski v Queensland* (2014) 254 CLR 51 at 101 [152]-[153]; [2014] HCA 46; *CGU Insurance Ltd v Blakeley* (2016) 90 ALJR 272 at 292-293 [102]; 327 ALR 564 at 589; [2016] HCA 2.

501 These techniques of notice delimit the boundaries of business premises and business access areas in the Protesters Act. The operation of the Protesters Act in this way can be illustrated by reference to the circumstances of Ms Hoyt and Dr Brown.

502 On 19 January 2016 and 25 January 2016 Ms Hoyt and Dr Brown, respectively, could have been stopped pursuant to the Protesters Act while engaging in a protest activity on Broxhams Road. Two signs, and also, in the case of Dr Brown, a barricade which had been erected under the Forest Management Act, had closed that road. It had been closed in order for it to be cleared in preparation for logging. On the assumption that the clearing of Broxhams Road was "access construction", and therefore "forest operations", then, at the points where the clearing was occurring, Broxhams Road was a business premises within the meaning of the Protesters Act. At the other points of the closed road, which were reasonably necessary to enable access to an entrance to, or to an exit from, the clearing operations, the areas were business access areas. Both Ms Hoyt and Dr Brown were trespassers on the road in areas of entry to, or exit from, the clearing operations. While on the road either could have been given a direction under s 11(2) of the Protesters Act to leave the area without delay.

503 However, the place where Ms Hoyt was stopped on 19 January 2016 was not on Broxhams Road. No sign had been erected under s 21(1)(b) of the Forest Management Act closing any part of the forest or prohibiting entry to any of the permanent timber production zone land due to any other forest operations. No authorised officer had told her to leave. The only evidence of forest operations at this time was the clearing of the forest roads. The same circumstance pertained on 20 January 2016. Although Maynes Road had also been closed on that date, Ms Hoyt was stopped near to, but not on, Maynes Road. No other signs had closed any part of the forest since there were no forest operations being undertaken anywhere other than on the roads at that time. It is unnecessary to consider whether the Protesters Act would have been engaged even if Ms Hoyt was stopped on Maynes Road. Arguably, it would not have been engaged if no forest operations such as access construction on Maynes Road were taking place.

504 As for Dr Brown, he was stopped on 25 January 2016 on the cleared part of Broxhams Road where signs had prohibited entry, and where trees, ferns and other plants had been harvested near a point where further clearing was taking place. He was given a direction under s 11(2) of the Protesters Act to leave the business access area. He was not in an area of forestry land because, as the State of Tasmania submitted in a note handed up during oral argument, he was outside permanent timber production zone land. Since he was not on forestry land, he was not in an area that would fall within the meaning of business premises as defined in the Protesters Act. Nevertheless, he was in an area that was reasonably necessary for access to the forest operations of clearing and he had been given notice of the prohibition of entry to this area. There may, therefore,

be doubt about the concession by the State of Tasmania in oral argument that Dr Brown was not in a business access area. In any event, it appears that the Director of Public Prosecutions dropped the charges because of a mistaken view that Dr Brown was standing at a point where forest operations were actually taking place and therefore that Dr Brown was on business premises and not in a business access area. As a result, the Director of Public Prosecutions mistakenly formed the view that Dr Brown should have been charged with being on business premises.

C. Uncertainty of statutory words does not affect constitutional validity

505 Apart from the extreme possibility identified at the start of these reasons where Parliament's attempt to frame a rule has failed, legislation that is ambiguous or unclear is not, for that reason, unconstitutional. Nor is legislation rendered more likely to be unconstitutional because any uncertainty in the terms might lead to some practical operation, prior to judicial construction, which is inconsistent with its legal meaning.

506 The reason why uncertainty does not have any constitutional effect is that the meaning of a statutory text is revealed by "the reasoning of courts seeking to apply that text in practice"[522]. Legislation, like language generally, is often unclear. Where a lack of clarity is exposed to the court, it is the task of the court to make it clear. In Australia, the resolution of statutory uncertainty is, emphatically, both the province and the duty of the judiciary[523]. If a statute is given a "practical operation" by the Executive that is contrary to its proper construction then the solution is not for the statute to be found to be unconstitutional. The solution is for the judiciary to construe the statute. Sometimes legislation can be in urgent need of construction. An obvious example is a statute which prescribes only broad standards, leaving the judiciary to fill the open texture created by Parliament. As Gummow and Crennan JJ said in *Thomas v Mowbray*[524], quoting Professor Zines[525]:

> "Given a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis. Rules and

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522 Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process", (2011) 37(2) *Monash University Law Review* 1 at 10.

523 *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529 at 562; [1972] HCA 20.

524 (2007) 233 CLR 307 at 351 [91].

525 Zines, *The High Court and the Constitution*, 4th ed (1997) at 195.

principles emerge which guide or direct courts in the application of the standard."

507 The need to understand statutory text together with its judicial exegesis is the reason why Australia has no doctrine that legislation can be unconstitutional based on uncertainty[526]. Even in the United States, where a vagueness doctrine developed in the early twentieth century around the express due process clause[527], the vagueness doctrine has been powerfully criticised for this reason. In a well-known note, Professor Amsterdam described the anomalous nature of the vagueness doctrine by contrasting it with rules of construction, where "[l]ine-drawing is the nature of the judicial process"[528] and a statute is taken "as though it read precisely as the highest court of the State has interpreted it"[529]. Amsterdam argued that the vagueness doctrine sat alongside these principles of judicial construction, with an "almost habitual lack of informing reasoning"[530] creating "a pair of mutually oblivious doctrines [that] run in infinitely parallel contrariety, like a pair of poolhall scoring racks on one or the other of which, seemingly at random, cases get hung up"[531]. The vagueness doctrine has also been criticised by judges in the Supreme Court itself. In a 2015 decision[532], Thomas J said that the majority decision authored by Scalia J had not involved "the usual business of interpreting statutes"[533] and that the majority had instead used the vagueness doctrine "to achieve its own policy goals"[534]. In a separate opinion, Alito J said

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526 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 195; [1945] HCA 23.

