Brown & Anor v The State of Tasmania - [2017] HCATrans 93

[2017] HCATrans 093

IN THE HIGH COURT OF AUSTRALIA

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Office of the Registry
Hobart No H3 of 2016

B e t w e e n -

ROBERT JAMES BROWN

-

First Plaintiff

JESSICA ANNE WILLIS HOYT

-

Second Plaintiff

and

THE STATE OF TASMANIA

Defendant

KIEFEL CJ
BELL J
GAGELER J
KEANE J
NETTLE J
GORDON J
EDELMAN J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON TUESDAY, 2 MAY 2017, AT 10.16 AM

MR R. MERKEL, QC: If the Court pleases, I appear with my learned friends, **MS F.I. GORDON** and **MR C.J. TRAN** , for the plaintiffs. (instructed by Fitzgerald & Browne)

MR M.E. O'FARRELL, SC , SolicitorGeneral for the State of Tasmania: May it please the Court, I appear with my learned friend, **MS S.K. KAY** , for the defendant. (instructed by SolicitorGeneral (Tas))

MR S.P. DONAGHUE, QC , SolicitorGeneral of the Commonwealth of Australia: May it please the Court, I appear with my learned friend, **MR P.D. HERZFELD** , for the AttorneyGeneral of the Commonwealth intervening. (instructed by Australian Government Solicitor)

MR P.J. DUNNING, QC , SolicitorGeneral of the State of Queensland: May it please the Court, I appear with my learned friends, **MR A.D. KEYES** and **MS P.D. MOTT** , for the AttorneyGeneral of the State of Queensland intervening. (instructed by Crown Solicitor (Qld))

MR R.M.NIALL, QC , SolicitorGeneral for the State of Victoria: May it please the Court, I appear with my learned friend, **MR M.A. HOSKING** , for the AttorneyGeneral for the State of Victoria intervening. (instructed by Victorian Government Solicitor)

MR C.D. BLEBY, SC , SolicitorGeneral for the State of South Australia: May it please the Court, I appear with my learned friend, **MR T.N. GOLDING** , for the AttorneyGeneral for the State of South Australia intervening. (instructed by Crown Solicitor (SA))

MS S.E. PRITCHARD, SC: May it please the Court, I appear with my learned friend, **MS J.E. DAVIDSON** , for the AttorneyGeneral of New South Wales intervening. (instructed by Crown Solicitor (NSW))

KIEFEL CJ: The parties and interveners would be aware that the Court has received written submissions from the Human Rights Law Centre Limited as amicus curiae but have advised the Centre that the Court would not be further assisted by oral argument. Yes, Mr Merkel.

MR MERKEL: If the Court pleases, I have handed up an outline of our oral submissions.

KIEFEL CJ: Yes, Mr Merkel.

MR MERKEL: If your Honour pleases. Can I briefly explain the propositions in the first four paragraphs of the oral submissions. Critically to the matter before the Court we say that the purpose and practical operation of section 6 and the associated provisions set out under paragraph (1) is to prevent protest in relation to the activities defined in section 4, which are "political, environmental, social, cultural or economic" issues, and we make the point they are key issues to which electors will normally have regard when electing representatives. The second condition is that the activities by protesters "prevent, hinder or obstruct" - or be about to do so - business activities at a site where private or government activities are carried on.

We make two points about paragraph 2 and we say the Act operates by reference to the content of communications. The first is it singles out as a target political versus nonpolitical communications, and we use the word "political" in the sense used in paragraph 1(a)

covering that range of issues which will broadly, in our submission, encapsulate what would be called political communication as determined in the cases by this Court. So, one singles out political versus nonpolitical issues.

But another area that falls into the same category is the Act has left out of its sight what might be called industrial issues. It has had a very limited carveout for protected action under the *Fair Work Act* and industrial issues by government employees, but otherwise the range of normal industrial issues and protest is left out of this Act.

So, by the description of "content" you have two discriminatory aspects - political and nonpolitical political as against industrial which would be a major area of protest activity that normally would fall outside the definition of the issues in section 4. So we say that the Act operates by reference to the content of communications, which is a criterion for the exercise of power under the Act.

In paragraph 3, we make the further point that the Act discriminates based on viewpoints – and we will take your Honours to the arguments we put in that regard but, we say, properly understood, having regard to its operation, terms and effect, it really is proscribing protests against business activities at the site and that that makes it a viewpointbased discrimination.

We make the point – which has come up in the submissions in paragraph 4 – that there are problems about reading down or putting a narrow operation on the words "prevent, hinder or obstruct" and we will address that in more detail but that would not avoid the unjustified burden which we say is imposed by the Act.

Can I just briefly outline – going to the legislative history of the Act - and then take your Honours to the terms of the Act. The Act was first enacted as a bill – sorry, first was in the form of a bill, which I will not take your Honours to – but there is a fact sheet in respect of that Bill because it was changed significantly in the Upper House. Could I take your Honours to that fact sheet because that is not affected by the changes – which is when the Bill was present to the Lower House in Tasmania. It just sets out certain points by way of background which are relevant to the submissions we put. In the first paragraph it explains

KIEFEL CJ: What is the status of the fact sheet, Mr Merkel?

MR MERKEL: I may be assisted by my learned friend. I understand it is like an explanatory memorandum presented to Parliament in support of the Bill, but I may be wrong about that.

KIEFEL CJ: Perhaps we could hear from the Solicitor later about that.

MR MERKEL: Yes; thank you, your Honour. This was the fact sheet presented with the Bill. I have understood it to be like an explanatory memorandum, but I may be wrong. It says in paragraph 1:

> This legislation is designed to implement the Tasmanian Government's election policy commitment to introduce new laws to address illegal protest action in Tasmanian workplaces.

