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The raised spectre of silencing ‘political’ and ‘environmental’ protest: Will the High Court find the *Workplaces (Protection from Protesters) Act 2014 (Tas)* impermissibly infringes the constitutionally implied freedom of political communication in *Brown v The State of Tasmania*?

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Abstract:

Brown v The State of Tasmania is an implied freedom of political communication challenge which was heard by the Full Bench of High Court in May 2017. The two Plaintiffs have impugned the constitutional validity of the Tasmanian ‘anti-protest’ legislation, the Workplaces (Protection from Protesters) Act 2014 (Tas). This article argues that the Act impermissibly infringes the constitutionally implied freedom of political communication because it does not pursue a legitimate legislative purpose under the second limb of the Lange test. In making this argument, it is submitted that in a graduated series of implied freedom challenges, Lange’s requirement that an impugned law pursue a legitimate legislative purpose has been significantly elevated by the High Court in the 20 years since. As such, the article fills a lacuna in the literature by exploring the content of this higher constitutional criterion of validity, focusing specifically on the reasoning of Hayne J in Monis v The Queen and the McCloy plurality’s recent articulation of the implied freedom’s ‘protective’ function. The article then applies McCloy’s new test of structured proportionality and concludes that, even if the Act pursues a legitimate legislative purpose, it is not ‘necessary’ nor ‘adequate in its balance’.

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‘In that sense it is said that because of that very fact, the very fact and the sole fact that they were engaging in political communication they are subject, not to the forest management regime but to this regime that imposes much greater penalties for - precisely for the act of political speech. That is really one way in which the case against you is put.’¹ – *Keane J to Mr Michael O’Farrell SC on 3 May 2017 during day two of the hearing of Brown v The State of Tasmania*

I INTRODUCTION

This article argues that the *Workplaces (Protection from Protesters) Act 2014* (Tas) (‘the Act’) infringes the constitutionally implied freedom of political communication under the test laid down in *Lange v Australian Broadcasting Corporation*.² At the time of writing, the Full Bench of the High Court (‘the Court’) on 2–3 May 2017 heard a challenge to the Act’s validity in its original jurisdiction on the Special Case filed by the Plaintiffs, Dr Robert Brown and Ms Jessica Hoyt, in *Brown v The State of Tasmania* (‘*Brown*’).³ As is now settled, the *Lange* test protects communication about political matters as an indispensable incident of the Australian system of representative and responsible government by operating to invalidate legislation that impermissibly restricts such communication. It is argued that the Act impermissibly infringes this constitutional guarantee because it specifically targets and restricts ‘political’ and ‘environmental’ protest that has a nexus to business premises, without an adequate justification for doing so. The Act targets and restricts the implied freedom by creating four principal types of offences, three of which operate to make protesting on a ‘political, environmental, social, cultural or economic’⁴ issue a mental element of the crime (crimes which are, by default, indictable offences).

As such, the author argues in Part V that the Act is constitutionally invalid because it does not pursue a legitimate legislative purpose, as required by the *Lange* test. It is submitted that the requirement of legitimate purpose as a criterion of constitutional validity has increasingly been elevated by the Court in a graduated series of implied freedom challenges, including

¹ Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) 4445.

² (1997) 189 CLR 520, 567 (‘*Lange*’).

³ See Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 93 (2 May 2017) and Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017). The Plaintiffs’ and Defendant’s submissions, along with submissions from the Attorneys-General intervening on behalf of the Commonwealth, South Australia, New South Wales, Queensland and Victoria are accessible at http://www.hcourt.gov.au/cases/case_h3-2016. See also Jeremy Gans, ‘News: Forest challenge stumbles into a factual thicket’ on *Opinions on High* (5 May 2017) <<http://blogs.unimelb.edu.au/opinionsonhigh/2017/05/05/news-tasmanian-forest-challenge-stumbles-into-a-factual-thicket/>>.

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

Coleman v Power,⁵ *Monis v The Queen*,⁶ *Unions NSW v New South Wales*⁷ and now *McCloy v New South Wales*.⁸ This determination of legitimate purpose may be fatal to the Act because it is arguable that the ‘true’,⁹ or collateral, purpose behind the Act is to silence protest on particular political and environmental issues, namely protest related to the forest industry in Tasmania. Such a purpose (or at the very least the chilling effect it has had on political protest in Tasmania) exposes the Act’s incompatibility with the Australian system of representative and responsible government. *Brown* is also the Court’s first chance to apply the new three-tiered structured proportionality test it propounded in *McCloy*.¹⁰ As such, this article argues in Part VI that, even if the Act’s purpose is constitutionally valid, while the Act may be ‘suitable’, it is neither ‘necessary’ or ‘adequate in its balance’.¹¹ This is principally because there are at least 13 other coextensive criminal offences and torts that regulate similar conduct. The constitutional validity of the Act has only been subject to several shorter analyses,¹² and as such this paper adds to the literature by offering a lengthier analysis.

II CONTEXT: FACTUAL BACKGROUND AND THE ACT’S OPERATION

A *Entry into Force*

In December 2014 the Act came into force in Tasmania. It was introduced into Parliament by the Liberal Government to uphold their 2014 electoral promise to ‘protect workers from radical protesters’.¹³ Even before its enactment, the (then) Bill was subject to condemnation by a myriad of actors,¹⁴ including the Office of the United Nations Commissioner for

⁵ (2004) 220 CLR 1 (‘*Coleman*’).

⁶ (2013) 249 CLR 92 (‘*Monis*’).

⁷ (2013) 252 CLR 530 (‘*Unions NSW*’).

⁸ (2015) 257 CLR 178 (‘*McCloy*’).

⁹ *Ibid* 205 [40] (French CJ, Kiefel, Bell and Keane JJ).

¹⁰ *Ibid* 193–5 [2].

¹¹ *Ibid*.

¹² See Nicholas Aroney and Lorraine Finlay, ‘Protesting the anti-protest laws: will a constitutional challenge succeed?’ (2016) 31(3) *Australian Environment Review* 67; Aidan Ricketts, ‘Freedom From Political Communication’ (2015) 40 *Alternative Law Journal* 234; Greg Barns, ‘The Workplaces (Protection from Protesters) Act 2014 – an end to peaceful protests in Tasmania?’ (2014) 29(10) *Australian Environment Review* 292; Peter Burdon and Mary Heath, *Bob Brown takes to the High Court to put hardline anti-protest laws to the test* (3 May 2017) *The Conversation* <<http://theconversation.com/bob-brown-takes-to-the-high-court-to-put-hardline-anti-protest-laws-to-the-test-76991>>.

¹³ Paul Harriss MP, Minister for Resources, ‘Protecting Workplaces from Radical Protesters’ (Media Release, 22 October 2014) <http://www.premier.tas.gov.au/releases/protecting_workers_from_radical_protesters>.

¹⁴ See, eg, Michael Safi, ‘Tasmania’s anti-protest law slammed by former supreme court justice’, *The Guardian* (online) 29 October 2014 <<https://www.theguardian.com/australia-news/2014/oct/29/tasmanias-anti-protest-law-slammed-by-former-supreme-court-judge>>; Human Rights law Centre, *Tasmania’s*

Human Rights (OHCHR), which issued a statement noting the Bill's enactment would 'have the chilling effect of silencing dissenters and outlawing speech protected by international human rights law.'¹⁵ The Bill proposed that persons convicted of a second or repeat against the Act would face mandatory terms of imprisonment of three months.

Since coming into force (without mandatory penalties), the Act has been subject to extensive criticism for the central reason that it criminalises political protest in public places ('business access areas'¹⁶), with penalties of up to \$10 000 per individual and terms of imprisonment for further offences.¹⁷ At the time, Professor George Williams correctly predicted that the Act was 'susceptible to challenge in the High Court'.¹⁸ Forest industry groups, peak business bodies and mining companies welcomed the new offences however, as the Act was seen as a measured response to continuing destructive behaviour directed at various primary industries including mining and forestry.¹⁹

B *Charges Laid under the Act and the High Court Challenge Heard*

In January 2016, two protesters (one of whom was Ms Hoyt) were arrested and charged under the Act after failing to comply with police directions to leave Forestry Tasmania land at Lapoinya.²⁰ A few days later Doctor Brown was arrested, charged and bailed under s 6(4) of the Act, after he also failed to comply with police directions to leave a 'business access area'. A further two protesters were subsequently charged. In March 2016, Doctor Brown issued a writ in the High Court's original jurisdiction, challenging the Act's constitutional validity. During this period the five accused were still subject to their bail conditions. In May and June 2016, Tasmania Police dropped the charges against Doctor Brown and the four other protesters, acting on advice from the Department of Public

Proposed Anti-Protest Laws Will Breach International Human Rights Law (29 October 2014) <<http://hrhc.org.au/tasmanias-proposed-anti-protest-laws-will-breach-international-human-rights-law/>>.

¹⁵ OHCHR, *UN Experts Urge Tasmania to Drop its Anti-Protest Bill* (9 September 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>>.

¹⁶ *Workplaces (Protection from Protesters) Act 2014* (Tas) ss 3, 5.

¹⁷ See, eg, Brendan Gogarty, *Criminalising dissent: anti-protest law is an ominous sign of the times* (28 November 2014) *The Conversation* <<https://theconversation.com/criminalising-dissent-anti-protest-law-is-an-ominous-sign-of-the-times-34790>>.

¹⁸ Michael Safi, 'Tasmania to focus anti-protest laws on anti-forestry and mining activists', *The Guardian* (online) 28 October 2014 <<https://www.theguardian.com/politics/2014/oct/28/tasmania-to-narrow-anti-protest-laws-to-target-anti-forestry-and-mining-activists>>.

¹⁹ See, eg, Nick Thomas and Tom Dougherty, *Protection from protest: a new standard to minimise business disruption in Tasmania* (11 December 2014) Clayton Utz <<https://www.claytonutz.com/knowledge/2014/december/protection-from-protest-a-new-standard-to-minimise-business-disruption-in-tasmania>>.

²⁰ Ostensibly a designated 'business premises' under s 3 of the Act.

Prosecutions; the reason being that it was too difficult to determine whether he was on a business access area or business premises. After early skirmishes about whether the Plaintiffs had standing to challenge the Act’s validity,²¹ the Full Court heard argument on the Special Case over two days on 2–3 May 2017.

