IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No H3 of 2016

BETWEEN

ROBERT JAMES BROWN
First Plaintiff
JESSICA ANNE WILLIS HOYT
Second Plaintiff

and

THE STATE OF TASMANIA
Defendant

ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

1. These submissions are in a form that is suitable for publication on the internet.

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the defendant, in relation to the second question stated for the opinion of the Full Court (see Special Case at 78, Special Case Book at 69).

Part III Reasons for Granting Leave to Intervene

3. Not applicable.

Part IV Constitutional and Legislative Provisions

4. The NSW Attorney adopts the defendant's statement of applicable legislative provisions.

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Filed for: Attorney General for New South Wales, Intervening
Filed by: Lea Armstrong, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Contact: Gemma Namey
Tel: (02) 9224 5252
Fax: (02) 9224 5255
Email: Gemma_Namey@cso.nsw.gov.au
Ref: 201603417

Part V Argument

Issues presented

5. In summary, the NSW Attorney submits as follows:

   (a) The operation of the Workplace (Protection from Protesters) Act 2015 (Tas) ("the Act") is confined to land in the lawful possession of a business operator, or to areas of land reasonably necessary to enable entrance and egress from such land. It thus operates in limited places, and the powers it confers on police to direct protesters to remove themselves from such places operate in limited conditions.

   (b) The Act's purpose is compatible with the system of representative government provided for by the Constitution. It is not "directed to" the implied freedom of political communication. Rather, it is concerned with ensuring the capacity of business occupiers to carry out their lawful business activities on business premises or business access areas in a manner that is unimpeded, unhindered or unobstructed by protesters, and thus serving the broader purposes of protecting business activities from disruption (thus preserving the contribution of such activities to the Tasmanian economy) and preserving public order.

   (c) The Act is proportionate, in the sense described by the plurality in McCloy v New South Wales (2015) 257 CLR 178. The plaintiffs focus on the Act's necessity and adequacy in its balance, but the alternative means identified by the plaintiffs are not directed to achieving the same purpose; and the adequacy of the Act's balance falls to be considered in light of the limited places in which it operates. The Act does not regulate protest activities at places adjacent to the site of business activities the subject of the protest, providing that such activities by business operators on the relevant site and entrance and egress from the site are not impeded, hindered or obstructed by protesters. Even if they are so impeded, hindered or obstructed, this will not by itself amount to an offence.

Limited places in which the Act operates

6. The restrictions in s 6 of the Act (with associated police powers to issue directions under s 11) operate on protesters, defined in s 3, by reference to s 4(1), as a person

who engages in protest activity. Protest activity must take place on business premises, or a business access area in relation to business premises: s 4(2)(a).

7. "Business premises" is defined in s 5 by reference to actual use of premises (as defined in s 3) for specified activities. In the case of mining, mining operations or exploration for minerals, the definition extends to premises on which such activities are authorised under an Act to be carried out. By contrast, in relation to the "forestry land" limb of the definition of business premises, with the exception of private commercial forests only those areas of land on which forest operations are being carried out, or preparatory work for the submission of a plan for certification as a certified forest practices plan under the Forest Practices Act 1985 (Tas) is being carried out (or would be being carried out but for protest activities), or premises that are used to process forest products or store vehicles or equipment for use on forestry land, will fall within the definition.

8. A "business access area" is relevantly limited by paragraph (a) of the definition of that term in s 3 to so much of an area of land outside the business premises as is reasonably necessary to enable access to an entrance to or exit from those premises. While the definition is not limited to a "road, footpath or public place", it is limited by the concept of reasonable necessity to enable access to a relevant entrance or exit. While what boundaries will be reasonably necessary to enable such access may differ depending on the business activity in question, it will not inevitably be the case that the entirety of the area of a road or footpath, for example, will be a "business access area", providing that access to an entrance or exit is preserved.