527 *International Harvester Co v Kentucky* 234 US 216 (1914).

528 Amsterdam, "The Void-for-Vagueness Doctrine in the Supreme Court", (1960) 109 *University of Pennsylvania Law Review* 67 at 70.

529 Amsterdam, "The Void-for-Vagueness Doctrine in the Supreme Court", (1960) 109 *University of Pennsylvania Law Review* 67 at 74, quoting *Minnesota ex rel Pearson v Probate Court* 309 US 270 at 273 (1940).

530 Amsterdam, "The Void-for-Vagueness Doctrine in the Supreme Court", (1960) 109 *University of Pennsylvania Law Review* 67 at 70-71.

531 Amsterdam, "The Void-for-Vagueness Doctrine in the Supreme Court", (1960) 109 *University of Pennsylvania Law Review* 67 at 67.

532 *Johnson v United States* 192 L Ed 2d 569 (2015).

533 *Johnson v United States* 192 L Ed 2d 569 at 585 (2015).

534 *Johnson v United States* 192 L Ed 2d 569 at 589 (2015).

that "[w]hen a statute's constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem"[535].

508 Not only does Australia have no doctrine that renders legislation constitutionally invalid directly for uncertainty but it also does not have a doctrine that renders legislation constitutionally invalid *indirectly* for uncertainty. As I explained in the introduction to these reasons, on many occasions for the better part of a century this Court has emphasised the need for legislation to be construed before its constitutional validity is determined. One reason for this is that the Executive does not administer statutes in a vacuum. The statutes are read, and understood, in light of their judicial construction. Their "practical effect"[536] is a consequence of their terms together with how those terms are construed.

509 An example can be given based on the circumstances of this case. Australian law does not operate on the assumption that a police officer who enforces the Protesters Act will do so by blindly making his or her own decisions about its meaning independently of the meaning given to it by the judiciary. Even before any construction is given to the Protesters Act by the judiciary, any decision by a police officer can be challenged by a person against whom the Act is sought to be enforced. That will prompt a construction by the judiciary. Enforcement will then proceed by reference to the judicial construction. Instructions such as those from which the police officers in the video recordings in this Special Case can be seen reading could not then, acting even remotely rationally, be formulated based upon a preferred view of some section of the Protesters Act independently of its judicial exposition.

D. Construing the Protesters Act with the Forest Management Act

The operation of the Forest Management Act

510 The Forest Management Act was enacted in 2013, and received Royal Assent on 6 November 2013. Its long title includes the statement that it is "[a]n Act to provide for the management of permanent timber production zone land".

511 Under the Act, land can become "permanent timber production zone land" in three ways. First, by s 12, it can be land which is purchased by the Forestry corporation. Secondly, by ss 10, 11A, and 11B, it can be Crown land, or "future potential production forest land" under the *Forestry (Rebuilding the Forest Industry) Act* 2014 (Tas), specified as permanent timber production zone land in

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535 *Johnson v United States* 192 L Ed 2d 569 at 600 (2015).

536 *Coleman v Power* (2004) 220 CLR 1 at 49 [91]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 558 [60], 579 [146]; [2014] HCA 35.

a gazetted order of the Minister which is accepted by both Houses of Parliament. Thirdly, it can be certain forest land which Sched 2 to the Act deems to be permanent timber production zone land.

512 The effect of the Forest Management Act is to vest possession of permanent timber production zone land in the Forestry corporation, which, by s 7(1), is the Forest Manager for permanent timber production zone land. Section 8 provides that the functions of the Forest Manager include managing and controlling all permanent timber production zone land and undertaking forest operations. Section 9(1) confers upon the Forest Manager such powers as are necessary to enable it to perform its functions. Those powers specifically include, by s 9(2), powers to grant permits, licences, leases, or other occupation rights in relation to permanent timber production zone land. Section 14 also permits the Forest Manager, with the approval of the Minister, to charge a person or class of persons a fee for a right to access permanent timber production zone land, or use a forest road, for any purpose.

513 The coupe in which Ms Hoyt and Dr Brown were present was permanent timber production zone land within the meaning of the Forest Management Act. Permanent timber production zone land also includes forest roads which are within that zone, unless a proclamation is made under s 24 of the Forest Management Act converting the forest roads into public roads.

514 An assumption underlying the plaintiffs' submissions in this case was that although possession of permanent timber production zone land was vested in the Forest Manager, the plaintiffs had a licence to be on that land unless they were specifically excluded by the Forest Manager or had not paid a fee charged by the Forest Manager under s 14. A licence is an accurate legal description for the permission to access the land although, speaking more colloquially, the licence was occasionally described in submissions as a (claim) "right". The basis for the assumption was that s 13(1) of the Forest Management Act either created or preserved a statutory licence permitting access by members of the public. That sub-section provides:

> "The Forest Manager must perform its functions and exercise its powers so as to allow access to permanent timber production zone land for such purposes as are not incompatible with the management of permanent timber production zone land under this Act."

515 The plaintiffs relied upon Forestry Tasmania's Forest Management Plan of January 2016 as providing the content for their statutory licence. That Plan recognises activities that are compatible with Forestry Tasmania's strategic objectives on permanent timber production zone land. These include dedicated recreation sites, organised events, recreational vehicle use, hunting and firearm use, fossicking and prospecting, firewood collection, indigenous rights use, commercial or private access, apiary sites, mineral exploration and mining, and

tourism. The activities described in Forestry Tasmania's Forest Management Plan are not exhaustive. They would also include peaceful protest activities such as the filming and investigation undertaken by Ms Hoyt and Dr Brown.