C *The Act’s Stated Purpose*

The construction of the Act’s legislative purpose is the starting point in assessing its constitutional validity.²² The determination of legislative purpose is anchored in the permissible intrinsic and extrinsic aids of construction, read in conjunction with the operation and effect of the Act’s provisions. The Second Reading Speech of the Act is a permissible extrinsic aid available in the construction of statutory purpose.²³

During the Second Reading Speech in the House of Assembly (the lower house in Tasmania), the Minister for Resources Mr Paul Harriss MP opened with the statement that the Government had introduced the (then) Bill ‘to rebalance the scales’,²⁴ in light of the decades-long running battles between the forestry industry and environmental activist groups in Tasmania. The Minister went on to state that there were three primary policy objectives of the Bill, which were to:

- deter protests that seek to intentionally shut down and harm Tasmanian businesses’ capacity to build productive commercial enterprises, through new offences and robust penalties;
- ensure Tasmanians can go to work and run their businesses in a safe manner, free from interference and disruption; and
- protect and support the continued right to free speech and the right to protest.²⁵

Notably, deterrence appears to have been a primary purpose of the legislation. This is also clear from the subsequently enacted legislation’s Long Title, which states the Act’s 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, and for related purposes.’²⁶

²¹ Transcript of Proceedings, *Brown v The State of Tasmania* [2016] HCATrans 152 (7 July 2016); Transcript of Proceedings, *Brown v The State of Tasmania* [2016] HCATrans 271 (14 November 2016).

²² See, eg, *McCloy* (2015) 257 CLR 178, 203 [31], 212–13 [67].

²³ *Acts Interpretation Act 1931* (Tas) s 8B(3)(f).

²⁴ Tasmania, *Parliamentary Debates*, House of Assembly, 26 June 2014, 26 (Paul Harriss, Minister for Resources).

²⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 26 June 2014, 26 (Paul Harriss, Minister for Resources) 26–7.

²⁶ *Workplaces (Protection from Protesters) Act 2014* (Tas) Long Title.

D Summary of The Act's Operative Offence Provisions

1 Operative offence provisions

The Act operates to create ten criminal offences, nine of which are indictable by default.²⁷ The four classes of offence created in Part 2 of the Act are:

- (i) invading or hindering business (s 6);
- (ii) causing or threatening damage or a risk to safety (s 7);
- (iii) remaining on a 'business access area'²⁸ after being directed to leave by a police officer (s 8); and
- (iv) preventing the removal of obstructions (s 9).

For the first three types of offence, the s 4 definition of a 'protester' means that protesting on a 'political, environmental, social, cultural or economic' issue becomes a mental element of the offence. The key offence provisions are sub-ss 6(4) (preventing, hindering or obstructing business), 8(1)(a) and 8(1)(b) (remaining on, or returning to, a business access area after being issued with a direction to leave), which are all triggered by a police officer issuing a direction under sub-s 11(1) to a person to move from business premises or a business access area if the police officer reasonably believes the person has, or is likely to commit, an offence against the Act. The Court squarely focused its attention during the hearing of *Brown* on the breadth of this power conferred upon police.²⁹ Section 7 creates three offences relating to causing or threatening damage or a risk to safety, which do not require the same 'move on' direction trigger under sub-s 11(1).

A range of penalties are prescribed for contravention of these offences, including fines, pecuniary compensation and imprisonment.³⁰ All of the offences in the Act are indictable except for the offence created by s 10(2); however, all offences may be heard summarily.³¹ Section 16(3) provides that for a number of offences created by the Act (including ss 6(4) and 8(1)), if these are prosecuted summarily, then the applicable penalties are reduced significantly.

2 Interpretation of 'business access area'

One of the most contentious aspects of the Act's operation is its extension of all four principal types of offence to what is defined as a 'business access area'. Section 3 defines a business access area as being:

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...

²⁷ Ibid s 16(1).

²⁸ Ibid s 3.

²⁹ Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) [4075]–[4110], [4550], [7265].

³⁰ *Workplaces (Protection from Protesters) Act 2014* (Tas) s 17(2).

³¹ Ibid s 16(2).

It is argued that this geographic definition is the ‘lowest common denominator’ in the Act with respect to its application to a wide range of protest types – it encompasses publicly accessible areas and, as such, operates to extend the Act’s offences to a wide variety of locales, including access roads to Forestry Tasmania land. The nebulous definition attracted criticism from the Police Association of Tasmania, which said that police officers ‘don’t carry surveying tools for a living, and that’s what you would actually need to interpret that law’.³²

III THE *LANGE* TEST: THE CONSTITUTIONALLY IMPLIED FREEDOM OF POLITICAL COMMUNICATION

It is now ‘well settled’³³ that in *Lange* a unanimous Court confirmed that implied into the Australian *Constitution* is a restriction on both Commonwealth and State³⁴ legislative power that guarantees freedom of political communication in the Australian system of representative and responsible government.³⁵ The constitutional implication arises from ss 7, 24 and 128 of the *Constitution*, which function to ensure that the members of the two Houses of Parliament are directly chosen by the people – the implied freedom of political communication therefore protects the people’s ‘free and informed choice as electors.’³⁶ As reasoned by the plurality in *Unions NSW*, this means that ‘political communication is an indispensable incident of that system of representative government for which the *Constitution* provides.’³⁷

The fundamental basis of the implication was earlier explained by Mason CJ in one of the embryonic implied freedom challenges, *Australian Capital Television Limited v Commonwealth*.³⁸ His Honour held that the implied freedom is a necessary incident of Australia’s system of representative and responsible government because: ‘Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected Representatives.’³⁹

The Court held in *Lange* that the test for determining whether a law infringes this guarantee is:

³² Richard Baines, ‘Tasmanian officers could boycott workplace protest laws: police association’, *The Mercury* (online) 4 June 2016 <<http://www.abc.net.au/news/2016-06-04/tasmania-police-could-boycott-workplace-protest-laws/7477936>>.

³³ *McCloy* (2015) 257 CLR 178, 200 [23] (French CJ, Kiefel, Bell and Keane JJ).

³⁴ The restriction on State legislative power was confirmed by the plurality in *Unions NSW* (2013) 252 CLR 530 at 548–51 [17]–[26].

³⁵ *Lange* (1997) 189 CLR 520, 567.

³⁶ *Unions NSW* (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³⁷ *Ibid.*

³⁸ (1992) 177 CLR 106 (*‘ACTV’*).

³⁹ *Ibid* 138.

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government...⁴⁰

The plurality in *McCloy* re-affirmed that this two-limbed test in *Lange* still stands as the ‘authoritative statement of the test to be applied to determine whether a law contravenes the freedom.’⁴¹ The content of the test has evolved throughout the implied freedom jurisprudence,⁴² and now it is settled that the second limb as laid down in *Lange* has two ‘arms’. These are that: (i) the Court must determine whether a law pursues a legitimate legislative purpose compatible with the system of representative and responsible government; and (ii), if the purpose is so compatible, then whether the law is reasonably appropriate and adapted to achieve that purpose. This paper will now sequentially consider both limbs (and each arm) of the *Lange* test to assess the Act’s constitutional validity.

IV APPLYING *LANGE*’S FIRST LIMB: DOES THE ACT EFFECTIVELY BURDEN THE IMPLIED FREEDOM?

A ‘Effective Burden’

The first limb of the *Lange* test is the determination of whether the Act, in its terms, operation and effect, effectively burdens the implied freedom of communication about political matters in Australia.⁴³ Hayne J’s articulation of the meaning of ‘effective burden’ in *Monis* has been subsequently approved by Keane J in *Unions NSW*,⁴⁴ and most recently by Gageler J in *McCloy*.⁴⁵ Hayne J explained in *Monis* that: ‘the expression “effectively burden” means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or content of political communication’.⁴⁶ North J’s finding in *Muldoon v Melbourne City Council*⁴⁷ is also apposite on this point: his Honour held that the effective burden requirement ‘operates as a low-level filter so that plainly inconsequential impediments will not needlessly require an examination of

⁴⁰ *Lange* (1997) 189 CLR 520, 567.

⁴¹ *McCloy* (2015) 257 CLR 178, 200–1 [23] (French CJ, Kiefel, Bell and Keane JJ).

⁴² See modification in *Coleman* (2004) 220 CLR 1, where McHugh J at 50 [92] extended the legitimate ends enquiry to an impugned law’s ‘manner of achieving’ its end.

⁴³ *Lange* (1997) 189 CLR 520, 567.

⁴⁴ *Unions NSW* (2013) 252 CLR 530, 574 [119].

⁴⁵ *McCloy* (2015) 257 CLR 178, 230 [126].

⁴⁶ *Monis* (2013) 249 CLR 92, 142 [108].

⁴⁷ (2013) 217 FCR 450 (*Muldoon*).

the more complex inquiries involved in answering the second *Lange* question.⁴⁸

B *The Act’s Burden On The Implied Freedom*

One of the seminal statements as to when a law will burden the implied freedom was expounded by McHugh J in *Coleman*. His Honour stated that: ‘[i]n all but exceptional cases, a law will not burden such communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence.’⁴⁹ The Act here does so burden the freedom because it directly restricts where, when and how protests may be conducted – explicitly limiting the time, place and conditions of political communication.

There are three reasons why the Act directly restricts such communication. First, ss 4(1) and 4(2) of the Act interoperate to expressly define a ‘protester’ as a person engaging in protest about a ‘political, environmental, social, cultural or economic’⁵⁰ issue. The s 4 definition is the cornerstone of the two offences created by ss 6 and 7. As such, the second and primary reason the Act burdens the implied freedom is that it creates these default indictable offences for engaging in particular types of conduct as a political protester. On this point, *Levy v State of Victoria*⁵¹ arguably stands for the proposition that the criminalisation of political protest is an archetypal instance of a burden being placed on the freedom.⁵²

Third, applying McHugh J’s statement of principle in *Coleman*, the Act restricts both: (i) the ‘place’ in which protest may occur, as it prohibits protest on ‘business premises’ and ‘business access areas’; and (ii) the ‘time’ when protest can occur, as s 6(4) prevents a person from returning to the relevant area for three months from the date the direction is issued. Putting the effect of this temporal restriction at its highest, s 6(4) in effect prevents a person from returning to a business access area to ‘prevent, hinder or obstruct’ business by protesting for a further three months under pain of an aggravated penalty of a term of imprisonment of up to four years or a \$10 000 fine for committing such a ‘further offence’. As such, it is almost certain that the Act imposes an effective burden on the freedom.

⁴⁸ Ibid 526 [369].

⁴⁹ *Coleman* (2004) 220 CLR 1, 49 [91].