The point I want to make is that this came about as a result of an election promise, not a Law Reform Commission report or some parliamentary committee report. We find, when we come to the material and the agreed facts, there is very little said about the mischief that this Act was directed towards or any of the reasons why this Act was enacted in the form it was in, but it is to be understood as satisfying an election commitment. Then in the fourth paragraph down it says:

> It does seek to regulate inappropriate protest activity that impedes the ability of businesses to lawfully generate wealth and create jobs.

Skipping the next paragraph, but going down to the business activity:

> Business activity covers those businesses that operate on a commercial basis with the intent to generate wealth and employment opportunities in Tasmania. This includes government owned businesses, as well as private for profit businesses.

That will explain why certain institutions such as hospitals and schools, which normally might be interfered with by some kind of protest activity, are put outside the operation of this Act. So it is a commercial enterprise protection rather than a protection operating more generally. Then the Bill sets out what the definition of "business premises" is and your Honours will see in the next paragraph, they cover a range of industry sectors:

including forestry, mining, agriculture and manufacturing . . .

The Bill provides that a protestor is a person engaging in protest activity on a road, footpath, public place, business premises or business access area. Importantly the Bill describes when a person is not engaging in protest activity.

I will take your Honours to that. That is clearly a reference to section 6(5) which allows a procession once a day at reasonable pace. There are also other exceptions where you have a lawful excuse but it is very hard to see how those sections would have any meaningful exemption from the Act.

Can I ask your Honours, just over the page in the fourth paragraph down, there is a reference to "incitement" - that did not appear in the Act. Then the last paragraph which appears both in this second reading speech and the second reading speech in the Legislative Council which was substantially the same:

The Bill sends a strong message to protest groups that intentionally disruptive protest action that prevents or hinders lawful business activity is not acceptable to the broader Tasmanian community.

There was a second reading speech in the Lower House which I do not need to take your Honours to. Then when the Act went through the Upper House, there were three significant changes which I do not, again, need to take your Honours to the form of, but the first was that the incitement aspect of the Act was dropped so it was not an offence to incite people to hinder, et cetera.

Section 6(1), (2) and (3) which are central to the case were offences in the Bill but were not made offences in the Act. So contravention of those sections became a pathway to the exercise of police powers rather than an offence in themselves. Certain mandatory penalty provisions were dropped but the police direction powers, which are central to our case, were enhanced.

With that background could I take your Honours to the Act which is not a simply or easy piece of legislation because it intertwines a number of sections. Could I go first to section 4 which sets out the meaning of "protester and engaging in a protest activity"? Can I just, as a broad introduction, say that all of these definitions and the operation of the Act is in the widest terms:

a person is a protester if the person is engaging in a protest activity.

In subsection (2):

a protest activity is an activity that –

which means any activity:

takes place on business premises or a business access area in relation to business premises –

and could I just stop there. "Business premises" are defined in section 2 – sorry section 3 – given the meaning in section 5 and in section 5 your Honours will see "business premises" are set out in a number of subparagraphs but they encapsulate the whole range of activity described briefly in the fact sheet. Importantly for us, they are:

premises that are forestry land –

which is defined in section 3 and relevantly picks up all forests being managed by the Forestry Corporation, which is a statutory corporation basically running forestry out of Crown land under the *Forest Management Act*, which I will take your Honours briefly to. Your Honours will also see in paragraph (g) of the definition that "business premises" includes:

premises occupied by a Government Business Enterprise

which is the subject of its own statute, which I will take you briefly to:

that performs functions, or exercises powers, in respect of a use made of other premises that are referred to in another paragraph of this definition -

and in (i) you have an extended definition:

> premises used for purposes ancillary to the carrying out of a business activity on business premises -

So one finds "business premises" given a very, very wide definition. A "business access area" is defined in section 3, which broadly covers areas:

> reasonably necessary to enable access to an entrance to, or to an exit from the business premises –

which will normally be footpaths, roadways and so forth, but in respect of forestry land we get into a much more complicated scenario which I will take your Honours to when I address the special case. When we go back to section 4 we see the range of areas where the protest activity can take place and then, critically, and unusually in this case, subsection (2)(b) says that the activity is:

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

Then in subsection (3) – again, this is another unusual and important part of our case. This case not only targets political communication as such, but targets one of the critical aspects of political communication, which is political association. It has these unusual provisions such as (3) and also, later in the Act, a warning to a group to leave is a warning to each and every member to leave, which has legal consequences. So in subsection (3) we have:

> a person is engaging in a protest activity if the person participates, other than as a bystander, in a demonstration, a parade, an event, or a collective activity, that is a protest activity.

Then in (4) we have a broadening saying:

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

In (5) we have this very important exception, the importance of which I will explain in a moment:

> a person is not to be taken to be engaging in a protest activity . . . if the person has the consent, whether express or implied, of a business occupier . . .
>
> (a) to be on the premises –

and to engage in the activity. We singled that out as having significance because it supports our argument that the practical operation and intended effect of this Act is to relate to protest activities against activities on premises. In the unlikely event there is a protest in support of activities it is likely to have the support of the occupier whose business activities are being supported. So the both express or implied consent is an important exception as to the legislative intent. Can I go straight to sections 6(1), (2) and (3) which are the key sections which we say seek to impugn. Section 6(1) says:

> A protester must not enter business premises, or a part of business premises, if –
>
> (a) entering the business premises or the part, or remaining on the premises or part after entry, prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier –

and there is an extended definition of "business occupier" in section 3, and:

> (b) the protester knows, or ought reasonably to be expected to know, that his or her entry or remaining is likely to prevent, hinder or obstruct the carrying out of a business activity –

Can I just indicate that that applies to any activity on the premises, no matter how significant or insignificant and you will find this pattern throughout the Act. Subsection (2) has the same effect but it relates to a business access area which will usually be public space, otherwise it is in the same terms. Subsection (3) is not confined to business premises or business access areas. Subsection (3) - again it is in the same terms but it says:

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

So, that takes one outside the initial public space that might be the entrance and it would be a contravention of subsection (3) if an act was done outside in another public area that had the two prerequisites – preventing, et cetera, knowing or expecting to know that it:

> is likely to prevent, hinder or obstruct -

Now, I should say that when one comes to the enforcement regime in this Act, a person who contravenes subsection (3), as we understand it, can only be the subject of enforcement if they actually enter a business access area and business premises. So the police powers could not be exercised against them outside the access area or premises, even though the contravention may have occurred outside those two areas.