516 The statutory licence in s 13(1) of the Forest Management Act is not absolute. Section 13(2) provides that nothing in s 13(1) prevents the Forest Manager from exercising its powers under ss 21, 22, and 23. The exercise of those powers prevents access to permanent timber production zone land in various circumstances. A member of the public who accesses permanent timber production zone land contrary to the restrictions imposed by those powers will become a trespasser and also commit an offence.

517 Section 21 of the Forest Management Act permits the Forest Manager to erect signs on or in respect of forest roads or on permanent timber production zone land. Section 23 permits the Forest Manager to close forest roads by signs, barricades, or trenches. Further, under s 22, any employee appointed by the Forest Manager as an authorised officer may request a person not to enter, to leave, or to cease an activity or conduct on, permanent timber production zone land or a forest road where the authorised officer believes "that the entry or presence of that person, or the activity conducted, or the conduct engaged in, by that person on the land or road is preventing, has prevented or is about to prevent the Forest Manager from effectively or efficiently performing its functions".

518 Sections 21 to 23 also provide that it is an offence (i) to undertake an activity or engage in conduct contrary to directions on a sign erected by the Forest Manager without lawful excuse; (ii) to be on, or otherwise use, a forest road which has been closed by a prescribed sign including with any barricade or trench; or (iii) not to comply with a request from an authorised officer. If a police officer reasonably suspects a person to be engaging in an activity contrary to directions on a sign, he or she may direct the person to leave the forest road or the permanent timber production zone land. The penalty for a contravention of any of ss 21 to 23 is a fine not exceeding 20 penalty units, currently $3,180.

519 This assumption that the public statutory licence permits general access subject to the exercise by the Forest Manager of its powers is consistent with the Second Reading Speech to the Forest Management Bill 2013 (Tas), where the Minister for Energy and Resources said[537]:

> "Under this bill the people of Tasmania will still be able to access and use permanent timber production zone land for the range of purposes and activities they currently enjoy and undertake in their public forest

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537 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 24 September 2013 at 40.

> estate. The provisions of the 1920 [A]ct are essentially maintained to ensure the right to access the land continue so long as the access does not interfere with the management of the land.
>
> Managing access and use
>
> The forest manager will continue to be able to control and manage access to permanent timber production zone land in order to undertake its responsibilities and to protect the safety of people. To assist, the forest manager will be able to close forest roads and erect signs to regulate access to the permanent timber production zone land. This is no different to what Forestry Tasmania can do now under the 1920 [A]ct. In addition, new powers will now allow the forest manager to authorise persons who can request a person not to enter or to leave a forest road or permanent timber production zone land."

The scheme of the Protesters Act

520 A little over a year after the enactment of the Forest Management Act, the Tasmanian Parliament enacted the Protesters Act. The Protesters Act received Royal Assent on 17 December 2014. Its long title provides that it is "[a]n 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". Critical concepts in the Protesters Act are the meanings of "protester", "business premises", and "business access area". It suffices at this stage to introduce the critical provisions of the Protesters Act.

521 A protester is defined broadly in s 4(1), and in the present tense, as a person "engaging in a protest activity". The term "protest activity" is defined in s 4(2) as having two requirements. The first is that the activity is "in furtherance of", or "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". The second is that the activity "takes place on business premises or a business access area in relation to business premises".

522 Section 6 of the Protesters Act is considered in detail later in these reasons. It creates various "contraventions" in s 6(1) to s 6(3), none of which, by itself, carries any sanction. Each of those sub-sections is concerned with conduct by a person that prevents, hinders, or obstructs business activity, or access to business premises or business access areas. Each also depends on the person being a protester. The definition of protester, set out above, requires that the person is engaging in the protest activity "on business premises or a business access area in relation to business premises".

523 Section 11 of the Protesters Act, the key parts of which are set out in the reasons for decision of Kiefel CJ, Bell and Keane JJ, essentially provides for circumstances in which a police officer can give a person a direction to leave business premises or a business access area. The direction can include a requirement that the person not commit an offence against the Act, or contravene ss 6(1) to 6(3), within three months (s 11(6)). The breach of that requirement is an offence (s 6(4)).

524 One qualification before the s 11 direction can be issued is that the person must actually be on the business premises or a business access area. Another qualification before the direction can be issued is that the police officer must reasonably believe that the person has committed, is committing, or is about to commit, an offence against a provision of the Act or a contravention of s 6(1), s 6(2), or s 6(3) on or in relation to the business premises or a business access area in relation to the business premises. The reasonableness of the belief of the police officer must be assessed against any judicial determination of it. As I explain below, that determination should require that the person is on business premises or a business access area.

525 The combined effect of the qualifications to s 11 is therefore that a direction cannot be issued by a police officer unless conditions are satisfied, including, but not limited to, requirements that (i) the person is on the business premises or a business access area; (ii) the police officer believes that the person is on the business premises or a business access area; and (iii) it is reasonable for the police officer to believe that the person is on the business premises or a business access area.

526 Section 8 of the Protesters Act is concerned with activities on business access areas after a direction from a police officer. Section 8(1)(a) prohibits a person from remaining on a business access area in relation to business premises after being directed to leave by a police officer. The penalty, in the case of an individual, is a fine not exceeding $10,000.

527 There is also a prohibition in s 8(1)(b) upon entering "a" business access area in relation to business premises within four days of a direction by a police officer to leave "the business premises" or "a business access area in relation to the business premises". The prohibition must relate to a person who, within four days, enters a business access area in relation to "the" (ie the same) business premises. In other words, if a police officer directed a protester to leave "business premises" or a "business access area" in a forest then the protester could not return within four days to a business access area in relation to *those* premises. To do so would incur a penalty of up to $10,000. As I explain below, the business access area will necessarily be marked by a sign.