⁵⁰ *Workplaces (Protection from Protesters) Act 2014* (Tas) s 4(2).

⁵¹ (1997) 189 CLR 579 (‘*Levy*’).

⁵² Ibid 625–6 (McHugh J).

V APPLYING THE FIRST ARM OF *LANGE*'S SECOND LIMB: ARE
THE PURPOSE AND MEANS OF THE ACT LEGITIMATE?
(‘COMPATIBILITY TESTING’)

A *The Current Formulation and McCloy's Two Implications*

This latest evolution of the first arm of the second limb of the test is its re-statement by the plurality in *McCloy* and their Honours' attendant reasoning. In *McCloy*, the plurality designated the term ‘compatibility testing’ for this arm and explained:

If “yes” to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as “compatibility testing”.

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.⁵³

This current formulation of this stage of the *Lange* test forms part of the ratio decidendi of *McCloy*. It is submitted that there are two key implications for this arm of the test arising from the plurality's reasoning.

The first implication for the legitimate ends inquiry is that the function of compatibility testing has been further clarified.⁵⁴ This is because their Honours articulated the doctrinal foundation of ‘compatibility testing’. Compatibility testing was held to be a higher ‘rule derived from the Constitution itself’,⁵⁵ as opposed to being simply a judicial tool to determine the ‘rationality and reasonableness of the legislative restriction’.⁵⁶ Proportionality testing under the second arm of the second limb is such a judicial tool. The plurality, by elevating compatibility testing's doctrinal foundation to that of a constitutionally derivative rule, expressly characterised its function to be that of a ‘protective’⁵⁷ gatekeeper. This gatekeeping function ensures the ‘[implied] freedom is protective of the constitutionally mandated system of representative government’.⁵⁸ Despite not agreeing with the plurality's differentiation between a tool used to determine reasonableness and a higher rule derived from the

⁵³ *McCloy* (2015) 257 CLR 178, 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ) (footnotes omitted).

⁵⁴ See Shipra Chordia, ‘Proportionality and *McCloy v New South Wales*: close but not quite?’ on *AUSPUBLAW* (1 March 2016) <<https://auspublaw.org/2016/3/proportionality-and-mccloy/>>.

⁵⁵ *McCloy* (2015) 257 CLR 178, 213 [68] (French CJ, Kiefel, Bell and Keane JJ).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

Constitution,⁵⁹ Chordia argues that this articulation of the basis of compatibility testing means that the plurality sought to cast light on the ‘actual analysis undertaken at this stage *irrespective* of the language employed to describe the [compatibility] test.’⁶⁰

As such, Chordia posits that the actual analysis undertaken by the Court during compatibility testing is to determine what the ‘*true purpose* of the law’ is.⁶¹ This accords with the plurality’s reasoning in *McCloy*, as their Honours took, in essence, a substance over form approach. As argued by Chordia: ‘[i]n effect, the majority is concerned here with “smoking out” whether there is another, ulterior purpose that may be hiding behind the asserted or obvious one.’⁶² This approach indicates that the Court may now be more willing to untether itself from the restraints imposed by the Act’s stated purpose, and move towards making a determination about the Act’s real purpose. On day two of the hearing of *Brown*, Gageler J put this point to Mr Bleby SC (appearing for South Australia) when his Honour said:

You would accept, I think, that it is possible to look beyond the face of the legislation, that is, Parliament cannot recite itself into power and it cannot recite itself out of a constraint of power.⁶³

Gageler J’s point was in response to Mr Bleby SC’s submission that the Court’s construction of the Act’s purpose should proceed from the basis that ‘Parliament can respond’ to ‘felt necessities’, namely ‘protestors who pose or carry that risk of disruption, damage, threat and the like’.⁶⁴ Therefore on Mr Bleby SC’s submission, the purpose of the Act (however variously expressed by the Defendant or interveners) is to target this mischief, which does not ‘elevate silencing protestors to an object of the Act’.⁶⁵

However, this paper submits that *McCloy* has opened the door a little wider for precisely such normative curial determinations about a law’s *true purpose* to be made because the protective gatekeeping function of compatibility testing has been elevated. If this proposition is accepted, this means that it is more likely that the Court in *Brown* will scrutinise whether or not silencing protestors *could* be a purpose of the Act. Meager, Simpson, Stellios and Wheeler’s analysis of *McCloy* supports this argument that the

⁵⁹ See Anne Carter, ‘Political Donations, Political Communication and the Place of Proportionality Analysis’ (2015) 26 *Public Law Review* 245, 248.

⁶⁰ Chordia, above n 54 (emphasis added).

⁶¹ Ibid. Chordia argues such true purpose is ‘construed from both its stated objective (end) and its practical and legal operation (means)’.

⁶² Chordia, above n 54.

⁶³ Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) 7260. For the avoidance of doubt, this discussion on the elevation of compatibility testing in *McCloy* and ulterior purpose appeared in the author’s original honours manuscript.

⁶⁴ Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) 7130.

⁶⁵ Ibid.

plurality in *McCloy* further elevated the legitimate end inquiry – the authors argue that the plurality’s clarification about the function of compatibility testing means there is a shift in the Court towards determining the ‘true’⁶⁶ purpose of an impugned law.

McCloy’s second implication is that the plurality placed a heightened importance on the identification of an impugned law’s legitimate purpose. This implication is a corollary of the first implication, and arises from the plurality’s articulation in *McCloy* of the threshold required to establish whether a law has a legitimate purpose. The plurality explained that proportionality, when used as a tool to determine the constitutional validity of laws in comparative countries, will usually determine legitimacy by reference to the extent of the grant of legislative power permitted by the relevant constitution. The critical difference between such comparative approaches and the *Lange* test is that the latter

requires *more*, both as to what qualifies as legitimate, and as to what must meet this qualification. It requires, at the outset, that consideration be given to the purpose of the legislative provisions and the means adopted to achieve that purpose in order to determine whether the provisions are directed to, or operate to, impinge upon the functionality of the system of representative government. If this is so, no further inquiry is necessary. The result will be constitutional invalidity.⁶⁷

By emphasising that ‘more’ is required of the legitimate object, the plurality has re-articulated the importance of compatibility testing. Supporting this proposition is Professor Stone’s argument pre-*McCloy* that in the Court’s recent implied freedom jurisprudence there has been a concentration on the question of whether the law has a legitimate end. Professor Stone wrote in 2014 that: ‘[m]ethodologically, the attention to the question of ‘legitimate end’ rather than the other aspects of the test (such as the ‘reasonably appropriate and adapted criterion’) appears to be something of a trend.’⁶⁸ Professor Stone posited that the lineage of cases bearing out this trend was *Coleman*, *Monis* and *Unions NSW* (to which *McCloy* can now be added).

Throughout the implied freedom jurisprudence, the curial determination of legitimate purpose has not often been a live issue, or been seriously challenged by litigants, with the vast majority of challenges mounted on the second arm of the second limb. That is, challenges relating to legislation

⁶⁶ Dan Meagher, Amelia Simpson, James Stellios and Fiona Wheeler, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis, 10th ed, 2016) 1231 [10.3.43].

⁶⁷ *McCloy* (2015) 257 CLR 178, 212–13 [67] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added).

⁶⁸ Adrienne Stone, ‘The High Court Strikes Down a Campaign Finance Law (Again): *Unions NSW v New South Wales*’ on *Opinions on High* (14 May 2014) <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/05/14/stone-unions-nsw>>.

not using means proportionate to, or connected with, legitimate ends.⁶⁹ Indeed in *Levy*, the seminal implied freedom case regarding protest laws (which were found to be valid), each Justice found that impugned Regulations 5 and 6 were ultimately directed at legitimate ends – namely, to ensure both public and individual safety during the start of the duck hunting season.⁷⁰ In addition, both of the two recent implied freedom protest cases (*Kerrison v Melbourne City Council*⁷¹ and *O’Flaherty v City of Sydney Council*⁷²) found the impugned laws to have a legitimate end. However, it is instructive that three Justices in *Levy* left open the possibility that the Victorian legislature may have had a collateral statutory purpose in enacting the laws. To illustrate, Brennan CJ held that there had been no grounds put forward by the Plaintiff ‘challenging the truthfulness of the declaration in Reg 1(a) that the objective [of the Regulations] was the ensuring of a greater degree of safety of persons’.⁷³

B ‘Legitimate End’ As A Higher Criterion Of Constitutional Validity

The plurality’s reasoning in *McCloy* accords with Hayne J’s (relatively) recent explanation in *Monis* about the fundamental role legitimate purpose plays in the *Lange* test. Hayne J held that simply identifying the ‘end or ends the impugned law seeks to serve’⁷⁴ is ‘necessary, but not sufficient’⁷⁵ when determining legislative validity under the *Lange* test. This is because ‘not every object or end pursued by a law will justify burdening the freedom’.⁷⁶ The crux of Hayne J’s reasoning is that the curial determination of what is ‘legitimate’ is a normative independent judgment about compatibility with the Australian constitutional system of government that is informed by, but not tethered to, the ‘end or ends that the impugned law seeks to achieve’.⁷⁷

To this end, Hayne J reasoned that simply ‘any end’⁷⁸ asserted to be ‘conducive to the public interest’⁷⁹ would not satisfy this higher constitutional criterion of legitimate end – the Court must go further and explain how the asserted end ‘has a connection and is compatible with the constitutionally prescribed system of government and with the freedom of

⁶⁹ For example, in *Tajjour v New South Wales* (2014) 254 CLR 508 (*‘Tajjour’*), at 509 the plaintiffs conceded that s 93X of the *Crimes Act 1900* (NSW) had the legitimate end of preventing or impeding criminal conduct.

⁷⁰ *Levy* (1997) 189 CLR 579, 596 (Brennan CJ), 609 (Dawson J), 614–5 (Toohey and Gummow JJ), 619–20 (Gaudon J), 627 (McHugh J), 648 (Kirby J).

⁷¹ (2014) 228 FCR 87, 104 [73] (*‘Kerrison’*).

⁷² (2014) 221 FCR 382, 385–6 [15]–[17] (*‘O’Flaherty’*).

⁷³ *Levy* (1997) 189 CLR 579, 599 (emphasis added). See also Gaudron J at 619 and McHugh J at 627.

⁷⁴ *Monis* (2013) 249 CLR 92, 147 [125].

⁷⁵ *Ibid* 148 [126].

⁷⁶ *Ibid*.

⁷⁷ *Ibid* 147 [125].