> When we go to subsection (4) we see that there is an offence. So, so far we have no offence, we have merely contraventions or provisions that can be contravened:
>
> A person commits an offence if he or she contravenes a requirement, specified in accordance with section 11(6) on a direction issued to the person under section 11(1) or (2), that the person must not, in the period of 3 months after the date on which the direction is issued, contravene subsection (1), (2) or(3) –

Now, this is an important pathway to sections 11 and 8 which I will take your Honours to, but the ultimate effect of it is that if a direction is given to a person because a policeman reasonably believes they have contravened – or about to contravene say, section 6(1), (2) and (3), they can be directed to leave and if they do not that is an offence. But, importantly, if directed to leave they must not return for any purpose within four days and if directed not to return for three months they must not return and it is a serious criminal offence if they return within three months in a way that contravenes section 6(1), (2) and (3).

It is a little complicated, but the fourday period – they must not return, full stop even if the return does not involve hindering or preventing an activity. The threemonth period requires them not to return for three months in a way that would contravene 6(1), (2) and (3) or contravene a direction not to return.

The pathway that this creates – and I will take your Honours to sections 11 and 8 – is to effectively prevent a protest. So if a protester is there on day one and directed to leave, they cannot be on the premises in days 2, 3, 4 and 5, irrespective of the purpose that they are there for and, certainly, independently of whether or not their attendance is hindering, obstructing, et cetera.

So, can I take your Honours now straight – sorry, I should finish this section. We have this provision which we will come back to later in relation to its significance, but section 6(5) says:

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

(a) passes business premises; or

(b) passes along a business access area . . .

at a reasonable speed, once on any day.

In the original Bill, this was a defence to a prosecution for an offence under (1), (2) and (3) but now it has the same effect because subsection (3) – in the threemonth period – would require you to contravene (1), (2) and (3) and it would be a defence if all you were doing was falling within subsection (5) which is a procession at reasonable speed once a day.

We say, properly understood, that is the only carveout from the burden on the freedom of political communication in this statutory scheme. There is a lawful excuse defence but it is hard to picture a lawful excuse that would have any meaningful effect.

The second reading speech gives as an example of a lawful excuse where a person obstructs someone from entering because they are concerned about that person's safety on the business premises, but it is quite difficult to see how that would arise in the context of a protest activity. One might imagine a circumstance but, certainly, it is not one that one can imagine in real life.

So, the only carveout that we say this Act makes in relation to permitting any political communication that would otherwise be prohibited, is subsection (5). We have the lawful excuse in subsection (6), which I have already mentioned. Subsection (7) is another example of the width intended for the operation of this Act:

Without limiting the generality of subsection (2), an act on business premises, or a business access area -

that hinders, et cetera, occurs if the act:

prevents, hinders or obstructs the use, by a business occupier in relation to the business premises, of a businessrelated object -

A "businessrelated object" is defined in section 3, and that is any object:

that belongs to, is in the possession of, or is to be used by, a business occupier -

So you have contravened section 6 if you prevent/hinder the use of a spanner or if you prevent/hinder the use of a large crane. This Act is indifferent to the significance of the interference or the significance of the object. I should say that this subsection is linked quite closely with section 7(4)(c) and (d). Can I take your Honours to those sections before I go to sections 11 and 8?

Section 7 appears to relate to damage to business premises or businessrelated objects and safety - activities that might interfere with or pose a risk to safety. I would like to make it quite clear at the outset that we do not suggest that a properly focused legislative protection of business from damage or from a risk of safety would be anything other than a legitimate object.

So the only quarrel we have with the provisions of section 7, save for 7(4)(c) and (d), is that they are discriminatory against business protesters. Were they of general application, even though they are in wide terms because they relate to safety or damage of an object, we do not embrace any submissions that that is not a legitimate purpose or object. So it is the discriminatory aspect of those sections that we would direct our submissions to, so we are outside the realm of safety, as in *Levy*, or damage to property, which would be comparable to the interests protected in *Levy*.

What this Act does – and again it is indicative of its ultimate purpose, which we say is to prevent political protest. Could I take your Honours through to section 7. Subsection (1) deals with damage; (2) and (3) deal with damage, then we get to the risk to safety, but all of the subsections are, we say, within a legitimate object until one gets to 4(c) and (d). They take us back to (3):

A person must not issue a threat of damage in relation to business premises –

for a political purpose, just encapsulating the section (4) definition. Then one goes to 7(4)(c), which gives an extended definition of a threat to cause damage. We see it picks up the language of 6(1), (2) and (3). So it is a threat to cause damage when it relates to use of a businessrelated object on business premises that is being or is to be prevented, hindered or obstructed, and (d) has the same effect in relation to an access area. So the point of 7(4)(c) and (d) is that it picks up the same territory as we are in under section 6(7), but it is unrelated to safety or actual damage or even a threat of damage, as we would understand it.

We say, when we set out the key provisions in paragraph 1 of our outline, it is 7(4)(c) and (d) we focus on. Section 6 takes it through to section 11. These sections are the enforcement provisions together with Part 4, which we focus on as the means by which the object of preventing political protest is sought to be achieved under this legislative scheme.