9. Section 6 is a critical section for the purpose of the plaintiffs' challenge to the Act, the plaintiffs contending that the purpose of that section is to prevent political communication causing even trivial or transient disruption to business activity: see Plaintiff's Submissions ("PS") at [37(c)]. A contravention of s 6(1)-(3) does not constitute an offence. Instead, by s 11(1), a person may be directed to leave a business premises or business access area by a police officer, if the officer reasonably believes that the person has committed, is committing, or is about to commit, a contravention of s 6(1)-(3) on or in relation to the business premises or business access area. That direction may include a requirement under s 11(6) that a person must not, within three months after the date of the direction, contravene s 6(1)-(3).

Contravention of a requirement of this kind is an offence: s 6(4). If a direction issued under s 11(1) does include a requirement under s 11(6), a person will nevertheless not commit an offence by processing, marching or forming part of an "event" that passes business premises, or along a business access area in relation to business premises at a reasonable speed once per day: s 6(5). There is also a defence of reasonable excuse to the offence in s 6(4): s 6(6).

10. Section 6(1)-(3) each use the phrase "prevents, hinders or obstructs". Those words should be construed subject to the limitations of the legislative powers of Tasmania and so as not to exceed those powers: Acts Interpretation Act 1931 (Tas), s 3. Where a choice is reasonably open on the ordinary principles of statutory construction, a statute must be read in a manner that will not invalidate it: see Residual Assco Group Ltd v Spalvins (2000) 202 CLR 629 at [28]; North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569 at [76] per Gageler J (dissenting). The plaintiffs do not refer to the Acts Interpretation Act 1931 (Tas), but notes the existence of authorities in other contexts suggesting that "hinder" and "obstruct" should be construed to refer to substantial hindrance or obstruction and accepts that the principle of legality would arguably favour such a construction: PS at [44]. The plaintiffs' reasons for rejecting such a construction and instead applying s 6 to "transient and insubstantial disruptions" (PS at [45]) should not be accepted.

11. The plaintiffs submit that contextual considerations in relation to s 6 weigh decisively against a "narrow" construction such as the principle of legality would favour: PS at [45(a), (b), (e), (f)]. Accepting that statutory context is always relevant to the task of construction, the use of "obstruct" in the context of offence provisions concerned with obstruction of highways (as in Schubert v Lee (1946) 71 CLR 589 at 594, where a "substantial detraction" from "commodious use of the place" by members of the public who may reasonably be expected to make use of it was required) provides a closer analogue to s 6 than does trade practices legislation concerned with the supply of goods or services, in which context the term "hinder" was considered in the cases on which the plaintiffs rely: see Australian Builders' Labourers' Federated Union of Workers (1993) 42 FCR 452 at 459-460 and

Devenish v Jewel Food Stores Pty Ltd (1991) 172 CLR 32 at 45-46 (drawing on English cases considering the construction of suspensory clauses in supply contracts).

12. Construing "hinder" and "obstruct" as including an element of substantiality does not involve a strained construction or a "counterintuitive judicial gloss" of the kind referred to by French CJ in International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319 at [42], that is unlikely to be reflected in the administration of the provision. Nor does it involve construing the Act to accommodate the implied freedom by requiring individual exercises of power by police to direct protesters to leave business premises and business access areas (having formed the requisite reasonable belief pursuant to s 11(1) or (2)) and to remove or arrest protesters pursuant to s 13 to be assessed against the implied freedom on each occasion, although some statutes might properly be construed to accommodate the implied freedom in this manner: see Wotton v Queensland (2012) 246 CLR 1 at [21]-[22] per French CJ, Gummow, Hayne, Crennan and Bell JJ, [88] per Kiefel J.

13. Contrary to the plaintiffs' submission (PS at [45(b)], the language of s 6(5) does not "confirm" the breadth of "prevents, hinders or obstructs" in s 6(1)-(3), but simply gives clarity in relation to the inapplicability of s 6(4) to what might be thought of as traditional protest march activity, even if this does prevent business activity for a substantial period of time, as may be the case if there are a large number of participants in a march. The absence of an express reference to the duration of the prevention, hindrance or obstruction could not be decisive, where those words in the relevant primary provisions (s 6(1)-(3)) carry an implication of substantiality.