⁷⁸ *Ibid* 149 [130].

⁷⁹ *Ibid*.

political communication which is its necessary incident.⁸⁰ The plurality in *Unions NSW* referenced Hayne J's reasoning in *Monis* and stated: '[t]he discussion in the reasons in *Monis* as to the provision's purpose serves to confirm the importance that the identification of statutory purpose has to the resolution of the second limb of the *Lange* test.'⁸¹ The headnote of the *Unions NSW* judgment stated that Hayne J's reasoning in *Monis* at [125] was 'applied' in the plurality's finding in *Unions NSW* that impugned provisions did not have a legitimate purpose.⁸² On this point, Professor Twomey, writing pre-*McCloy*, has argued that: 'it must be recognised that the point of the proportionality test is to expose those cases where a "legitimate end" is a mere ruse to achieve quite a different end and to burden the implied freedom.'⁸³

C *No Legitimate Purpose For the Two Impugned Provisions in Unions NSW*

The only High Court authority to render a law invalid (albeit only partly invalid) on the basis that it did not have a legitimate purpose compatible with the Australian constitutional system of government is *Unions NSW*. As neatly summarised by Professor Stellios, neither impugned provision in that case 'revealed a legitimate purpose or could be connected with the broader anti-corruption purposes of the Act.'⁸⁴ Reflecting the weight of implied freedom jurisprudence, which has to date mostly accepted the stated statutory purpose as a legitimate end, the plurality started their substantive reasoning as to legitimacy of purpose with the proposition that: '[t]he identification of the true purpose of a statutory provision which restricts a constitutionally guaranteed freedom is not often a matter of difficulty.'⁸⁵ This statement is important not only because it recognises that the identification of the 'true purpose'⁸⁶ of an impugned law is the *primary function* of the legitimate ends inquiry, but the use of the word 'true' also implies that this inquiry may also reveal the law to have, on closer inspection, a collateral or illegitimate purpose.⁸⁷

Section 96D's operation and effect in *Unions NSW* was found to be that it 'effectively denies the making of a political donation by anyone other than an elector'.⁸⁸ The plurality went on to find that s 96D was 'selective in its

⁸⁰ *Ibid.*

⁸¹ *Unions NSW* (2013) 252 CLR 530, 557 [50].

⁸² *Ibid* 531.

⁸³ Anne Twomey, 'Before the High Court – *McCloy v New South Wales: Developer Donations and the Buying of Influence*' (2015) 37 *Sydney Law Review* 275, 280.

⁸⁴ James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 6th ed, 2015) 572.

⁸⁵ *Unions NSW* (2013) 252 CLR 530, 556 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁸⁶ *Ibid.*

⁸⁷ *Levy* (1997) 189 CLR 579, 599 (Brennan CJ). See also Gaudron J at 619 and McHugh J at 627.

⁸⁸ *Unions NSW* (2013) 252 CLR 530, 546 [11].

prohibition. Yet the basis for this selection was not identified and is not apparent.⁸⁹ That is, s 96D was selective because it applied to all legal persons (including persons not enrolled, corporations and other entities) other than enrolled electors. On this point, the plurality reasoned that s 96D stopped ‘just short of a complete prohibition upon political donations. A complete prohibition might be understood to further, and therefore to share, the anti-corruption purposes of the EFED Act.’⁹⁰ Put another way, a complete prohibition would have made it more likely that s 96D could have been constitutionally valid.

Applying this logic, if the Act here had covered the field and applied to *all* persons, as opposed to just protesters, then this would likely have militated in favour of validity. That is, like the selective prohibition in s 96D, it is submitted there is no principled basis identified in the Act for the selective targeting of *protesters* rather than *persons*. This selectivity raises the fundamental question of why protest has been specifically targeted to the exclusion of other behaviours that have *precisely the same effect* on workplaces’ economic efficiency by preventing, hindering or obstructing business activity. Take the following examples, which would not constitute an offence under the Act: (i) persons loitering at a business entrance, harassing employees in the pursuit of a personal or individual grievance; (ii) a group of street performers haranguing workers at an exit from a workplace; and (iii) employees of neighbouring business obstructing access to a business entrance without permission, in order to carry out construction works on the front of the neighbouring business.

The Act could have ameliorated this selectivity by including a wide, non-exhaustive definition of ‘persons’ as including ‘protesters’ as well as other persons having the prescribed effect on business activities. Gordon J expressly raised this point on day two of the hearing of *Brown* (in the context of the necessity stage of structured proportionality):

Is it not here, when one looks at this Act, in terms of looking at alternatives, to say it would be simple just to have the *Workplaces (Protection from Protesters) Act* remove all references to “protesters” and substitute “person” for “protester”?⁹¹

The most pressing counter-argument in response to this point is that there are additional linkages in the ss 6 and 8 offences which connects them to the wider purpose the Act seeks to address; that is, linkages over and above what was missing in s 96D in *Unions NSW*. This argument goes to the point

⁸⁹ Ibid 558 [53].

⁹⁰ Ibid 559 [59].

⁹¹ Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) 5545. For the avoidance of doubt, this discussion concerning reference only to ‘persons’ and not ‘protestors’ appeared in the author’s original honours manuscript.

of rational connection and is discussed below under the ‘suitability’ stage of structured proportionality.⁹²

Section 95G(6) was the second impugned provision found invalid in *Unions NSW* on the basis of illegitimate purpose. In effect, it severely restricted the amount of money that could be donated by the Labor Party and its affiliated unions.⁹³ As suggested by Professor Stone, Keane J in *Unions NSW* (in broad agreement with the plurality) perhaps best articulates why s 95G(6) did not have a legitimate purpose. By operating to aggregate the amount spent by affiliates of political parties and thereby having a significant effect on the Labor Party, Keane J held that:

The effect of this differential treatment is to distort the free flow of political communication by favouring entities ... To discriminate between sources of political communication in this way is to distort the flow of political communication.⁹⁴

D *Whether The Act Has A Legitimate Object*

The argument in favour of validity is the characterisation of the Act’s legitimate object as the protection of workplaces from damage and disruption from protesters (the ‘orthodox purpose’). However, it is submitted that there are three principal arguments that militate against such a characterisation. These three arguments demonstrate that under *Lange*, regardless of whether Act’s stated purpose is conducive to the public interest, it does not satisfy the higher constitutional criterion of legitimate end, exposing its incompatibility with Australia’s system of representative and responsible government. These three arguments are that: (i) the Act expressly criminalises ‘political’ and ‘environmental’ protest; (ii) the s 5 definition of ‘business premises’ means the offences discriminate against particular types of protest; and (iii) the conduct targeted by the Act is already regulated by 13 coextensive criminal offences and torts, with penalties set at lower thresholds for these existing offences.

Set against these are three of the principal arguments in favour of validity: (i) that any such attacks on the Act’s validity confuse its ‘effect’ with its ‘overall purpose’; (ii) any reliance on *Unions NSW* to impugn the Act’s legislative purpose fails to take into consideration that *Unions NSW* only invalidated individual provisions of an Act, not the entire legislative purpose, the latter being a more onerous challenge for a litigant; and (iii) in relation to the offences created by ss 6 and 8, the Act does not prohibit protests per se, but operates only on those that have the prescribed effect

⁹² These linkages are: (i) the geographic restrictions to business premises; and (ii) the calibration of targeting protest activity that only has the prescribed effect on business activity.

⁹³ *Unions NSW* (2013) 252 CLR 530, 561 [64].

⁹⁴ *Ibid* 586 [167].

of preventing, hindering or obstructing business activity on business premises.

1 Act operates to expressly criminalise ‘political’ and ‘environmental’ protest

The principal argument is that the Act operates to expressly criminalise ‘political’ and ‘environmental’ protest by way of the s 4 definition of a ‘protester’. Aroney and Finlay, who conclude that the Act will be likely be found constitutionally valid, acknowledge that this definition to ‘single out protest activities is likely to invite exacting scrutiny from the Court’.⁹⁵ Directly on this point, Brennan CJ in *Levy* held:

A law which simply denied an opportunity to make such a [non-verbal] protest about an issue relevant to the government or politics of the Commonwealth would be *as offensive to the constitutionally implied freedom as a law which banned political speech-making on that issue*.⁹⁶

Brennan CJ is reasoning from the proposition that laws that restrict political protest are *prima facie* illegitimate and require a very strong justification, because such a primary mode of legislative operation (that is, restricting political protest) is inherently incompatible with the system of responsible government.⁹⁷ The proposition that a law banning or restricting political protest will be illegitimate under the *Lange* test is an implication arising from Brennan CJ’s use of the word ‘offensive’.

By specifically prohibiting political communication, the operation of the Act here is sharply distinguished from the provisions found to be constitutionally valid in *O’Flaherty v City of Sydney Council*.⁹⁸ There, the impugned Act conferred power on Council Officers to issue notices prohibiting people from staying overnight or camping in Martin Place in Sydney, and it was a criminal offence if the person failed to comply. The plaintiff in that case was a political protester who was part of the ‘Occupy Sydney’ movement that had occupied Martin Place. On appeal, Edmonds, Tracey and Flick JJ in a unanimous judgment upheld Katzmann J’s finding that the law did not impermissibly burden the implied freedom.⁹⁹ Their Honours found that the law was ‘facially neutral’ because it did not ‘seek to prohibit the communication of “government or political matters”’.¹⁰⁰ Here, the Act is not so ‘facially neutral’: three of the four principal offences operate on ‘political’ protestors (with ss 6 and 7 applying exclusively only to ‘protesters’).

⁹⁵ Aroney and Finlay, above n 12, 69.

⁹⁶ *Levy* (1997) 189 CLR 579, 595 (emphasis added).

⁹⁷ See also *Coleman* (2004) 220 CLR 1, 52 [98] (McHugh J); *Unions NSW* (2013) 252 CLR 530, 577 (Keane J).

⁹⁸ (2014) 221 FCR 382 (*O’Flaherty*).

⁹⁹ *Ibid* 390 [26].

¹⁰⁰ *Ibid* 386 [17].

Allied to this is the fact that the effect of the s 4 definition is to ensure that ‘political communication itself becomes effectively part of the mental element of the offence’.¹⁰¹ It follows that, interfacing Hayne J’s articulation of legitimate object being a higher criterion of constitutional validity with *McCloy*’s elucidation that this stage of the test has a protective gatekeeping function, the Act’s criminalisation of political protest effects a general deterrence of a critical method of participation in society which is an ‘indispensable incident’¹⁰² of the constitutionally prescribed system of representative and responsible government. Whilst not necessarily leading to constitutional invalidity, it is submitted that this general deterrence goes to the core of what is protected from legislative control under the implied freedom. Given the value placed by the Court on the freedom of political communication,¹⁰³ it is submitted that the protection of business activities from disruption fails to justify this significant burden on the freedom, meaning that the Act impermissibly infringes it for want of a legitimate object.