528 Section 13 provides for police powers of arrest and removal of persons. Critically, each sub-section of s 13 requires that the person be either on business

premises or on a business access area. An arrest under s 13(1) or s 13(2) requires that the person is, respectively, on business premises or a business access area. Section 13(3) implicitly requires that the person is on business premises or a business access area because it confers a power to remove a person from the business premises or business access area. In addition, there is a requirement in each sub-section that the police officer reasonably believes that the person is committing, or has committed (within the previous three months in the case of arrest), an offence against a provision of the Act, or a contravention of s 6(1), s 6(2), or s 6(3), on or in relation to the business premises or a business access area in relation to the business premises. There are further constraints in s 13(4) on the removal and arrest powers, which require that the police officer reasonably believes that the arrest or removal, and the period during which arrest persists, is necessary for particular listed purposes.

529 Part 4 of the Act provides penalties for offences against the Act and also empowers a court to order a person to pay compensation for offences committed against ss 6 and 7, the latter of which is considered below.

The meaning of business premises and business access areas in the Protesters Act

530 In the Protesters Act, a "business access area" is defined in s 3 in relation to business premises as follows:

> "(a) ... 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".

531 Relevantly to this case, "business premises" are defined in s 5(1) as "premises that are forestry land". "Forestry land" is relevantly defined in s 3 to include "an area of land on which forest operations are being carried out". "Forest operations" are defined as:

> "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".

532 The term "forest products" is defined in the same section as follows:

> "(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".

533 Read in a vacuum, the words of the Protesters Act initially appear rife with uncertainty in their application to forestry land. How is it possible to determine the area of land in which the forest operations are being carried out? What area, for example, is covered by the apparently innocuous reference to "managing trees before they are harvested"? Would any simple acts of managing any trees within the 800,000 hectares of permanent timber production zone land mean that the area surrounding those trees being "managed" becomes business premises? How far would that area extend? For how long? How could a protester know whether forest operations had begun and, if so, when forest operations had begun or when or whether they had ceased?

534 These questions, and the associated uncertainty, could be multiplied when considering the scope of a "business access area". How could any protester determine whether any entrance to or exit from a potentially vast area where forest operations are being carried out is reasonably necessary to enable access to or from that area? For instance, Broxhams Road is a long track which bounds the lengthy south eastern edge of the coupe. It is used for walking, horse riding, and dirt bike riding. If Broxhams Road is reasonably necessary to obtain access to an area of forest operations, would a protester passing along any part of Broxhams Road be, without any possible way of knowing it, within a business access area if Broxhams Road had not been closed or had only been closed in part?

535 Fortunately, the words of legislation are not interpreted, and the legislation is not construed, in a vacuum. The answer to all these questions is revealed by a proper construction of the Forest Management Act. There are four reasons why the "business premises" and "business access areas" provided for in the Protesters Act should be construed as meaning those areas where the Forest Manager has denied access to the public, in the exercise of powers under s 21, s 22, or s 23 of the Forest Management Act.

536 *First*, textually, the Protesters Act employs a technique of borrowing from, and operating consistently with, the Forest Management Act. This technique is consistent with a construction of the Protesters Act that would treat

business premises and business access areas as those places which had effectively been designated as such under the Forest Management Act.

537 When considering the relationship between two interrelated statutes it is necessary to consider whether the operation of the later statute, here the Protesters Act, (i) is autonomous in relation to its own subject matter; (ii) overrides the earlier statute in case of any inconsistency; or (iii) provides "an additional layer of legislation on top of the pre-existing legislation, so that each may operate within its respective field"[538]. The Protesters Act, in its regulation of forestry activities, is an example of (iii), employing an additional layer of legislation on top of the pre-existing, and more specific, Forest Management Act.

538 An immediate textual association between the two Acts is that the Protesters Act, in s 3, defines the Forestry corporation as the "owner" in relation to business premises which are Crown land that is permanent timber production zone land within the meaning of the Forest Management Act. Even more fundamentally, the definition of business premises, as relevant to this case, is "an area of land on which forest operations are being carried out". The definition of "forest operations" which, in the present, active tense, "are being carried out" determines the business premises in this case. That definition, and the associated definition of "forest products", are relevantly the same as those in the Forest Management Act.

539 The area of land where forest operations are being carried out must therefore be understood as that area of land where forest operations are being carried out under the Forest Management Act. The operation of the Forest Management Act effectively requires that the powers under s 21, s 22, or s 23 be exercised in and around where forest operations are being carried out. Forest operations are, by s 8(b), the function, and therefore the responsibility, of the Forest Manager. The Forest Manager's powers to erect signs or to close forest roads in ss 21 and 23 of the Forest Management Act are for purposes including "discharging its responsibilities". Hence, the assumption is that the powers in ss 21 and 23 will be exercised where the Forest Manager is discharging its responsibilities in the process of carrying out forest operations. Further, as the State of Tasmania pleaded, and the plaintiffs admitted, Forestry Tasmania has legal obligations to operate safely, including under common law and s 20(2) of the *Work Health and Safety Act* 2012 (Tas), which require it to ensure that, so far as is reasonably practicable, the place of forest operations, and the means of entering and exiting that place, are without risks to the health and safety of any person. Another purpose of the Forest Manager's powers to erect signs or to

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538 *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 19 [45]; [2013] HCA 2, quoting *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553.

close forest roads in ss 21 and 23 of the Forest Management Act is for "safety". Again, this illustrates that the powers in ss 21 to 23 will be exercised in and around the places where the Forest Manager engages in forest operations.

540 This conclusion is further bolstered by the correct proposition, advanced by the States of Tasmania, Victoria and New South Wales, that liability under the Protesters Act will only arise where there is a substantial or serious interference with the carrying out of business activity or access to business premises or business access areas, or damage to business premises or a business-related object. It is extremely difficult to imagine any circumstance where the Forest Management Act and the *Work Health and Safety Act* would not require the exercise of those powers to preclude a *substantial* interference, as described above, with forest operations.