14. Constructional choices are open in relation to the words "hinder" and "obstruct" where appearing in s 6(1)-(3), and those words should therefore be construed to minimise the impact of the Act on the common law freedom of expression: see eg South Australia v Totani (2010) 242 CLR 1 at [31] per French CJ; North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569 at [11] per French CJ, Kiefel and Bell JJ (cf at [81] per Gageler J); Evans v New South Wales (2008) 168 FCR 576 at [72]-[78]. In R v Bell; Ex parte Lees (1980) 146 CLR 141 at 148, Gibbs J recognised the capacity of a broad construction of the words "prevent or hinder" where used in an offence provision, to "effect a very drastic interference

with ordinary civil rights", and rejected a construction of the words that would have such an effect. The same approach should be applied to "hinder" and "obstruct" in s 6(1)-(3).

Compatibility

15. In the context of legislation that, as here, is accepted to burden the freedom (as to burden, see the Defendant's Submissions ("DS") at [44]-[46]), the Lange/McCloy process of justification first requires identification of a legitimate statutory purpose: see Coleman v Power (2004) 220 CLR 1 at [92]-[96]; McCloy at [31].

16. In the context of an offence provision, the question of purpose is "rarely answered" by reference to the words of the provision alone: Monis v The Queen (2012) 249 CLR 92 at [317] per Crennan, Kiefel and Bell JJ. Even if the purpose of an individual provision is narrow, it may be conducive to a broader statutory purpose and thus serve a legitimate end for the purposes of the implied freedom, providing it is connected to those purposes and serves them in some way: Monis at [179] per Hayne J; Unions NSW v New South Wales (2013) 252 CLR 530 at [50] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

17. The plaintiffs' primary challenge is to the legitimacy of the purpose of s 6 (see eg PS at [36]-[37], [46]), which includes an offence provision that is dependent on the past issue to a person of a direction under s 11 incorporating a requirement under s 11(6). The narrower purpose of s 6, of ensuring that protesters do not prevent, hinder or obstruct the carrying out of lawful business activities on business premises or business access areas, serves the broader statutory purposes of maintaining economic opportunities for business operators, protecting business activities from disruption and preserving public order that are identified in the Defendant's Submissions: DS at [49(d)-(f)].

18. Section 6 is directed to those purposes by its terms, which are expressly concerned with disruption to the carrying out of business activities (by prevention, hindrance or obstruction of the carrying out of such activities per se, or by prevention, hindrance or obstruction of access to business premises or a business access area). It serves the broader purposes identified above by imposing a restriction on the activities of protesters that is selective according to the vulnerability of such activities to

disruption and directed to the mischief of disrupting lawful activities carried out by business operators on their business premises, in circumstances where the prospect of such disruption by protesters is far from remote: cf Unions NSW v New South Wales at [53]. Those purposes, and the means employed to achieve them, are compatible with the maintenance of the constitutionally prescribed system of representative government.

19. To the extent the general law is relevant to the issue of compatibility (see Monis at [128], [222] per Hayne J), its development of the torts of trespass and private nuisance indicates the legitimacy of a concern to protect the rights of persons in lawful possession of land, including by reference to the established use of the land: see eg, in relation to nuisance, Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479 at 507 per Dixon J; Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia [1971] 1 NSWLR 760 at 767. The fact that the Act "strikes the balance differently from the common law action in nuisance" (PS at [55]) cannot determine the question of compatibility, given the general law in no way "limits or restrains the exercise of legislative power": Monis at [128] per Hayne J.

20. The plaintiffs are unable to point to any authority for their proposition that "some interruption to business is a necessary part of freedom of political communication in relation to business activities": PS at [47]. That is unsurprising, given that the implied freedom does not give a person a right to enter any particular area for the purposes of political communication: Levy v State of Victoria (1997) 189 CLR 579 at 625-626 per McHugh J; Meyerhoff v Darwin City Council [2005] NTCA 8 at [17]-[23]; Gunns Ltd v Alishah [2009] TASSC 45 at [15]-[16].