2. Specifically targeting ‘mining’, ‘forestry’, ‘agriculture’ and ‘manufacturing’ in the s 5 definition of ‘business premises’

Before the Act came into force, Professor Stone was quoted as holding reservations about its specific targeting of ‘certain types of workplaces’, namely ‘mining workplaces, forestry workplaces, agriculture and food producers’,¹⁰⁴ raising the question of ‘whether this is absolutely targeted towards the environment movement’.¹⁰⁵ If so, Professor Stone commented that this would give rise to the argument that the Act is ‘not really directed to a legitimate end ... that it’s really directed to favouring the government’.¹⁰⁶ These concerns are not ameliorated by the Act in its current form because it still specifically enumerates each of these types of workplaces as falling within the ambit of the s 5 definition of ‘business premises’ in sub-ss (a)–(d). As such, an open construction (‘the first construction’) of s 5 is that, by applying the common law presumption of *ejusdem generis*, these first four sub-ss of s 5 limit the following general ones (the general provisions regard premises used as ‘shop, market or warehouse’ and premises related to the primary uses enumerated in sub-ss (a)–(e)). The opposing argument is that the first four sub-ss in (a)–(d) do not establish a genus which qualifies sub-ss (e) and (f), which are both

¹⁰¹ Ricketts, above n 12, 238.

¹⁰² *Lange* (1997) 189 CLR 520, 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Unions NSW* (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis* (2013) 249 CLR 92, 147 [125] (Hayne J).

¹⁰³ *Lange* (1997) 189 CLR 520, 560; *ACTV* (1992) 177 CLR 106, 169 (Deane and Toohey JJ).

¹⁰⁴ ‘Anti-protest laws aimed at forest activists pass Tasmania’s Lower House’, *The Mercury* (online) 27 June 2014 < <http://www.abc.net.au/news/2014-06-27/anti-protest-laws-pass-tasmania27s-lower-house/5554064>>.

¹⁰⁵ *Ibid.*

¹⁰⁶ Safi, ‘Tasmania to focus anti-protest laws on anti-forestry and mining activists’, above n 18.

expressed in general terms.¹⁰⁷ It is submitted that the first construction is more likely to be adopted by the Court because there is a quantitative focus in s 5 on industries which have historically been affected by political and environmental protest action in Tasmania.

On this first construction, applying the reasoning of both the plurality and Keane J in *Unions NSW* with respect to the discriminatory operation of the two provisions found there to be invalid, the entire Act can be characterised as discriminating against particular protests with a nexus to mining, forestry, agricultural and manufacturing workplaces. Keane J found that s 95G operated such that ‘certain sources of political communication are treated differently from others.’¹⁰⁸ The distortive effect this had on the system of representative and responsible government necessitated that the purpose of the provision was invalid. Indeed, here, after the public consultations on the proposed Bill, Paul Harriss MP noted that a number of further defined types of premises (such as residential) were removed from the s 5 definition so that the Act ‘only covers those industries that have been identified as vulnerable to protest action’.¹⁰⁹ It is suggested that this directly discriminatory operation of the Act renders its object incompatible with Australia’s system of representative and responsible government.

This discriminatory operation of the Act has been confirmed by its application – charges under the Act have only been laid against protesters engaging in one particular type of protest – forestry protesters. At the risk of quoting too heavily from the written submissions, the Plaintiffs’ written reply to the Defendant in *Brown* explains how acute the discrimination effected by the Act is:

In so far as environmental protest about logging is concerned, it is artificial to suggest that protesting of all kinds (pro and anti-logging) is prohibited by the Act neutrally. As Scalia J observed in his concurring opinion in *McCullen v Coakley*, “it blinks reality say ... that a blanket prohibition on the use of [locations] where speech on only one politically controversial topic is likely to occur – and where that speech can most effectively be communicated – is not content based”.¹¹⁰

On this point of discrimination, set against the coloured backdrop of the decades of environmental activism in Tasmania, Hayne J’s statement that the ‘very purpose of the freedom is to permit the expression of unpopular or minority points of view’¹¹¹ is apposite. Gageler J raised this point in the hearing of *Brown* when his Honour put to Mr O’Farrell SC that the Act may not be compatible with the system of responsible government if it is

¹⁰⁷ *R v Regos* (1947) 74 CLR 613, 624 (Latham CJ).

¹⁰⁸ *Unions NSW* (2013) 252 CLR 530, 586 [167].

¹⁰⁹ Paul Harriss MP, above n 13.

¹¹⁰ Robert Brown and Jessica Hoyt, ‘Plaintiffs’ Annotated Reply Submissions’, Submissions in *Brown v The State of Tasmania*, H3/2016, 11 April 2017, [9].

¹¹¹ *Monis* (2013) 249 CLR 92, 147 [122] (Hayne J).

apparent that ‘the majority of electors are in favour of silencing a minority of electors’.¹¹² To this end, Gageler J’s obiter dictum in *Tajjour* regarding the legitimate ends test is also highly instructive:

The end is not legitimate unless the end is itself compatible with the system of representative and responsible government established by the Constitution. The end of *quelling a political controversy* or of *handicapping political opposition* would not answer that description.¹¹³

On its face, the Act is not directed at suppressing minority points of view, quelling a political controversy or handicapping political opposition. Nonetheless in its terms, operation and effect the Act has had precisely these effects, because there is significant uncertainty as to the scope and application of its offences. Indeed, deterrence of a specific type of protest was expressly recognised as a purpose of the Act in its Second Reading Speech. It is submitted that the general ‘chilling effect’¹¹⁴ this had had on political and environmental protest that is *not* directed at ‘intentionally shut[ting] down and harm[ing] Tasmanian business’¹¹⁵ means the Act does not serve an object compatible with the Australian system of responsible government.

3 Conduct targeted by the Act already regulated by 13 coextensive criminal offences and torts with penalties set at lower thresholds for these existing offences

The operative effect of the four principal types of offence created by the Act is to criminalise various forms of protest that have a physical nexus with business premises and a temporal nexus with the carrying out of business activities. A key argument militating against the Act having a legitimate end is that there are at least 13 coextensive summary and indictable offences and common law torts which already operate to target and criminalise to at least some degree the conduct proscribed by the Act. As such, it follows from this wide overlap of targeted conduct that it is plausible that the Act is not directed at its stated objectives. These coextensive offences and torts are tabulated in Appendix A below. It is suggested that the penalties prescribed by the Act, for offences that target very similar conduct to these existing criminal offences, are much more severe, raising the question of why ‘political, environmental, social, cultural or economic’¹¹⁶ protesting attracts significantly heavier penalties. As reasoned by Toohey and Gummow JJ in *Levy*, the ‘attachment of a penalty is a significant matter in the assessment of the validity of such a law’¹¹⁷ under the *Lange* test.

¹¹² *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) 4520.

¹¹³ *Tajjour* (2014) 254 CLR 508, 579 [148] (emphasis added).

¹¹⁴ *Ibid.*

¹¹⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 26 June 2014, 26 (Paul Harriss, Minister for Resources).

¹¹⁶ *Workplaces (Protection from Protesters) Act 2014* (Tas) s 5(2)(b).

¹¹⁷ *Levy* (1997) 189 CLR 579, 614.

Three salient points arise from this comparison that go to the heart of whether the Act has a legitimate object compatible with the system of representative government. First, any free-standing area of operation which the Act carves out and targets is necessarily narrow in scope (for example, the carved-out conduct is a protester preventing, hindering or obstructing a business activity while effecting the unlawful trespass under the s 6(4) and 6(1) offence). Second, as exemplified by offences numbered 1–4 and 7, the existing penalty range is set at a much lower threshold – it follows that the Act’s imposition of high pecuniary fines and terms of imprisonment must be for the purpose of effecting general deterrence of such protest, as stated by the Minister in the Second Reading Speech. Third, it is open on a forensic examination of the conduct targeted by the Act’s four principal offences to argue that, in reality, the purported ends of the Act are already being served by Tasmania’s coextensive criminal offences and torts.

4 In favour of validity – ‘effect’ versus ‘overall purpose’

An opposing argument to any attempt by the Plaintiffs to characterise the Act’s true purpose as illegitimate, or impute a collateral statutory purpose, is reliance on the reasoning of the plurality in *McCloy*. The plaintiffs in *McCloy* argued that the ‘true’ purpose behind the legislation was to ‘deny funding to electoral activity by a party, candidate or elected member.’¹¹⁸ The Court did not agree, finding that s 4A(c) of the impugned Act in *McCloy* relevantly provided its purpose was the prevention of ‘corruption and undue influence in the government of the State’.¹¹⁹

The critical passage from French CJ, Kiefel, Bell and Keane JJ is:

The plaintiffs’ submission, that the relevant provisions of the EFED Act have as their true purpose the removal of the ability of persons to make large donations in the pursuit of political influence, would appear to confuse the *effect* of Div 2A, and other measures employed, with the overall *purpose* of these provisions.¹²⁰

That is, there was a difference between each provision’s ‘effect’ and ‘overall purpose’. The significance of this reasoning is that it directly addresses the submission by the plaintiffs in *McCloy* that the impugned provisions there had a ‘true’¹²¹ purpose that was *different or collateral* to the express purpose stated by that Act’s objects clause.

Applying this reasoning about a differentiation between ‘effect’ and ‘overall purpose’ to the Tasmanian Act, the line of argument in favour of validity is to uphold the orthodox construction of the Act’s purpose, namely to protect businesses from damage and disruption due to protesters. Following this, applying the plurality’s reasoning in *McCloy*, the argument

¹¹⁸ *Ibid.*

¹¹⁹ *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s 4A(c).

¹²⁰ *McCloy* (2015) 257 CLR 178, 205 [40] (emphasis in original).