When we go to section 11(1), which is the operative section, it gives the police officer power to:

direct a person who is on business premises to leave the premises without delay, if the police officer reasonably believes that the person has committed, is committing, or is about to commit, an offence, against a provision of this Act –

which would be 7(4)(c) and (d):

or a contravention of section 6(1), (2) or (3), on or in relation to –

(a) a business premises; or

(b) a business access area –

That relates to on business premises. We have the same in subsection (2) - "in a business access area". One can normally understand the delineation between business premises and business access areas in relation to most of the businesses. When we get to forestry land, that delineation becomes far more complex. We will address forestry land as a separate topic.

Your Honours now see how you have a direction to leave. That takes us to section 8(1) and (2). There are certain exceptions in (3) and (4) about a business operator, but we do not have any concern with those. They relate to a different subject. We are not sure quite what they are directed to. When you go to 8(1):

A person must not –

(a) remain on a business access area . . . after having been directed by a police officer under section 11 to leave . . .

(b) enter a business access area in relation to business premises within 4 days after having been directed by a police officer under section 11 to leave –

That is a penalty of a fine not exceeding $10,000. That is the fourday provision that I identified earlier to your Honours. Then you have the only defence there is a lawful excuse for committing the offence. I gave your Honours an example that was given in the second reading speech but it is hard to imagine what is embraced by a lawful excuse.

> Then there is section 9, which deals with not preventing, hindering or obstructing a police officer from taking action under section 12, which is police officers removing obstructions and so forth. Then can I go to section 11(6) and (8), which refers back to a direction under this section:
>
> may include a requirement that the person must not, in the period of 3 months after the date on which the direction is issued –
>
> (a) commit an offence against a provision of this Act –

Sections 7 and 8 would be examples, and:

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

So through that circular route, one goes back to the only defence to a direction would be in a procession passing once a day at reasonable pace. Otherwise, one is into quite serious offences if you commit an offence of breaching section 6(4). Subsection (7) takes up the point again that I had indicated to your Honours is significant and unusual about this case because of its targeting of political association. Section 11(7) says:

> A direction may be issued under this section to a person or to a group of persons.
>
> (8) If a direction is issued under this section to a group of persons, the direction is to be taken to have been issued to each person –
>
> (a) who is a member of the group to whom the direction is issued; and

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

The other provision I would take your Honours to is section 13(3). The arrest powers in general follow what might be normal police powers or powers one would expect. Section 13(3) gives the police power to remove a person from business premises or business access area in relation to premises, who the police officer reasonably believes is committing or has committed an offence against a provision of the Act or a contravention of 6(1), (2) and (3) in relation to business premises and a business access area.

So you have the direction powers under sections 8 and 11 and a removal power under section 13. Section 13 can only be for the purposes set out in the section and the section sets out in subsection (4) the reasonable belief that it is necessary to do so and we just focus on (c), to preserve public order.

So if you have a reasonable belief that it is to preserve public order or to prevent the continuation or repetition of an offence against a provision of Part 2 or for the safety or welfare –we focus on the word "welfare" – of members of the public, so long as is necessary to fulfil the purpose. Section 14 allows use of force. Section 15 takes the pathway of infringement notices as a lesser enforcement remedy.

Then we go to Part 4 which is the enforcement regime and one sees a fairly heavy penalty regime if you fall outside the infringement notice. Offences against a provision, other than 10(2) which is about giving your identity to a police officer, are indictable. They may with the consent of the prosecutor be heard in a court of summary jurisdiction. Then, going to 3(b) we have the penalties of fines and imprisonment going back to very, very serious consequences for breach.

One has in section 17 the breach of section 6(4) which is not complying – contravening a direction and that takes the fine up to $100,000 and, again, a very strong enforcement regime for a further offence which takes you up to a term of imprisonment not exceeding four years. Again, as part of this enforcement regime, is section 18 which is "Compensation for loss":

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

It sets out in subsection (8) if more than two people are convicted then the amount – sorry, subsection (9) – if two or more are convicted it may apportion the loss. Regulations are provided for and there are certain exceptions for proscribed classes of activities but, again, I may be corrected by my learned friend, the Solicitor, we do not understand there are any regulations that have been passed under the Act, so it operates in the form that we have identified to your Honours.

We say three issues of construction arise in respect of the Act that are relevant to the case which we are putting. The first is the proper construction of the critical collocation of words – "prevent, hinder or obstruct". Can I just indicate

KIEFEL CJ: They are words that are not uncommon

MR MERKEL: No, no, they are

KIEFEL CJ: not only in legislation but in injunctions.

MR MERKEL: Yes. We have no problem with the definition of each of the words. The real question we are addressing here are the submissions put by the interveners, but not Tasmania, that these words should be given a narrow construction in accordance with the principle of legality and they should be read down to serious – be qualified by the obstruction, et cetera, being serious or New South Wales put it, having a degree of substantiality.

Tasmania do not actually support any of those constructions – and I will take your Honours to that in a moment – but the issue I am addressing is the question of whether there can be or should be a narrow construction to confine the expression to serious or something in that context, which is not easy to apply but I wanted to take a number of steps about that.

We say ultimately it makes no difference because of the generality of the operation of the Act, the broad discretion given to a police officer to prevent a protest – nipping it in the bud or stopping it from being carried on on the basis of a reasonable belief. We will deal with all of those matters. So whether it is narrow or its ordinary natural construction does not ultimately make a difference to what we submit, but clearly some of the interveners are contending for a narrow construction because that makes it easier to contend there is a legitimate interest being protected here.