21. A law will not be "directed to the freedom" in the sense in which that term was used by Crennan, Kiefel and Bell JJ in Monis (at [349]) and Crennan and Kiefel JJ (Bell J agreeing) in Attorney-General (SA) v Corporation of the City of Adelaide (2013) 249 CLR 1 at [221] where it concerns a subject other than "communications which the freedom seeks to protect"; in other words, where, as here, its purpose is other than to burden political communication: cf PS at [38]. The plurality in McCloy expressed the relevant compatibility test as "whether the provisions are directed to, or operate to, impinge upon the functionality of the system of representative government": at [67].

The purposes of the Act are directed to other matters than the functionality of the system of representative government. As the plaintiffs concede (PS at [41]), the only expression of views that is restricted is that which has, or is reasonably believed to be about to have, the proscribed disruptive effect on business activity; and even then, only where the expression occurs on business premises or a business access area, or would prevent, hinder or obstruct access to such an area.

22. It should be noted that insofar as an act must have the specified effect on business activity (and a protester must know, or be reasonably expected to know, that the act will have that effect) before it will be the subject of regulation by the Act, the law does not discriminate by reference to the content of the communication: cf McCloy at [220]-[222] per Nettle J; see also at [136]-[137] per Gageler J. Nor does the law discriminate as to the content of communication insofar as it is concerned with entrance and egress to business premises and business access areas: see, in the First Amendment context, McCullen v Coakley, 573 US __ (2014) (Slip Opinion at 13); 134 S Ct 2518; Boos v Barry, 485 US 312, 321 (1988).

Proportionality

(a) Suitability

23. Applying the McCloy formulation as to proportionality testing for the purposes of argument in the present case, the plaintiffs submit that the purpose of the Act is not a legitimate purpose, but do not separately address the "suitability" criterion identified by the plurality in McCloy at [80]. As the defendant has pointed out (DS at [63]), the provisions of the Act evidently have a rational connection to the purpose the defendant has identified in relation to the prevention, hindrance or obstruction of business activities on business premises or business access areas, because they prohibit acts on such premises or areas that have that effect (providing the mental element in s 6(2)(b) is satisfied), as well as acts preventing, hindering or obstructing access by a business occupier to a relevant entrance or exit (again, providing the mental element in s 6(3)(b) is satisfied).

24. Contravention of s 6(1)-(3) plays a central role in the operation of the enforcement provisions in Pt 2 of the Act, which are thereby rationally connected to the identified legitimate purpose. The offence provisions in ss 6(4) and 8 depend on the issuance of

a direction under s 11, which in turn depend on a police officer's reasonable belief as to an offence or contravention of s 6(1)-(3). The arrest and removal powers conferred on police in s 13 are contingent on a person on business premises or a business access area committing or having committed an offence under the Act in relation to the premises or a business access area in relation to that premises within the last three months, or a contravention of s 6(1)-(3) (but only if a police officer holds a reasonable belief as to necessity for one of the purposes identified in s 6(4)): s 13(3).

(b) Necessity

25. The NSW Attorney confines his submissions on necessity to the plaintiffs' reliance on the Inclosed Lands, Crimes and Law Enforcement Amendment (Interference) Act 2016 (NSW). Those provisions do not supply an "obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom" (McCloy at [58]) because, contrary to the plaintiffs' submission (PS at [69]), they are not directed to the same ends. They are directed to "inclosed lands", as defined in the Inclosed Lands Protection Act 1901 (NSW), rather than to business premises or business access areas. Unless enclosed by a fence or natural boundary, the Inclosed Lands Protection Act 1901 (NSW) would not apply to forestry lands of the type specifically included under the Act.

(c) Adequacy of the balance

26. The third stage of proportionality testing – which is a "tool of analysis" rather than a rule derived from the Constitution, for the purposes of which the "methodology to be applied ... does not assume particular significance" (McCloy at [68], [88]) – involves consideration of the importance of the purpose and the benefit to be achieved: McCloy at [87]. The "benefits gained by the law's policy" in the present case are congruent with any limit it imposes on the freedom, when the limited nature of that effect is balanced against the public importance of preventing disruption to business operations, by prevention, hindrance or obstruction of business activities. There is a substantial history in Tasmania of such disruptions in the forestry industry, reports of which are set out in the Special Case at [64]-[67] (Special Case Book at 65-66).