¹²¹ *Ibid* 203 [32], 205 [40].

runs that, just because the Act has had the effect of deterring protest, this does not mean that the ‘overall purpose’ of the Act is directed at general deterrence of political and environmental protest. As such, it is open to argue that the Act does not operate to criminalise protesting simpliciter and is very specific in its operation. This is for the key reason that, for the ss 6 and 8 offences, an element of the offence is that the protester ‘prevents, hinders or obstructs access’ to a business premises or business access area. This external element of the offence restricts the scope of those offences and therefore, so the argument runs, does not evince a purpose to deter protesting generally, or protests that do not seek to shut down business operations. In *Brown*, this argument in favour of validity was made by Mr Bleby SC when he submitted that:

So when the plaintiff submits that the true purpose of this legislation is the prevention of onsite political protests, the answer must be, in my respectful submission, the same as was given in *McCloy* at paragraph 40 by the plurality - that is, that this would appear to confuse or conflate the effect of the law with the overall purpose of the provisions.¹²²

5 In favour of validity – invalidating individual provisions versus the legitimacy of the entire Act’s object

A second argument in favour of validity is that there is a qualitative distinction between: (i) finding two individual provisions in an Act lack a legitimate purpose not connected to the Act’s overall purpose, as in *Unions NSW* (where the overall purpose of the Act is legitimate); and (ii) any attempt here to characterise the entire purpose of the Act as not directed at a legitimate end compatible with Australia’s constitutional system of government. The latter is a more onerous challenge and confronts the opposing argument of ‘effect’ versus ‘overall purpose’ explained above.

6 In favour of validity – the Act does not restrict protests per se

A third argument support the Act’s validity is one that featured heavily in Tasmania’s and the interveners’ submissions.¹²³ Cast in a variety of ways, essentially this argument is that the ss 6 and 8 offences in the Act only operate to restrict protest that has the prescribed effect on business activity and do not target and restrict political protests per se. The temporal and geographic restrictions support the view that the Act evinces a very specific purpose: to protect workplaces from damage and disruption due to protest.

¹²² Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) 7150. For the avoidance of doubt, please note that this discussion of ‘effect’ versus ‘overall purpose’ appeared in the author’s original honours manuscript.

¹²³ See the State of Tasmania, ‘Defendant’s Submissions’, Submissions in *Brown v The State of Tasmania*, H3/2016, 21 March 2017, [75], [48]. See particularly the State of Victoria, ‘Annotated Submissions of the Attorney-General of Victoria (Intervening)’, Submissions in *Brown v The State of Tasmania*, H3/2016, 28 March 2017, [22]–[28] and the Commonwealth, ‘Annotated Submissions of the Attorney-General for the Commonwealth (Intervening)’, Submissions in *Brown v The State of Tasmania*, H3/2016, 28 March 2017, [61]. For the avoidance of doubt, this section concerning per se protest was inserted after *Brown*’s hearing.

That the Act does not operate on protest at large also means the impugned provisions align closely with the similar protest offences found to be valid in *Kerrison* and *O’Flaherty* on the basis of public safety concerns.

VI APPLYING *LANGE*’S SECOND LIMB SECOND ARM: IS THE ACT REASONABLY APPROPRIATE AND ADAPTED TO ACHIEVE THE LEGITIMATE PURPOSE? (THREE-STAGE PROPORTIONALITY TESTING)

A *McCloy*’s *Structured Proportionality Testing*

In *McCloy*, the plurality clarified what is required by the second arm of the second limb of the *Lange* test. Their Honours did so by laying down a test of structured proportionality to determine whether an impugned law is ‘reasonably appropriate and adapted to advance’ its ‘legitimate object’.¹²⁴ As such, the Act must now meet the three new separate criteria of validity, which were explained by the plurality as follows:

suitable — as having a rational connection to the purpose of the provision;

necessary — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance — a criterion requiring a value 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.¹²⁵

These propounded criteria of whether a law is reasonably appropriate and adapted are the latest evolution in the Court’s evolving implied freedom jurisprudence, and represent a narrower, more prescriptive approach that was favoured by a bare majority of the Court. It remains to be seen how the retirement of French CJ (as a member of the bare majority) and the appointment of Edelman J will affect the composition of this majority.

Conversely, *Lange*’s wider formulation of ‘reasonably appropriate and adapted’ was broadly preferred by Gageler J,¹²⁶ Nettle J¹²⁷ and Gordon J.¹²⁸ Indeed, Gageler J in *McCloy* stood in stark opposition to the plurality, reasoning that this new structured proportionality test was the ‘wholesale

¹²⁴ *McCloy* (2015) 257 CLR 178, 193–5 [2], 201 [24].

¹²⁵ *Ibid* 195 [3].

¹²⁶ *Ibid* 234 [140].

¹²⁷ *Ibid* 259 [225].

¹²⁸ *Ibid* 282 [311].

importation ... of proportionality analysis'¹²⁹ drawn from foreign constitutional jurisprudence. Nettle J was also retrospect, not explicitly approving either the plurality's or Gageler J's approach but finding that '[i]t is enough to observe that each approach involves questions of judgment',¹³⁰ while applying the orthodox formulation of reasonably appropriate and adapted. Gordon J was also reticent about the introduction of structured proportionality, preferring to maintain the two-step *Lange* test because: [t]he method or structure of reasoning to which the plurality refers does not yield in this case an answer any different from that reached by the accepted modes of reasoning.'¹³¹

The plurality's formulation has already attracted much commentary,¹³² and has been applied at least twice.¹³³ At its heart, this stage of the *Lange* test requires a justification of the burden on the freedom as evaluated against the Act's legitimate purpose. On this new approach of the bare majority, the Act must now sequentially satisfy three independent criteria to be found valid.

1 Suitability

The crux of the 'suitability' inquiry is the determination of whether the means the impugned provision(s) employs has a 'rational connection to the purpose of the provision'.¹³⁴ The plurality in *McCloy* at this stage of the

¹²⁹ Ibid 234 [140]. Gageler J raised two principal concerns with the importation: (i) that the criteria of suitability and necessity are too wide and fail to take into account both the 'subject matter of the law' and the extent of the restriction on the freedom, 'no matter how large or small, focused or incidental' it may be (at 235 [142]); and (ii) the 'adequate in its balance' criterion does not properly reflect the 'reasons for the implication of the constitutional freedom' (at 236 [145]).

¹³⁰ Ibid 259 [225].

¹³¹ Ibid 282 [311].

¹³² See Keith Mason, 'The use of proportionality in Australian constitutional law' (2016) 27 *Public Law Review* 109; Carter, above n 59; Anne Twomey, 'Proportionality and the Constitution' (Speech delivered at ALRC Freedoms Symposium, Federal Court, Queens Square, Sydney, 8 October 2015); Murray Wesson, 'Crafting a concept of deference for the implied freedom of political communication' (2016) 27 *Public Law Review* 87; Chordia, above n 54; Scott Stephenson, 'McCloy Symposium: Scott Stephenson on the Complications and Consequences of Constitutional Comparison' on *Opinions on High* (2 November 2015) <<http://blogs.unimelb.edu.au/opinionsonhigh/2015/11/02/stephenson-mccloy>>; Kristen Walker, 'Justice Hayne and the implied freedom of political communication' (2015) 26 *Public Law Review* 292; James Stellios, 'Marbury v Madison: Constitutional limitations and statutory discretions' (2016) 42 *Australian Bar Review* 324, 347–8.

¹³³ *Chief of the Defence Force v Gaynor* [2017] FCAFC 41 (8 March 2017) [91]–[92]; *Gaynor v Chief of the Defence Force (No 3)* (2015) 237 FCR 188, 255–6 [284]. *McCloy's* structured proportionality was referred to in *Griffin v Council of Law Society of New South Wales* [2016] NSWCA 275 (29 September 2016) at [85] as the relevant test to be applied, but *Sackville AJA* (with whom Ward and Gleeson JJA agreed) found it was unnecessary to determine whether the implied freedom operated in that case. See also *Murphy v Electoral Commissioner* [2016] HCA 36 (5 September 2016) [37].

¹³⁴ *McCloy* (2015) 257 CLR 178, 193–5 [3].

proportionality inquiry thus imposed a threshold test to ensure that the provision(s) is actually directed to the legitimate end of the law,¹³⁵ citing the reasoning of the plurality in *Unions NSW*.¹³⁶ In *Unions NSW*, the plurality reasoned that this rational purpose inquiry is focused on what the impugned provision(s) ‘seeks to achieve’.¹³⁷ Hayne J in *Tajjour* further articulated the rational connection inquiry as being directed at ‘realisation’; that is, ‘[t]o accept that the law is rationally connected to a legitimate end is to accept that the means adopted by the law are capable of *realising that end*’.¹³⁸

A key argument against the Act being a suitable choice for effecting its purpose is that its means are functionally dislocated from its purpose of ensuring that business operations are not interrupted, because it specifically and deliberately targets ‘protesters’ instead of ‘persons’. This functional dislocation occurs because the Act could have achieved the object of preventing persons on business premises or business access areas from preventing, hindering or obstructing business activities simply by referring to ‘persons’ and not expressly targeting ‘protesters’ instead (for example, as argued above it could have contained a non-exhaustive definition of persons as including ‘protesters’).

By parity of reasoning with the plurality’s decision in *Unions NSW*, it is submitted that the exclusive targeting of *protesters* appears similarly dislocated and disconnected as were s 96D’s means, for the reason that it is unclear what exactly the Act here seeks to achieve by targeting protest *over and above persons* (as at this stage, the orthodox purpose must be accepted as having been found legitimate). Framing this argument in the negative, and adopting Hayne J’s language of ‘realisation’, the exclusion of ‘persons’ from being an element of the protesting offences means that an array of conduct (such as the three examples given above) that may be as harmful to business as protesting is excluded from the Act’s operation, bringing into question whether the offences are capable of ‘realising’ the Act’s object. However, this argument concerning the dislocation and disconnection of the Act’s means is met with considerable force by the point made by Mr Donaghue QC intervening for the Commonwealth in *Brown*. Mr Donaghue QC, when making submissions concerning rationality, directly addressed the dislocated means argument in his submission that ‘[t]he fact that other people are causing damages to business does not mean that it is irrational to focus on the subset selected here.’¹³⁹

¹³⁵ See also *Tajjour* (2014) 254 CLR 508, 562 [78] (Hayne J).

¹³⁶ *Unions NSW* (2013) 252 CLR 530, 558–9 [55]–[56].

¹³⁷ *Ibid* 559 [56].

¹³⁸ See also *Tajjour* (2014) 254 CLR 508, 562 [78] (Hayne J) (emphasis added).

¹³⁹ Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) 5365.