I will just make a number of fairly short submissions. "Prevent, hinder, obstruct", as your Honour the Chief Justice says, is a term that is usually used, but if you look at the collocation, they run the whole gamut or spectrum from preventing, stopping something from happening; hindering, making it more difficult or impeding; obstructing, just getting in the way or deliberately getting in the way of something. So the ordinary, natural meaning covers anything that could interfere with the conduct of a business activity or the use of a businessrelated object.

We say that the use of those words in their ordinary and natural meaning suggests they are intended by the legislature to have their ordinary and natural meaning. Tasmania, in its submissions, at paragraphs 38 and 63, is not contending for any narrow meaning. At 38, they give a particular construction which would suggest disavowing the intervention of a qualitative test such as "serious".

They say that it may be suggested that the Act has a particular operation in a business access area which would be a protester who impedes neither access nor egress but by overt conduct such as waving placards distracts people from carrying on business activities on the site. This example gives rise to a useful analysis of the operation of the Act. Then later in the submissions, at 68, Tasmania offers

GORDON J: I think you might mean 63.

MR MERKEL: I am sorry, 63. Thanks, your Honour. At 63, Tasmania introduces the concept of undue interference, however that might operate because that seems to be entirely circular. So Tasmania is not proffering any narrow view. But there are problems with a reading down. We do say that, on legislative intention, the legislature should know about the principle of legality and should be taken to mean what it says and not have the Court, in effect, tell them what they maybe did not mean by applying that principle of construction.

We notice that in section 9 you have these words in respect of obstruction of a police officer and we are not sure that that would just mean serious obstruction of a police officer but, importantly, as I have pointed out already, when you come to sections 6(1), (2) and (3) and 7(4)(c) and (d), the interference is with any business activity or any businessrelated object, no matter how insignificant or how significant.

So that again that is indicative of an intent to cover the field as widely as possible. Victoria has put forward "serious", New South Wales "a degree of substantiality", Tasmania "undue", but what we say in this context it is quite difficult to translate any of those meanings or even,

I think in *Monis*, three of your Honours had said it would be at the serious end of the spectrum the defence might be read but having a spectrum here does not solve any of these problems.

Serious obstruction or serious hindering, in the context of this Act, gives rise to extraordinarily difficult problems, particularly in two instances: one, I have taken your Honours to section 6(5) which is the only example given of what is not intended to be covered which again would support a legislative intent, not decisive in itself of a broad construction but also, unlike the situation in *Monis*, *Coleman v Power* and so forth, here the discretion with which we are concerned is the reasonable belief of a police officer, not well equipped or in a position to make a judgment about what is or is not serious.

It relates to obstructing business activities on business premises, obstructing in a business access area by a police officer who would come to this area as a total stranger, one would expect. So, as opposed to where it is in *Monis*, *Coleman v Power* for a court to determine whether there is an offence, here the key trigger to the prevention of political protest is residing in the belief, the reasonable belief of a police officer and what actually happened - and the special case sets this out in some detail - to Mr Brown is a good example of how difficult it would be to read seriousness into this definition.

A police officer thought he may be about to impede upon some logging operations about to – and to say "about to seriously impede" produces problems of quite a difficult and different dimension to that which your Honours have been concerned about when the Court has had to approach this kind of problem in *Monis*, *Coleman v Power* and even I think, your Honour the Chief Justice in respect of section 18C of the *Racial Discrimination Act* talked of offence at the serious end, not just a mere slight but again that is a determination by the Court. So we say that

KEANE J: Would the police officer also have to have a reasonable suspicion that the protester knows or ought reasonably be expected to know that the act is likely to prevent, hinder, et cetera?

MR MERKEL: Yes, your Honour.

KEANE J: So, the police officer would have to make a judgment based on his belief that the impact on the business is sufficiently evident that the protester knows that there is an impact.

MR MERKEL: Yes, the police officer would be in the mind of the protester about what the protester would reasonably be expected to know but that is about what is about to happen. It is not just "has happened". The trigger here, and we say it is a key trigger in our case, that this all preempts the protest activity by enabling it to be stopped because of an interference that is about to happen which we say might or might not happen.

It is those broad discretions which are not really, ultimately, saved by introducing a qualifier such as "serious" - "seriously hindering" in this context is a very, very different concept to apply, particularly at that level of the section (11) belief of the police officer, which your Honours explored in some detail in *Prior v Mole* in a different context. But it does show the breadth of the discretion that the police officer has and how it, for all intents and purposes in this statutory context, becomes virtually unreviewable because the protest is at an end before any opportunity to test that belief can, in fact, occur. So the practical

KEANE J: The offence may not be made out because the prosecution may not be able to show that the police officer's belief was reasonable.

MR MERKEL: Your Honour, the present two cases, or case, is a great example. What happened to Mr Brown – in the end it was decided he was on business premises somewhere in this Lapoinya Forest, not a business access area. If your Honours will see the video, which I invite your Honours to do, one will see how fraught with difficulty those matters are, including where does the business access area start and finish in a forest.

I will take your Honours to this because forestry land has its own peculiar problems which do not exist in urban premises. It is an act of enormous width which is intended and ultimately the intent is clear. It is to stop the protest. So it is of little avail for Mr Brown later – three or six months because he was on bail not to go back to the area, not only a direction not to go back for three months according to the transcript but it was a bail condition – any protest was effectively at an end. Any immediate protest was certainly at an end because of the fourday limit.

So we say there are problems about attributing that narrow interpretation. That is the first issue of construction. Could I go to the second which seems to be not really disputed by our learned friends as far as I can understand and that is that the definition in section 4 about political, environmental, social, cultural, economic issues would embrace and be captured by what we would describe as political communication. It is a contentbased criterion that we have set out in paragraphs 1(a) and 2 and it arises under sections 4(1) and (2).