541 *Secondly*, a consistent textual construction of the provisions of the Protesters Act also limits the meaning of "forest operations", and the associated business premises and business access areas, to areas where the Forest Manager has denied access, in the exercise of powers under s 21, s 22, or s 23 of the Forest Management Act. The terms "business premises" and "business access area" have a ready meaning when applied to shops and shopfronts. When applied to operations on forestry land it is necessary somehow to delimit the areas surrounding or providing access to the very broadly defined "forest operations" within 800,000 hectares of permanent timber production zone land in which those operations might take place. It is a difficult construction which treats that process of delimitation as being, in many cases, subjective, ad hoc, and unascertainable by those who are subject to the Protesters Act. In contrast, a simple contextual construction of the meaning of "business premises" and "business access area" when applied to forestry land is to treat those definitions in the same way as a shop or building. Signs, notices, barriers, and instructions delimit the boundaries of the premises and its entries and exits. So too, in a forest, the signs, notices, barriers, and instructions of the Forest Manager will delimit the boundaries of the premises and signify its entries and exits.

542 *Thirdly*, general principles of construction support this narrow approach to the Protesters Act to create a regime which is intelligible and capable of practical operation. One of those principles is an expectation of clarity in penal provisions. In *McBoyle v United States*[539], the United States Supreme Court held that a federal offence concerning "motor vehicles" did not apply to an aeroplane. Justice Holmes said that "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed"[540]. This was later explained by Harlan J

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539 283 US 25 (1931).

540 *McBoyle v United States* 283 US 25 at 27 (1931).

(with whom Black and Stewart JJ agreed) as based on "a notion of fair play"[541]. It is unnecessary in this case to consider the accuracy of these explanations of the premise for the principle in the United States. It is also unnecessary to explore the manner in which, and extent to which, this principle is appropriately characterised as part of any second-order principle of construction that penal provisions are construed narrowly[542] or is better seen merely as involving recognition of the context of the provision as penal[543]. It suffices to say that the principle that penal provisions will be construed in a manner that gives rise to as much clarity as possible is longstanding and forms part of the conventions of legal language against which legislation is drafted and is reasonably understood. In Blackstone's *Commentaries on the Laws of England*[544], he gave the example of a statute, *The Cattle Stealing Act* 1740 (14 Geo II c 6), which purported to create a felony for stealing sheep or other cattle. The words "or other cattle" were said to be "much too loose to create a capital offence" so the Act was confined to sheep[545]. The same principle is longstanding in Australia[546].

543 In this case, even if the principle is applied as one of "last resort", the principle favours a construction which treats "business premises" and "business access areas", relevantly for this case, as areas which have been marked out for forest operations, including entry to and exit from those operations, by signs or notices. Any competing construction, in relation to forest operations, would be unworkable and unintelligible to those to whom the Protesters Act is directed. It would involve the likelihood of commission of offences in circumstances where an individual could not ascertain whether a fundamental criterion for the offence had occurred.

544 Perhaps even more fundamental is another long-established[547] principle of construction which also supports the narrow approach confining the Protesters

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541 *United States v Standard Oil Co* 384 US 224 at 236 (1966).

542 *Beckwith v The Queen* (1976) 135 CLR 569 at 576; [1976] HCA 55; *Waugh v Kippen* (1986) 160 CLR 156 at 164-165; [1986] HCA 12; *Chew v The Queen* (1992) 173 CLR 626 at 642; [1992] HCA 18.

543 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 49 [57]; [2009] HCA 41.

544 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1 at 88.

545 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1 at 88.

546 *Scott v Cawsey* (1907) 5 CLR 132 at 144-145, 154-156; [1907] HCA 80.

547 *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63.

Act to independently unlawful conduct relating to forest operations. This is the so-called "principle of legality" that "it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing [this intention in language of] irresistible clearness"[548]. This principle is "known to both the Parliament and the courts as a basis for the interpretation of statutory language"[549].

545 One fundamental common law freedom is freedom of speech. That freedom, as French CJ has observed, has been recognised as such since as early as Blackstone[550]. In *Attorney-General (SA) v Adelaide City Corporation*[551], Heydon J said, with reference to considerable authority, that:

> "The common law right of free speech is a fundamental right or freedom falling within the principle of legality. That must be so if there is any shadow of truth in Cardozo J's claim that freedom of speech is 'the matrix, the indispensable condition, of nearly every other form of freedom'." (footnotes omitted)

546 For this reason, it has been said in relation to legislative intrusions upon freedom of speech that "in confining the limits of the freedom, a legislature must mark the boundary it sets with clarity"[552] and that "the curtailment of free speech by legislation directed to proscribing particular kinds of utterances in public will often be read as 'narrowly limited'"[553].

547 It is very difficult to see why the Protesters Act should be construed to operate, in an unascertainable way, to create offences beyond those that would arise from protest activities in areas to which access was prohibited. It is even more difficult to see why such a construction should be adopted, which would curtail freedom of speech, only then to conclude that the construction would give rise to an operation of the Protesters Act that would make it constitutionally invalid.

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548 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; [2010] HCA 23, quoting *Potter v Minahan* (1908) 7 CLR 277 at 304.

549 *Monis v The Queen* (2013) 249 CLR 92 at 209 [331]; [2013] HCA 4.

550 *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 31 [43]; [2013] HCA 3.

551 (2013) 249 CLR 1 at 67 [151].

552 *Coleman v Power* (2004) 220 CLR 1 at 75 [185].

553 *Coleman v Power* (2004) 220 CLR 1 at 76 [188].