As such, because the suitability stage only requires a basic rational connection between the impugned provision's (or entire law's) effect and legitimate purpose, the arguments in favour of the satisfaction of the suitability inquiry are qualitatively stronger. There are two key arguments in addition to Mr Donaghue QC's reply in relation to dislocated means. First, the offences contain a geographic restriction that the Act applies to both 'business premises' and 'business access areas'. As such, the Act operates on businesses but does not extend to other geographic locations, such as protest outside residential areas.¹⁴⁰ Second, the broad scope of the offences in its application to 'protesters' is calibrated to realising its stated object of protecting all workplaces from damage and disruption because workplaces vary considerably in nature.

Weighing these lines of argument, it is likely that if the end of protecting workplaces from damage and disruption due to protesters is found to be legitimate, then the Act is suitable to rationally effect its means under this first stage of the proportionality test.

2 Necessity

The second criterion of validity requires consideration of whether there are any 'obvious and compelling alternative, reasonably practical means of achieving the same purpose'¹⁴¹ which have a less restrictive effect on the implied freedom. As reasoned by the *McCloy* plurality,¹⁴² the qualification of 'obvious and compelling' means that this criterion is 'merely a tool of analysis'¹⁴³ (as opposed to a 'higher rule' derived from the Constitution as with the legitimate ends determination), thereby ensuring the Court does not substitute its own determination for that of the legislature's, with respect to the selection of the measure used to effectuate legislative purpose.¹⁴⁴

The Act will satisfy the necessity criterion if it can be shown that the legislative purpose could not be achieved by reliance on the existing offences and common law torts. As explained by Crennan, Kiefel and Bell JJ in *Tajjour*, the alternative 'must be as effective in achieving the legislative purpose.'¹⁴⁵ As such, Tasmania's argument in favour of validity is that the existing offences have not successfully deterred protest because: (i) they cannot target the specific conduct criminalised by the Act (most

¹⁴⁰ See also Aroney and Finlay, above n 12, 70. Cf the very narrow scope of the geographical restriction in *O'Flaherty* (2014) 221 FCR 382 at 387, which was limited only to Martin Place in Sydney.

¹⁴¹ *McCloy* (2015) 257 CLR 178, 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

¹⁴² See also *Monis* (2013) 249 CLR 92, 214 [347] (Crennan, Kiefel and Bell JJ).

¹⁴³ *McCloy* (2015) 257 CLR 178, 211 [58] (French CJ, Kiefel, Bell and Keane JJ).

¹⁴⁴ *Ibid* 217 [81]–[82]. See also *Coleman* (2004) 220 CLR 1, 52–3 [100] (McHugh J).

¹⁴⁵ *Tajjour* (2014) 254 CLR 508, 572 [114]. Although note Gageler J's question to Mr Donaghue QC on day two of *Brown's* hearing – 'Why does it have to be as effective? Does it always have to be as effective?': Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) 5520.

prominently the conduct of preventing, hindering or obstructing business activities on business access areas); and/or (ii) the bulk of the existing offences are summary offences with lower-range pecuniary penalties only (for example, offences 4 and 9 in Appendix A) or short maximum jail sentences (for example, offences 1, 2 and 3 in Appendix A). Thus, on this line of argument, the higher penalties and carving-out of aggressive forms of protest that result in economic harm to businesses as indictable offences are the only effective means of achieving the Act’s legitimate end.

Conversely, a key challenge to the Act’s necessity (which is potentially fatal) would be to demonstrate the existing criminal offences and torts (as discussed above and tabulated in Appendix A) render the Act’s offences redundant as a superfluous means of achieving its purpose. The coexistence of at least 13 other criminal offences and common law torts targeting very similar conduct assists the Court under the necessity stage of determining whether the Act is ‘appropriately tailored to its goal (the ‘end’) with minimum collateral impact.’¹⁴⁶ The Act has arguably not minimised its collateral impact because it directly restricts the freedom, due to the wide definition of business access area but more fundamentally, by operating on protest at large instead of narrow acts by persons that prevent or hinder business activities (with prosecutions for such conduct arguably available under offences numbered 1, 2, 3, 7 and 8 in Appendix A). On this point, Aroney and Finlay argue that a factor favouring validity in the proportionality analysis is that the ss 6 and 7 offences contain specific carve-outs for activities that will not qualify as protest, such as processions, marches and events. However, the extant offence numbered 8 in Appendix A is coextensive with these carve-outs, because it requires a permit for holding such activities.

3 Adequate in its balance

The cornerstone of the new structured proportionality analysis is the criterion that the impugned law must be ‘adequate in its balance’. As explained by French CJ, Kiefel, Bell and Keane JJ in *McCloy*, the ‘adequate in its balance’ stage mandates a value judgment of whether the burden on the implied freedom is ‘undue’.¹⁴⁷ This judicial balancing exercise requires a consideration of not only the ‘extent’¹⁴⁸ of the burden on the freedom, but crucially, it also expressly requires the Court to evaluate the ‘public importance of the purpose sought to be achieved.’¹⁴⁹ Here, the importance of the public purpose of preventing economic loss through interference with business by protesters must be weighed against the Act’s direct burden on the freedom.

¹⁴⁶ Chordia, above n 54.

¹⁴⁷ *McCloy* (2015) 257 CLR 178, 218 [86].

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

The principal argument militating against the Act being ‘adequate in its balance’ is that, even though at this stage the Act has been found to have a legitimate object, the burden on the freedom is too great, and ‘undue’,¹⁵⁰ because it directly criminalises political protest. This is anathema to Australia’s constitutional system of representative and responsible government. The aggravation in the Act that renders the burden undue, and therefore justified on this line of argument, is the default categorisation of protest as an indictable crime when balanced against the object of preventing economic loss to workplaces. Aroney and Finlay concede in their proportionality analysis that in *Levy*, the “importance” of the legislative object (prevention of injury or death) was greater than that of the Tasmania law (protection of business activities).¹⁵¹

McHugh J’s reasoning in *Coleman* is highly instructive on this first point of balancing the public importance of the Act’s object versus its restriction on the freedom. McHugh J reasoned that:

laws that burden such a communication by seeking to achieve a social objective unrelated to the system of representative and responsible government will be invalid, *pro tanto*, unless the objective of the law can be restrictively interpreted in a way that is compatible with the constitutional freedom.¹⁵²

McHugh J went on to give an example of such *pro tanto* invalidity. His Honour reasoned that a law that banned all political communications for the object of national security would be invalid unless the system of representative government was ‘so threatened by an external or internal threat’ that such a blanket prohibition was a reasonably appropriate and adapted means of ‘maintaining the system’.¹⁵³ By parity of reasoning, here the object of the law (protecting economic loss in workplaces due to interference by protesters) is an object unrelated to the system of representative and responsible government (as opposed to an object such as that in *Unions NSW* or *McCloy* of preventing corruption in the electoral process – indeed, the latter’s object even operated to ‘preserve and enhance’¹⁵⁴ representative government). It follows that here, unless the public object of preventing such economic loss to workplaces is qualitatively more important than allowing people to protest on political and governmental matters to ensure the functioning of the system, the Act’s restriction on the freedom is unjustified and should be rendered invalid. This is because protest goes to the heart of participation in the system of

¹⁵⁰ *Ibid.*

¹⁵¹ Aroney and Finlay, above n 12, 70.

¹⁵² *Coleman* (2004) 220 CLR 1, 52 [98].

¹⁵³ *Ibid.* See also the same example given in *McCloy* by French CJ, Kiefel, Bell and Keane JJ who at 218 [84] stated that ‘some statutory objects may justify a very large incursion on the freedom’.

¹⁵⁴ *McCloy* (2015) 257 CLR 178, 208 [47].

representative and responsible government, as it voices dissent on matters concerning the election of State and Federal representatives.

Second, the Act is not adequate in its balance because, even if it is conceded that it carves out a free-standing area of operation and thus operates on conduct unable to be regulated by other criminal laws (that is, it satisfies the necessity stage because it targets obstructing or hindering business resulting in economic loss), the prescribed penalties are properly characterised as both excessively harsh for the act of political protest and disproportionate to the attainment of the Act’s object. In *O’Flaherty*, one of the analogous protesting cases, the maximum penalty prescribed was \$1,100.

Third, the Act can be contrasted to the Regulations impugned in *Levy*, which, as found by Toohey and Gaudron JJ, did not ‘have, as their direct operation, the denial of the exercise of the constitutional freedom in a significant respect.’¹⁵⁵ The clear implication from this passage is that the incidental restriction of the implied freedom (in concert with the temporal and geographic restrictions discussed below) in *Levy* was enough to save the laws from invalidity. Here, however, the Act directly targets political communication and denies people the ability to engage in communication about governmental matters. These restrictions imposed by the Act are therefore more difficult to justify than the incidental regulation in *Levy*.

On this point of direct and indirect burdens, Mason CJ in *ACTV*¹⁵⁶ distinguished between laws that restrict an ‘activity or mode of

¹⁵⁵ *Levy* (1997) 189 CLR 579, 614.

¹⁵⁶ (1992) 177 CLR 106. It should be noted that Mason CJ’s distinction between laws that restrict communication by reference to the character of ideas and those that do not has been the subject of criticism in later cases. See: Crennan, Kiefel and Bell JJ in *Tajjour* (2014) 254 CLR 508 at [132]; French CJ in *Tajjour* at [37] ([t]hose categories of laws do not attract different levels of scrutiny in the application of the criteria of validity’); and *Unions NSW* (2013) 252 CLR 530 at 555 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). Recognising these conflicting statements of law, Nettle J in *McCloy* expressly stated at [221] that a ‘degree of uncertainty has arisen as to several aspects of the second limb of the Lange test. Those aspects include whether the standard of appropriateness and adaptedness varies according to the nature and extent of the burden...’. His Honour however then went on to find at [221] that this question has an affirmative answer and that ‘it should now be accepted that the standard of appropriateness and adaptedness does vary according to the nature and extent of the burden. A law that imposes a discriminatory burden will require a strong justification.’ While this point has not been settled by a clear majority of the Court, Nettle J’s recent reasoning means that it is still open to rely on Mason CJ’s distinction in *ACTV* as a legitimate mode of analysis. In favour of Nettle J’s reasoning, see also: *Wotton v State of Queensland* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ) and *Hogan v Hinch* (2011) 243 CLR 506 at 555 [95] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). See further Mr Dunning QC’s submissions for Queensland in *Brown* which focused extensively on this point: Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) [6090]–[6305] and Mr Niall QC for Victoria at [6630].