So, the only point we would make there is that when I refer to "political communication" I embrace that range of issues and we say that the sections I have taken you to must lead to the conclusion that a necessary condition for the exercise of power under this Act is that a protester is engaged in a protest activity and that is a political communication or a political association for the purposes of the communication.

So, unusually – and we are not able to find any precedent in Australia for this and probably one would have to look far and wide – the legislature has directly targeted political communication and political association, not as the sole condition, but as a critical condition for any liability or the exercise of any power under this Act. That makes this a very, very unusual case in that sense.

The third issue of construction, which I addressed briefly earlier, is that protests are likely to be against activities at the business premises. That is our third proposition in our outline. We say – and we refer to the *Shorter Oxford* meaning – that there is nothing unusual, that ordinary and natural meaning of the words "protest" and "protester" picks up someone objecting to or expressing dissent from something, and the something here will be the business activities conducted at the area.

The second is that, in operation and effect, a protest activity onsite – and we have been accused of not defining "onsite" – in these submissions we make it clear that "onsite" means business premises and business access areas at or near business premises because an offending act can occur just outside a business access area. If there is uncertainty about what is meant by "onsite", it is because of the statute, not because of our use of the word. "Onsite" encapsulates where that protest activity is likely to occur. We say that a protest activity on site in that sense is likely to be agitating for some change of activity, that is, objecting to the activity.

This concept is well articulated in a recent decision of the American Supreme Court. Can I take your Honours briefly to it because it captures the point we want to make rather well, accepting the First Amendment jurisprudence differs. But that is not the reason we want to take your Honours to it. It is *McCullen v Coakley* 134 S Ct 2518.

This is a case – one of many – where States were seeking to regulate activities outside an abortion clinic. The regulation here was a Massachusetts statute that made it a crime to knowingly stand on a public way or sidewalk within 45 feet of an entrance or driveway, which in this context was an abortion clinic. So unlike the present case, this was a law that was facially neutral and did not base its operation on content. Chief Justice Roberts, at 2531, in the first column, starting with "We disagree" – this is on it being content based – says:

> To begin, the Act does not draw contentbased distinctions on its face.

Then at about two-thirds of the way down that paragraph:

> The Act would be content based if it required "enforcement authorities" to "examine the content of the message that is conveyed to determine whether" a violation has occurred.

That is, of course, in contrast to what we say here. But then at paragraph [14] at 2533 his Honour says:

> It is of course true that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.' "

Then what was said here was that an exemption was made in respect of employees who worked at the clinic and the argument was that employee exemption was likely to enable employees to put the view of their employer and, therefore, this was a onesided view based distinction, and his Honour said:

> At least on the record before us, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

So, on the papers and the material before the court the employees were expected not to be undertaking that function. A very, very different view was expressed by Justice Scalia, with whom Justices Kennedy and Thomas joined. That is at page 2543. If I can read this passage to your Honours because this is what we say is encapsulated in the case before us, except may I draw one distinction. Here the exemption of a business occupier to give express or implied consent is exactly what is described in this judgment and what was found not to be available in the Chief Justice's judgment. Justice Scalia said:

> First, petitioners maintain that the Act targets abortion-related – for practical purposes, abortionopposingspeech because it applies outside abortion clinics only (rather than outside other buildings as well).

> Public streets and sidewalks are traditional forums for speech on matters of public concern. Therefore, as the Court acknowledges, the hold a "'special position in terms of First Amendment –

jurisprudence. Then in the next column his Honour says:

> Moreover, "the public spaces outside of [abortionproviding] facilities . . . ha[ve] become, by necessity and by virtue of this Court's decisions, a forum of last resort for those who oppose abortion." . . . It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur–and where that speech can most effectively be communicated–is not content bases. Would the Court exempt from strict scrutiny –

which is the contentbased scrutiny:

> a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 SelmatoMontgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not.

> > The majority says, correctly enough, that a facially neutral speech restriction escapes strict scrutiny, even when it "may disproportionately affect speech on certain topics," so long as it is "justified without reference to the content -

Then can I go to page 2546 where under the exemption his Honour says:

> Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpointdiscriminatory restriction) for another reason as well: It exempts "employees or agents" of an abortion clinic "acting within the scope of their employment," . . .

> It goes without saying that "[g]ranting waivers to favoured speakers (or ... denying them to disfavoured speakers) would of course be unconstitutional."

The over at the next column, halfway down:

> Is there any serious doubt that *abortionclinic employees or agents* "acting within the scope of their employment" near clinic entrances may–indeed, often will–speak in favour of abortion -

Then his Honour gives examples. Justice Alito expresses similarly strong views at page 2549, where his Honour, after saying that plainly it would be an area for critics against abortion but in the last line of the first column his Honour says:

> In short, petitioners and other critics of a clinic are silenced, while the clinic may authorize its employees to express speech in support of the clinic and its work.

That is precisely this case, which is the significance of the express or implied consent of an occupier to enable or to permit a protest activity.

KIEFEL CJ: Cases of this kind in the past in Australia have sometimes been dealt with on the basis of tort law, in particular the setting and interference with business, which are of course founded upon different notions, which brings me to this. The land on which forests are conducted are usually managed under the Forestry Management Act, but there will be some land caught by - to which the Act refers in respect of which business operators will have proprietary rights.

> This was a matter raised by Justice McHugh in *Levy* and it is a matter I think that is raised in a number of the submissions against you – that the freedom must operate differently if you have another – not another right since the freedom is not itself a right – but you have business operators who have proprietary rights to exclude people. How do you deal with that?

MR MERKEL: Your Honour, I will deal with it at length in our submissions when we come to the extent of the burden, because that is the heading which our learned friends have put this under, but can I just say in advance of that submission that your Honour used "forestry land". The forestry land we are concerned with does not raise that issue because it is Crown land which, under section 13 of the *Forest Management Act*

KIEFEL CJ: I realise that.