548 *Fourthly*, the context of the Protesters Act also supports the construction that confines "business premises" and "business access areas" to areas of forest operations, and entry to and exit from those operations, as signified by the exercise of the powers of the Forest Manager under ss 21, 22, and 23 of the Forest Management Act. In other words, in the circumstances of forest operations, the Protesters Act is concerned only with conduct that is independently unlawful under the Forest Management Act. In the Fact Sheet, which forms part of the extrinsic material from which the Protesters Act falls to be construed[554], the Protesters Bill was described as being "designed to implement the Tasmanian Government's election policy commitment to introduce new laws to address *illegal* protest action in Tasmanian workplaces" (emphasis added). It provided that the Bill did "not seek to prohibit the right to peaceful protest". In the Second Reading Speech, the Leader of the Government in the Legislative Council, Dr Goodwin, said that it was "important to stress" that the Bill was not seeking to undermine or remove a person's right to voice dissent or undertake protest action[555]. She said that the "context of this legislation is about addressing *unlawful acts* against businesses central to the Government's policy focus of developing our competitive industries in the forestry, mining, agriculture, building, construction and manufacturing sectors"[556] (emphasis added). Later she emphasised that "[a]ll this bill seeks to do is ensure that protests are conducted responsibly and safely and do not impede the rights of others"[557].

549 The debates on the Protesters Bill also support this conclusion. An objection by Mr Finch to the legislation, in response to the Second Reading Speech, was that "this controversial legislation is not necessary"[558]. Speaking of existing laws, including trespass, Mr Finch said that all of these measures "adequately cover any future protests against forestry operations"[559]. Another

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554 *Acts Interpretation Act* 1931 (Tas), s 8B(3)(e).

555 Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 29 October 2014 at 4.

556 Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 29 October 2014 at 4.

557 Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 29 October 2014 at 5.

558 Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 29 October 2014 at 10.

559 Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 29 October 2014 at 10.

speaker, Mrs Taylor, observed that in briefings members of Parliament had been informed "that everything is covered by other statutes, except perhaps the clause governing the disruption of business activity", but that "the laws that should prevent illegal activity of this nature [had] not been properly implemented or applied"[560]. Mrs Hiscutt, in defence of the Bill, said that the Bill "only directs the place where you can express your opinions, namely off private property"[561].

Relevant provisions of the Protesters Act require a person to be on business premises or on a business access area

550 With limited exceptions, an essential feature of the Protesters Act is that an offence generally can only be committed by, and enforcement mechanisms are only possible against, a person who is "on business premises" or "on a business access area". For instance, contraventions of ss 6(1) and 6(2) involving preventing, hindering, or obstructing the carrying out of a business activity require proof of matters, including that (i) the protester enters the business premises or part of the business premises, or (ii) the protester does an act on business premises, or on a business access area in relation to business premises.

551 An offence under s 6(4) of the Protesters Act occurs if a person contravenes a requirement of a direction by a police officer issued under s 11(1) or s 11(2). But the terms of ss 11(1) and 11(2) are such that any direction under s 11(1) or s 11(2) will be invalid if the person is not, respectively, on business premises or a business access area. The conditions imposed on a direction under either sub-section, and the consequences which flow from any non-compliance with those conditions, are dependent upon the person having been on the business premises or business access area when directed.

552 There are two arguable exceptions where the Protesters Act operates upon a person without the person being on business premises or a business access area. The first is that offences under s 7 can be committed outside business premises or a business access area. The core element of the offences in ss 7(1) and 7(2) is that the protester does an act that causes damage to business premises or a business-related object knowing, or where the protester could reasonably be expected to know, that the act is likely to cause damage to the business premises or business-related object. It may be doubted, however, whether this is really an exception. Sections 7(1) and 7(2) are only enlivened by acts of a protester. And, as explained above, the definition of protester includes an element which requires the person, in the present active tense, to be on business premises or a business

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560 Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 29 October 2014 at 38.

561 Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 29 October 2014 at 40.

access area in relation to business premises. Further, and in relation also to s 7(3), which deals with threats of damage in relation to business premises and applies to persons generally, s 7 is not engaged on the facts of the Special Case and no substantial argument was addressed to it, as Kiefel CJ, Bell and Keane JJ observe[562]. Indeed, when s 7(1) was addressed in oral argument, counsel for the plaintiffs in reply properly conceded that there were "other laws that already make that illegal and that would remain the position".

553 The second possible exception where a duty is imposed on a person not being on business premises or a business access area is s 6(3), which provides that:

> "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."

554 Three points should be made about s 6(3). First, to reiterate the point above, the sub-section is only engaged by acts of a protester, the definition of which requires the person to be on business premises or a business access area in relation to business premises. This may mean that there is no exception for this sub-section at all. Secondly, although this sub-section arguably imposes a duty upon a person who might be outside business premises or a business access area, it does not create an offence. As the plaintiffs conceded, the enforcement of s 6(3) requires that the person be on business premises or a business access area. For instance, a direction by a police officer under s 11 can only be given to persons who are on the business premises or on a business access area. The consequences which follow from a direction under s 11 are premised upon the person first having been on business premises or a business access area. Further, the criteria for an arrest without warrant under s 13 also include a requirement that the person is on business premises or on a business access area. Thirdly, it is at least arguable that an impediment of the type described in s 6(3) would also be unlawful even if it does not involve a trespass. The State of Tasmania submitted that the impediment would need to be substantial. In *Mogul Steamship Co v McGregor, Gow, & Co*[563], Bowen LJ, in a passage in the Court of Appeal which

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562 At [39].

563 (1889) 23 QBD 598 at 614, citing *Garret v Taylor* (1620) Cro Jac 567 [79 ER 485].

was not doubted by the House of Lords, said that a tort would be committed by the impeding or threatening of workers. This statement was cited with approval by Nicholas J in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[564]. In *OBG Ltd v Allan*[565], Lord Hoffmann described the tort as an instance of causing loss by unlawful means.