27. The plaintiffs submit that the purpose in question is of a "low order of importance" (PS at [48]) because the historical development of the common law tells against the

importance of the purpose in the absence of further evidence: PS at [51]. The Tasmanian Parliament's interest in relation to the economy of the State and the capacity of business operators to conduct activities in Tasmania free from such disruption should not be assumed to be identical to those of individual business operators who are potential plaintiffs in trespass or nuisance actions. It might be noted that actions in tort may not in any event be a practically effective remedy for individual business operators. The same is true of the Tasmanian Parliament's interest in the preservation of public order, including in relation to business access areas, where an action for trespass or nuisance will not necessarily be available to a business operator. The fact that the legislature considered the common law remedies to require supplementation does not demonstrate the importance of the legislative purpose. The state of the common law does not assist at this stage of proportionality testing. Justice Hayne's judgment in Monis, considering the general law for the purpose of assessing the legitimacy of a legislative purpose (at [128], [222]), does not support the contrary view.

28. The plaintiffs, understandably, seek to demonstrate the uniqueness of on-site protests as a mode of communication: PS at [56]-[60]. It may be that the general system of law in Australia postulates for its operation "agitation" for legislative and political change, as was suggested by the plurality in a non-constitutional context in Aid/Watch Inc v Federal Commissioner of Taxation (2010) 241 CLR 539 at [45] (not a case concerned with the regulation of protest; cf PS at [55]). That does not demonstrate the negative effect of any limit that this law imposes on the freedom, which requires assessment of the plaintiff's submissions as to the importance of on-site protest in relation to forestry issues. The plaintiffs submit that the Act seeks to prohibit on-site protest as a "primary and distinctive" means of environmental protest: PS at [60]. The defendant properly points to the lack of precision with which the concept of "on-site" protesting is used by the plaintiffs: DS at [33], [36]-[37]. The Act does not operate where a person is protesting on land that is not a business premises or a business access area, unless a protester's act prevents, hinders or obstructs access to such an area.

29. The plaintiffs do not suggest that the capacity of protesters to interact with business occupiers (by way of persuasion, criticism or otherwise) is relevant to the

distinctiveness or success of on-site protest. Instead, its importance as a mode of communication is said to arise from images of the protest and of the environment which the protesters believe to be under threat: Special Case at [58], [59], Special Case Book at 63-64. The plaintiffs do not explain why, in circumstances where on-site protest will only attract the operation of the Act if it prevents, hinders or obstructs the carrying out of a business activity (including by preventing, hindering or obstructing access to a business premises or business access area), the Act will have the effect of "excluding people from protesting on or near the site of the alleged environmental harm": PS at [60]. The boundaries of a particular business premises or business access area will be a question of fact, but there is nothing in the Act that prohibits persons from protesting adjacent to the site of an alleged environmental harm, providing they are not present on business premises or a business access area (or preventing, hindering or obstructing access to one). Nor does the Act regulate the recording of images of the business activities occurring in the face of a protest from areas in which persons have a right to be present, such as (in the present case) the Flowerdale River Forest Reserve adjacent to the Lapoinya Forest: see Special Case at [7], Special Case Book at 55.

30. The plaintiffs' reliance on Levy as recognising the "attraction and power" of on-site protesting (PS at [57]) is misplaced. Chief Justice Brennan recognised that "neither the application nor the validity of the Hunting Season Regulation depends upon the locus where a protest might have been made; invalidity depends on the operation and effect of the Regulations: Levy at 595. By contrast, the application of the Act does depend on the location of a protest – if it is not located on a business premises or business access area, it must have an effect on such an area of the proscribed kind, otherwise s 6 will not operate. The police powers in ss 11 and 13 are confined to business premises and business access areas, and the offence provision in s 8 is confined to business access areas.