MR MERKEL: and it will have access to. So it does not get to his Honour's point until a direction is given under sections 21 to 23, which is the enforcement regime by a forestry officer - you must leave.

KIEFEL CJ: But the Act has a wider operation than with respect to forestry land. That is my concern. We are asked to strike down the whole or part of the Act. That is why I wanted to know at the outset are you saying that the Act ought to be read so that it is referable only to land to which the public may have access ordinarily? Are you going to exclude land in respect of which people have proprietary rights?

MR MERKEL: Your Honour, the evidence before the Court is that forestry land, with some possible exceptions but we have no evidence about what they might be, is Crown land managed by the Forestry Corporation, which has its own statutory regime. In respect of private land, the same principles will apply as they would to private premises.

> But may I say this, your Honour. This Act operates irrespective of the intervention of the owner. Trespass is an example. If one walks into a shop there is an implied licence to be there unless that licence is withdrawn. If you become a trespasser and engage in a protest activity, that is one circumstance which might attract not just his Honour Justice McHugh's observations, which Justice Brennan did not agree with that is a more complicated topic – but we are not in that territory because none of the criteria for liability under this Act are linked to what you might say is defeating a common law right.
>
> This Act has deliberately stayed away from stipulating its operation in terms of trespass or any of the private nuisance tort or of besetting. If the Act operated in that circumstance then the question your Honour the Chief Justice has raised with me would be raised.

KEANE J: Why does it not arise because of section 4(5)? The Act does not bite where the owner or the business occupier consents to the presence of the protester.

MR MERKEL: It says it is not a protest activity.

KEANE J: So the Act has no operation in relation to that?

MR MERKEL: The Act has no operation where the business occupier consents to the protest activity.

KEANE J: So in the case of a business occupier who is in possession of premises, who is therefore entitled to maintain an action for trespass against the world, who is entitled to prevent anyone coming upon the premises for any purpose, this Act does not expand the operation of the common law.

MR MERKEL: Your Honour, with respect, we say there is a difference between the occupier consenting to a business activity that is a protest and an occupier revoking any licence that may have been granted to a person to enter business premises. We are not like in a home, where you might say there is no implied licence for anyone to enter; we are in business premises where there is an implied licence for people to enter for whatever reason may be the case, and that may be a question of construction. If there is a sign outside but if it is a shop, people are invited to enter.

NETTLE J: But they would not be impliedly authorised to engage in protest activities.

MR MERKEL: All I am saying is – that is correct, your Honour, but dealing with - in taking steps, before a person becomes a trespasser the licence must be revoked or there must be no licence at all.

NETTLE J: Yes.

MR MERKEL: That is a question of fact in each case. But my point, in answer to his Honour Justice Keane, is that that is a factdependent issue depending on the circumstances of a particular case. But it is not part of our case to say a trespasser has a right, once being a trespasser, to engage in a political protest on private property. That is not what this Act is directed towards. Forestry land has it owns regime – and I will deal with that as a separate point – but we are not suggesting that the right of protest extends into that domain.

EDELMAN J: But you are suggesting something in a way which is similar because you are suggesting that there is a restriction on the ability to remove a licence that has been given. So if a licence has been given to be present on a premises, that licence can only be removed in particular ways or subject to the implied constitutional restriction.

MR MERKEL: Your Honour, that raises a more complex question. When we address this in a little more detail towards the end of our submissions – take the private law of nuisance, for example – it may

be – and the Court has yet to consider it – that a certain reasonableness defence or a public interest defence that might be a defence under the current law for an action in nuisance may have to accommodate – depending on the circumstances in which the issue arises – a similar defence to that which arose in *Lange*.

So, to say that the common law prohibits something, putting aside trespass where you have no right to be where you are, and the issues of public land, we are in the area of private torts and even statutory restrictions we need to confront the *Lange* point that the common law and statute and exercise of statutory powers have to accommodate the implied freedom of political communication. So, we say, that it is not just a simple answer to say that there might be the setting or private nuisance

EDELMAN J: You do not say that effectively it is an automatic process of accommodation. In other words, if a law were to make it a serious offence to engage in a form of political protest by punching a politician, you would not say there would be an automatic application then of *Lange* in those circumstances.

MR MERKEL: No, we would not. I want to make it very clear that we are not saying we are trying to change the law of trespass in this case because trespass is not an element in this statutory scheme. Nor do we say that issues such as damage to property or safety are not able to be accommodated with the implied freedom and quite comfortably as they were in *Levy*.

But we say it is no answer to our case to say that the common law may itself render unlawful some activities that might fall within the umbrella of the case because very, very little fact situation – very few facts have been presented in the agreed facts in the special case suggesting this has been a problem over the last 35 years.

Since the Franklin Dam, we have had huge protests with huge environmental change in Tasmania and when you look at the paucity of the facts put forward in the special case suggesting some difficulty in accommodating the private interests in respect of trespass and nuisance and so forth, and any other related torts, and protests

KIEFEL CJ: But, Mr Merkel, on the other hand you are not saying that this Act ought to be read as limited to premises in respect of which there is a right of public access. That was the point of my question earlier. Section 5 clearly refers to premises in respect of which persons might have occupational or other proprietary rights in which not even a licence can be inferred from the operation of the business

MR MERKEL: Yes.

KIEFEL CJ: to enter the premises. But it is not your position that we should read the Act as limited to public areas. As I understand it, you are not addressing that question at all. You are going to address the question of whether there is another object in relation to justification at a later point.

MR MERKEL: Yes, your Honour, although may I make it clear. We are not saying trespass on private property is an area where protest would be permitted. We are not suggesting

KIEFEL CJ: No, no, I understand that you are not suggesting

MR MERKEL: No.