communication'¹⁵⁷ versus laws that restrict communication 'by reference to the character of the ideas or information'¹⁵⁸ – with the latter being 'extremely difficult to justify'¹⁵⁹ under the implied freedom. The first obstacle the challenge the Act faces in respect of Mason CJ's categorisation is that, on its face, the Act appears to operate only on an 'activity or mode of communication' (and not 'content') because, so the argument runs, it is certain behaviours (and not 'ideas or information' per se) that are criminalised. In response to this point, it is submitted that the type of behaviour criminalised by the Act (protest on a 'political, environmental, social, cultural or economic' issue which has the prescribed effect on business activity) is an activity or mode of communication that, by its very nature as protest, is intrinsically linked to the expression of ideas or information of a particular character; as such, it does restrict ideas and information. So much was expressly recognised by Brennan CJ in *Levy*, who held that 'actions as well as words can communicate ideas.'¹⁶⁰

This paper takes the next step in Mason CJ's distinction and submits that the Act also restricts communication by reference to the 'content' of that protest. This is because the practical operation and effect of the Act is that it has *only* been used against anti-logging protesters. This means that, when viewed in light of the history of environmental protest in Tasmania, it is submitted that in reality the Act does target and restrict communication by reference to the character of ideas or information.¹⁶¹ Gageler J encapsulated this argument during the hearing of *Brown* when his Honour put to Mr Dunning QC (appearing for the State of Queensland) that the:

characterisation of the burden which as applied to this case could possibly be that of a discriminatory law – that is, a law that focuses on, is targeted towards political communication and nothing but political communication, *and that as so targeted is content based – that is, it favours or disfavors a particular political point of view in its practical operation.*¹⁶²

Fourth, the Act's restriction on political communication is not subject to any temporal restriction – that is, unlike in *Levy*, which was 'strictly limited in place and time'.¹⁶³ Similarly, in *Muldoon* where the laws were held valid, the temporal restriction imposed by the impugned law was limited to

¹⁵⁷ *ACTV* (1992) 177 CLR 106, 143.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Levy* (1997) 189 CLR 579, 594.

¹⁶¹ See also Robert Brown and Jessica Hoyt, 'Plaintiffs' Submissions', Submissions in *Brown v The State of Tasmania*, H3/2016, 27 February 2017, [41]–[43].

¹⁶² Transcript of Proceedings, *Brown v The State of Tasmania* [2017] HCATrans 94 (3 May 2017) [6215].

¹⁶³ *Levy* (1997) 189 CLR 579, 614 (Toohey and Gummow JJ).

prohibiting camping overnight – protesters were free to use the gardens at all other times.¹⁶⁴

Fifth, in response to any opposing argument that people can protest in other places that are not business premises or business access areas, McHugh J’s reasoning in *Levy* is apposite.¹⁶⁵ McHugh J held:

It is beside the point that their arguments against the alleged cruelty of duck shooting could have been put by other means during the periods when the Regulations operated. What the Regulations did was to prevent them from *putting their message in a way that they believed would have the greatest impact on public opinion* and which they hoped would eventually bring about the end of the shooting of game birds.¹⁶⁶

That is, McHugh J reasoned that the very point of protesting at a particular location is to ‘maximise their opportunity to influence public opinion’¹⁶⁷ by showing televised broadcasts of the protest where the location is central to the subject of the protest. This is particularly relevant to environmental protest in Tasmania, as such televised broadcasts aided the campaign to save the Franklin River in the 1980s for example.

VII CONCLUSION

In conclusion, it is argued that the Act is constitutionally invalid under the *Lange* test. Its criminalisation of political protest impermissibly burdens the implied freedom of political communication because: (i) it fails for want of legitimate legislative purpose compatible with the Australian system of representative and responsible government; or (ii) alternatively, it is not either necessary or adequate in its balance, due to the undue burden it places on the freedom, by creating default indictable offences that punish only protesters and not persons. The primary argument made in this paper is the Act does not pursue a legitimate legislative purpose because: (i) its expressly targets ‘political’ and ‘environmental’ protest, which has had a ‘chilling’ effect on protest that is *not* directed at damaging business or hindering business operations, and may have as its ‘true’ purpose the object of silencing dissent; (ii) its operation and application is discriminatory, as it specifically protects ‘mining’, ‘forestry’, ‘agricultural’ and ‘manufacturing’ workplaces from protest, impermissibly distorting the flow of political communication; and (iii) there are at least 13 existing coextensive criminal offences and torts which regulate very similar conduct, rendering the Act’s offences redundant. It is hoped that the Court will take the opportunity to invalidate the Act on the basis of this incompatibility.

¹⁶⁴ *Muldoon* (2013) 217 FCR 450, 528 [384].

¹⁶⁵ *Levy* (1997) 189 CLR 579, 625. See also *McCloy* (2015) 257 CLR 178, 263 [240] (Nettle J).

¹⁶⁶ *Levy* (1997) 189 CLR 579, 625 (emphasis added).

¹⁶⁷ *Ibid.*

APPENDIX A: TABLE OF OFFENCES

1	S13(3AA) POA: Public annoyance	Disturbing the peace in public place: s 13(1)(b). Committing a nuisance: s 13(1)(e).	Maximum 3 penalty units ¹⁶⁸ (\$471) or maximum 3 months' jail (doubled if two offences under s 13(1) within 6 months).	Section 6(4) (contravention via s 6(3)).	Maximum \$10 000 fine per offence and then 4 years' imprisonment for a 'further offence'.
2	S14B(1) POA: Unlawful entry onto land	Entering or remaining on land, building, structure or premises without consent of owner or occupier.	Maximum 25 penalty units (\$3925) or imprisonment for a term not exceeding 6 months.	Section 6(4) (contravention via s 6(1)).	Ibid.
				Section 6(4) (contravention via s 6(2)).	Ibid.
3	Section 37(1) POA Injury to property	A person shall not unlawfully destroy or injure any property.	Maximum 10 penalty units (\$1 570) OR up to 12 months' imprisonment.	Section 7(1).	Maximum \$50 000 or imprisonment for a term not exceeding 5 years, or both.
4	S22 Forest Management Act 2013 (Tas) Request to leave permanent timber production zone land	An authorised officer may request a person not to enter permanent timber zone production land, or a forest road, or to leave either of those areas, or cease to undertake an activity or engage in conduct on that land or road. Forest road is defined in s 3 as constructed or maintained by or for the Forest Manager either inside or outside permanent timber production zone land; or any other road on permanent timber production zone land, other than; or any other road that is on Crown land.	Maximum 20 penalty units (\$3 140).	Section 8 ('business access area' offence).	Maximum \$10 000 fine.
5	Section 276AA Code: False threats of danger	Making a statement known to be false from which it can be inferred that some act has been or likely to be done that may give rise to serious risk of	Up to 21 years' imprisonment (Code 389(3)) but in practice sentences are non-custodial (eg, community service orders). ¹⁶⁹	Section 7(3).	Ibid.

¹⁶⁸ A penalty unit is \$157 in Tasmania for the period 1 July 2016–30 June 2017.

¹⁶⁹ Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 384.

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		danger to persons or property.			
6	S140/S141 Code: Common Nuisance	Unlawful act that endangers life, safety, health, property or comfort of the public or by which public are obstructed in exercise of common right of enjoyment. (Note: this is a statutory codification of the common law tort of public nuisance)	1. Upon conviction a Court may adjourn case so that the convicted person can abate or remove nuisance; 2. Pay a fine equal to the amount of removing nuisance (s 388A Code). 3. Imprisonment of any length under (s 388B Code).	Section 6(4) (contravention via s 6(2)) on ‘business access area’.	Maximum \$10 000 fine per offence and then 4 years’ imprisonment for a ‘further offence’.
7	S15B POA: Dispersal of persons	Police officer may direct person to leave a public place for at least 4 hours if the police officer believes that the person is obstructing or is likely to obstruct the movement of pedestrians or vehicles (s 15B(1)(b)) or is likely to endanger the safety of any other person or is likely to commit a breach of the peace.	Maximum 2 penalty units (\$314).	Section 8 (for contravention of s 6(3)).	Maximum \$10 000 fine.
8	S49AB POA: Public street permits	A person must not organise or conduct a demonstration held wholly or partly on a public street unless she or he has a permit. Demonstration means a ‘march, rally or other kind of political demonstration’ (s 49AA).	Fine not exceeding 10 penalty units (\$1 570).	Section 6(4) (contravention via s 6(3)).	Maximum \$10 000 fine per offence and then 4 years’ imprisonment for a ‘further offence’
9	R236 Traffic (Road Rules) Regulations 1999 Pedestrians not to cause a traffic hazard or obstruction	A pedestrian must not cause a traffic hazard by moving into the path of a driver or unreasonably obstruct the path of a driver or other pedestrian.	Fine not exceeding 5 penalty units (\$785).	Ibid and s 8 (for contravention of s 6(3)).	Ibid.
9	S43 Traffic Act 1925: Removal of things obstructing public streets	If an article is placed or left in a public street to the obstruction, annoyance or danger of other road users, an authorised person may remove and detain it.	Can be sold to cover costs.	Section 9(1) (obstruction of police under s 12).	Maximum \$10 000 fine.
10	S35 POA Assault	In <i>Williams v Hursey</i> (1959) 103 CLR 30, at 76–7 it was held that picketers who wish to intimidate and	Summary offence under s 35(1) POA: maximum 2 penalty units or 12 months’ imprisonment.	Section 7(3).	Maximum \$50 000 fine or imprisonment for a term not exceeding 5

		assault can be guilty of assault. The existing offence falls under the 'Attempting or gesturing to apply force' s 182(1) <i>Code</i> definition which applies to s 35 <i>POA</i> .			years, or both.
11	Common law tort of trespass to land	Every unjustified entry onto land of another carried out intentionally or negligently is guilty of trespass.	Varies.	Section 6(4) (contravention via s 6(1)).	Maximum \$10 000 fine per offence and then 4 years' imprisonment for a 'further offence'
12	S34B(1) POA Obstructing police officer in execution of duty	A person must not assault, resist or wilfully obstruct a police officer in the execution of her/his duty.	Maximum fine of 100 penalty units or a three years' imprisonment.	Section 9 (contravention via s 12).	Maximum \$10 000 fine.
13	Work Health and Safety Act 2012 (Tas) S19 Primary Duty of Care	A person conducting a business must ensure the health and safety of persons.	See Div 5 – varies based on culpability: up to \$600 000 for businesses or imprisonment.	Various including ss 6, 7 and 8.	Varied.