31. Justice McHugh in Levy explained that the protesters' opportunity to protest was destroyed by the lack of a right to be present in the hunting area, not by the impugned regulations: 189 CLR at 626. It was only because the argument for both parties assumed that in the absence of those regulations, both the plaintiff and others were entitled to enter the permitted hunting area to make their protests that his Honour

proceeded on the basis that it was the impugned regulations (rather than the proprietary rights of the Crown or the operation of the general law) that prevented access to the hunting area. Similarly here, a protester's opportunity to engage in on-site protest will be determined by the existence of a right to be present in the vicinity of the business activity the subject of the protest, which will depend on the ownership of the business premises in question, applicable licences and other rights of entrance or occupation and, in some cases, such as forestry land, the operation of a statutory regime, specifically the Forest Management Act 2013 (Tas) ("FM Act"), the operation of which in relation to the approximately 800,000 hectares of "permanent timber production zone land" in Tasmania is described in the Special Case at [74]-[75], Special Case Book at 68.

32. While the plaintiff cites Hague v Committee for International Organisation, 307 US 496 at 516-517 (1939) (PS at [59]) in relation to streets and parks, the First Amendment cases differentiate between traditional public fora of that kind and other types of public property, recognising that the location and purpose of such property is critical; that a lower level of scrutiny is applicable where the government is acting not simply as a regulator but as a proprietor in managing its own operations; and that the government's ownership of property does not automatically open that property to the public: see US v Kokinda 497 US 720, 725-727 (1990); McCullen v Coakley, 573 US __ (2014) (Slip Opinion at 8); 134 S Ct 2518. Applying that analysis, the role of Forestry Tasmania in relation to land declared to be permanent timber production zone land under the FM Act is that of a manager rather than a lawmaker. The requirement in s 13 of the FM Act that Forestry Tasmania perform its functions and exercise its powers so as to allow access to permanent timber production zone land for such purposes as are not incompatible with management of such land under the FM Act (Special Case at [75], Special Case Book at 68) emphasises the primacy of that management function.

33. Finally, the plaintiffs seek to amplify the negative effect of the Act on the implied freedom by alleging that the Act is imprecise and will have a "chilling effect": PS at [63]. The alleged imprecision dissipates when the role of prior directions under s 11 in triggering the offence provisions in ss 6(4) and 8(1) is borne in mind. To the extent that the location of a person on business premises or a business access area

following a direction under s 11 (as in s 8), is an element of an offence, it will be incumbent on the prosecution to establish beyond reasonable doubt that the person was located in a proscribed area. Political expression is not "chilled" beyond the operation of the prohibitions in s 6(1)-(3); because contravention of one of those subsections remains a pre-requisite to the operation of the direction power in s 11 and thus, if the direction power is exercised, to the potential to commit an offence or to be arrested in relation to the commission of an offence under s 13.

34. The "adequate congruence" required at this stage of the test for proportionality is achieved by the Act. No blanket ban on protests at business premises is imposed. Protesters remain free to communicate their views, other than in ways that prevent, hinder or obstruct the carrying out of business activities: see, as to other laws held not to infringe the implied freedom where protesters were otherwise able to communicate their views, O'Flaherty v City of Sydney Council (2014) 221 FCR 382 at [26] per Edmonds, Tracey and Flick JJ; Gibson v Commissioner of Police [2007] NSWCA 251 at [11] per Beazley, Giles and Ipp JJA; Muldoon v Melbourne City Council (2013) 217 FCR 450 at [384] per North J. The limited restriction on the freedom is appropriately balanced by the benefits sought to be attained, particularly in view of the limited locations in which the Act will operate.

Part VI Estimate of time for oral argument

35. It is estimated that 15 minutes will be required for oral argument.

Dated: 28 March 2017

MG Sexton SC SG
Ph: 02 8093 5502
Fax: 02 8093 5544
Email: Michael_Sexton@agd.nsw.gov.au

Sarah Pritchard

Sarah Pritchard SC
Eleven Wentworth Chambers
Ph: 02 9223 5894
Email: spritchard@elevenwentworth.com

Joanna Davidson
Sixth Floor Selborne Wentworth Chambers
Ph: 02 8915 2625
Email: jdavidson@sixthfloor.com.au