555 There is only one circumstance in which conduct prohibited by the Protesters Act, in a forestry context, might not be independently unlawful. Section 10 permits a police officer to require any person (not a "protester" as defined) reasonably believed to be about to contravene s 6(3) to state the person's name, date of birth and address, and to give the officer any evidence of the person's identity that the person has in his or her possession. That section will therefore apply to a person who is reasonably believed to be, or about to become, a protester (and therefore on business premises or in a business access area) even if the person is not actually, or does not become, a protester. It is an offence to fail, or refuse, to comply with this requirement of the police officer: s 10(2). Section 10 is broader than the police powers under s 55A of the *Police Offences Act* 1935 (Tas). But s 10 was not the subject of any submissions and, in oral argument, the plaintiffs did not include s 10 in their list of challenged provisions.

E. Was the freedom burdened?

556 The preceding section of these reasons has shown that the Protesters Act, in its relevant operation in the circumstances of this case, applies only to independently unlawful activity. Two essential issues arise. The first is whether the implied freedom of political communication in the Constitution applies to constrain legislative power over political communication which is independently unlawful. Put another way, can legislation burden freedom of political communication where the conduct it prohibits is independently unlawful? The second issue is whether the State of Tasmania conceded that it could.

Legislation in relation to unlawful conduct cannot burden the implied freedom

557 The constitutional freedom of political communication that was unanimously confirmed by this Court in *Lange v Australian Broadcasting Corporation*[566] was held to be a constraint upon the exercise of State and Commonwealth legislative power. However, the constraint only applies to State or Commonwealth legislative power if there is a "burden on the freedom". This phrase is not entirely apt but it signifies that the constitutional implication only

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564 (1936) 37 SR (NSW) 322 at 341.

565 [2008] AC 1 at 19 [6].

566 (1997) 189 CLR 520; [1997] HCA 25.

constrains legislative power where that power is exercised to impede legal freedom to communicate about government and political matters. If the conduct about which legislation is concerned is independently unlawful, so that there was no legal freedom to communicate about government or political matters, then there can be no "burden" on the freedom. The implied constraint upon legislative power cannot operate.

558 This conclusion is unassailable. In *Australian Communist Party v The Commonwealth*[567], Dixon J said that the rule of law forms an assumption of the Constitution. Whatever is meant by the "rule of law", and however the assumption might operate in relation to constitutional implications, it would be anathema if, in a society founded upon the rule of law, this Court could be required to assess the extent to which the Constitution implies that persons be free from legislative constraints upon unlawful conduct. The Constitution does not create spheres of immunity from unlawful activity. Put another way, if there is no freedom then there cannot be any burden upon that freedom.

559 This point was made by McHugh J in *Levy v Victoria*[568]. That case was concerned with the validity of regulations that prohibited persons from entering a permitted hunting area without a licence at a certain time. The plaintiff, who was charged with an offence under the regulations, claimed that the regulations were invalid because they prohibited him from protesting Victorian hunting laws. Justice McHugh explained, as has now been confirmed on many occasions[569], that the implied freedom is not an individual right but is "a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution"[570] (emphasis in original). As McHugh J explained, since the implication does not create any individual right this means that before the implied freedom can operate to restrain legislative action it must inhibit an

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567 (1951) 83 CLR 1 at 193; cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [89].

568 (1997) 189 CLR 579 at 622, 625-626; [1997] HCA 31.

569 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 [381]; [2005] HCA 44; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 89 [220]; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [30], 554 [36], 574 [119]; [2013] HCA 58; *Tajjour v New South Wales* (2014) 254 CLR 508 at 569 [104], 593-594 [198]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30]; [2015] HCA 34.

570 *Levy v Victoria* (1997) 189 CLR 579 at 622.

existing right or privilege[571]. In *Levy*, that meant that "unless the common law or Victorian statute law gave [protesters] a right to enter that area, it was the lack of that right, and not the [r]egulations, that destroyed their opportunity to make their political protest"[572]. In *Levy*, it was not necessary for McHugh J to explore this point any further because the arguments of the parties assumed that, in the absence of the regulations, the plaintiff was entitled to enter the area.

560 The reasoning of McHugh J was expressly adopted by five Justices of this Court in *Mulholland v Australian Electoral Commission*[573]. That case concerned a challenge to two rules in the *Commonwealth Electoral Act* 1918 (Cth). One rule, the 500 rule, permitted registration or continued registration of political parties without a parliamentary representative only if they had 500 members. A second rule, the no overlap rule, prohibited two or more parties from counting the same person as a member. Only registered political parties could be included on the ballot paper. Justice McHugh reiterated his views from *Levy* and held that there was no burden on the implied constitutional freedom because the political party, of which the appellant was the registered officer, did not have any right to be put on the ballot paper independently of the *Commonwealth Electoral Act*[574]. Justices Gummow and Hayne[575], in a joint judgment, and Heydon J in a separate judgment[576], also quoted the passages from McHugh J in *Levy* described above, and concluded that no right or freedom, independent of the *Commonwealth Electoral Act*, had been identified by the appellant[577]. The point that the appellant had no right to be included on the ballot paper was also made succinctly by Callinan J, in terms which apply to this case[578]:

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571 *Levy v Victoria* (1997) 189 CLR 579 at 622.

572 *Levy v Victoria* (1997) 189 CLR 579 at 626.

573 (2004) 220 CLR 181; [2004] HCA 41.

574 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223-224 [107]-[108].

575 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 246 [184].

576 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 303-304 [354].

577 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 247 [186]-[187].

578 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 298 [337].

> "In argument, McHugh J drew an analogy: protestors cannot complain about an interference with, or the prevention of their doing what they have no right to do anyway, for example, to communicate a protest on land on which their presence is a trespass. As the appellant has no relevant *right* to the imposition of an obligation upon another, to communicate a particular matter, he has no right which is capable of being burdened." (emphasis in original, footnote omitted)

561 There are three clarifications to the principle that the implied freedom of political communication does not apply to unlawful conduct. The first clarification applies where the conduct is unlawful due to a law which is, itself, invalid because it contravenes the implied freedom. No party or intervener in this case suggested that any provision of the Forest Management Act was contrary to the implied freedom. It is very difficult to see how they could have done so in circumstances in which the common law recognises no public ius spatiandi vel manendi[579]. In other words, the purported burden upon freedom of political communication imposed by the Forest Management Act must be assessed with regard to the fragility of the liberty of the public to enter forestry land. That liberty could be withdrawn at any time by the Crown or the relevant person in possession of the land. That would be so whether the liberty arose from custom or, more controversially, from some fictional implied licence. A further reason why no party or intervener raised any issue concerning the validity of the provisions of the Forest Management Act may have been the difficulty in seeing how the implied freedom should restrain legislation which permitted a protester to exercise a freedom to protest in the vast majority of 800,000 hectares but not in the vicinity of works involving significant safety concerns and the potential use of heavy machinery.

562 There is a second clarification to the principle that the implied freedom of political communication does not apply to unlawful conduct. The second clarification arises where the subsequent legislation which is challenged operates as part of a single scheme, together with the initial legislation which made the conduct unlawful. For a scheme to exist it is not enough that two statutes, such as the Forest Management Act and the Protesters Act, operate together. They must also have "a wider common purpose"[580] as Acts which need "to be read together as a combined statement of the will of the legislature"[581]. In those

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579 *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 74; [1959] HCA 63.

580 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 414 [97]; [2012] HCA 56.

581 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 354 [10], quoting *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463; [1995] HCA 44.

circumstances the burden upon a general freedom to engage in political communication might fall to be assessed by reference to the joint effect of the two statutes[582]. If so, it would be no answer to say that the subsequent legislation imposes only a further incremental burden upon conduct that is already unlawful. No party, and no intervener, suggested that the Forest Management Act and the Protesters Act were to be considered as part of a single scheme with a wider common purpose in this sense.

563 The third clarification to the principle that the implied freedom of political communication does not apply to unlawful conduct is the recognition in *Lange* that the common law, including common law rules that make acts unlawful, must develop consistently with the Constitution. This process of development of the common law, consistently with the Constitution, must occur by the common law analogical method. The need to develop the law of defamation in *Lange* was said to arise because a "different balance" was demanded by new circumstances including the "expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern development in mass communications, especially the electronic media"[583]. In contrast, there is plainly no need, for example, to develop the common law in relation to assault to create a liberty by which persons can assault others for the purpose of political communication. Nor is there a need, and no party contended, for the law concerning property rights to develop so that an individual has a liberty to trespass on the property of another for the purposes of political communication.

No concession of any burden was made in relation to forest operations

564 In its written submissions, the State of Tasmania accepted that the Protesters Act "may impose a burden in *some* circumstances" (emphasis added). In oral submissions, the State of Tasmania explained the nature of this concession, saying that "there may be a burden imposed by the Act but it does not arise here". The State of Tasmania had earlier said that there would be no burden if the Act were only directed at permanent timber production zone land rather than including, for example, "a protest outside a shop". Similarly, the State of Victoria, whose submissions were the most focused upon the question of burden, and adopted by the State of South Australia, submitted that the "burden on the freedom" imposed by the Protesters Act was "slight or nil".

565 The "concession" by the State of Tasmania that there may be a burden in "some circumstances", although not in this case, was no real concession at all.

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582 Cf *South Australia v The Commonwealth* (1942) 65 CLR 373 at 411; [1942] HCA 14.

583 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565.

The validity of the Protesters Act falls to be assessed against the existing state of facts[584]. Those facts, in this case, concern only the operation of the Protesters Act in relation to forestry. If there is no existing freedom of political communication in that context then the Protesters Act cannot be held invalid by reference to some hypothetical circumstance where a freedom might exist. Put another way, whether there is a burden upon an existing freedom imposed by the Protesters Act must be assessed in the context in which facts are before the Court (ie forestry) before turning to questions that are designed to test whether the freedom has been impermissibly infringed.

566 For these reasons, the State of Tasmania did not concede that the Protesters Act imposed any relevant burden in the circumstances of this case. But even if such a concession of law had been made, I would not accept it without first construing the meaning of the Protesters Act. My construction of that Act leads to the conclusion that, as the States of Tasmania, Victoria, and South Australia submitted, no burden is imposed by the Protesters Act.

F. Conclusion

567 The necessary first step before assessing constitutional validity is to determine the meaning of legislation. On the proper construction of the Protesters Act, in relation to forest operations and areas of access to those operations, the relevant provisions apply only to conduct which is already independently unlawful under the unchallenged provisions of the Forest Management Act. Any other construction would render the meaning of the Protesters Act unintelligible to those to whom the Act is directed. Within an intelligible narrow construction, which minimises the intrusion into freedom of speech, the Protesters Act still imposes penalties and other consequences on protesters for their unlawful conduct which go beyond the burdens imposed by the Forest Management Act. Those additional consequences are only borne by protesters. But the essential point is that the additional consequences are imposed on independently unlawful conduct. However high the value that one puts upon a freedom of political communication, the constitutional area of "immunity from legal control"[585] does not extend to persons whose conduct is independently unlawful.

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584 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Duncan v New South Wales* (2015) 255 CLR 388 at 410 [52]; [2015] HCA 13; *Knight v Victoria* (2017) 91 ALJR 824; [2017] HCA 29.

585 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, quoting *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 327; [1994] HCA 44.

568 The substantive question remaining in the Special Case, concerning the alleged invalidity of provisions of the Protesters Act, should be answered, "no". The plaintiffs should pay the defendant's costs.