KIEFEL CJ: unlawful behaviour.

MR MERKEL: Yes.

KIEFEL CJ: I am trying to understand your approach to construction.

MR MERKEL: Yes, your Honour, your Honour is correct in that certain business premises will be private and that needs to be looked at separately. Business access areas will not be; they will be public areas and

KIEFEL CJ: But as I understand your submissions, your argument is that that arises as relevant not at the point of construction but only at the point of justification.

MR MERKEL: Yes, your Honour, although one has to jump the purpose hurdle first. There is no dispute there is a burden but we put quite strong submissions about the purpose of this

KIEFEL CJ: Well, you say there is no dual purpose.

MR MERKEL: No, we say that this is a purpose which we define and that is incompatible and we say that that does not get to the private property question but it does at the second stage of that second question.

KEANE J: Do you accept that if it is right to say that all that the Act does is add enforcement measures to give effect to what would be the position under the common law in terms of the rights of the occupier, visàvis the rights of those who wish to protest either on the premises or near the premises in terms of access, do you accept that if all the Act does is add enforcement measures to vindicate the right of possession, including the right not to be beset, that the implied freedom has nothing to say?

MR MERKEL: No, we do not accept that, your Honour, for a number of reasons, but firstly, we say that the premise of your Honour's question is not made out here because the common law, and I will have to deal with this later, the common law and the criteria in this Act do not match but some protest activity might be unlawful under the common law but also adopting what your Honour has put to me, if the common law already gives sufficient protection, then there remains the question ultimately, which we say will be very difficult one for our learned friends to deal with, particularly Tasmania, what is the mischief that this Act is directed at that would justify the burden that is imposed on political communication in public areas or in forests and so forth, and the answer is not much or if at all, anything.

> So there is a certain paradox about the argument that the common law covers it. Therefore we say there is no need for this Act. But we have to jump a number of hurdles first, because critical to this case are the two discriminatory factors which have selected political communication as the target rather than any other form of communication. We say that needs to be confronted in this case by our learned friends.

KEANE J: But you do not say that the fact or the circumstance that the Act targets political communication gives a licence to either enter upon premises or to beset them. You do not say that.

MR MERKEL: No, we do not say that, but once it targets political communication – there are many ways of putting it – whether it be compelling justification, if it is for a proper legitimate purpose. Justice Gaudron required an overriding purpose. The laws of sedition or antiterrorist laws may be overriding, but when we are in this territory we are not certainly in an overriding legitimate interest, if it be legitimate at all.

So we say that there are a number of issues about that, but this is not a case the outcome of which depends upon answering questions such as "there is a licence to engage in a protest in circumstances where it is an unlawful activity", subject to the one qualification I gave Justice Edelman, and that is that it may be when the time arises that the law of nuisance may have to accommodate a *Lange*type defence.

EDELMAN J: That requires you to read, effectively, the *Forest Management Act* as if it were entirely independent of this legislation. If one asked the question, what is the licence that has been given, and one read section 13 of the *Forest Management Act* with provisions such as section 6 of this Act, then one looks at the terms of the licence to be there as a whole rather than as two compartments.

MR MERKEL: Yes, we are in heated agreement with your Honour. The *Forest Management Act* definitions are picked up in this Act and this Act goes out of its way to capture forest management land, which is the point we are shortly coming to, which is an immunisation of what we say, effectively, is an executive arm of government from scrutiny, which is a separate point.

EDELMAN J: But then what is given is not a licence to be there and then taking something away, it is a licence to be there on the particular premises in particular circumstances, subject to various conditions.

MR MERKEL: That begs the question, with respect, your Honour, as to whether what this Act takes away is something that you were entitled to before. If you did not enjoy an entitlement to the freedom of access, this Act may not take away that freedom, but in respect of section 13 of the *Forest Management Act* that is something to which the public have access, subject to this Act. So this Act takes away a freedom which they otherwise had under the *Forest Management Act*. A different question might arise if powers were exercised under the *Forest Management Act*, but that is not what happened here.

GORDON J: But you do not need to have the powers exercised under it. The point is that section 13(5) provides a licence for access so long as your activities are not incompatible with the purposes. The point Justice Edelman is putting to you is that the licence is given on condition. The question for you is freedom from what? What is the freedom that has been taken away?

MR MERKEL: Your Honour, we are jumping ahead to forestry land.

GORDON J: I do not think we are jumping ahead. The question is whether or not you should start there.

MR MERKEL: Your Honour, section 13 of the *Forest Management Act*, which I was about to come to – can I possibly do this in context – says:

> The Forest Manager must perform its functions and exercise its powers so as to allow access to permanent timber production zone land -

which is what we are concerned with:

> for such purposes as are not incompatible with the management of permanent timber production zone land under this Act.

So that is the access that is given to the public and there are facts in the special case that deal with it. This Act with which we are concerned starts with access of the public, and it is traditionally an area to which the public have had access, and says you cannot have access. You can be removed under the Workplace Act if you are engaging in a protest activity.

GORDON J: I think the question, though, given the interaction between these two pieces of legislation, is the access that is given is not access at large. It is access to that land, but what is said for the purposes that are set out in section 13(1) of the *Forest Management Act*.

MR MERKEL: That is correct. This Act

GORDON J: So the question then arises: freedom from what?

MR MERKEL: Your Honour, the way this statutory scheme works – and I need to take you to the whole of the scheme – until ordered to be removed, one could not say you are a trespasser. Can I take your Honours to this Act in its context. Before just leaving the Workplace Act, what I wanted to conclude is that the three issues of construction that we have articulated and set out in our outline, we say, make it clear on this last point that the Act is directed to protests against activities, and that is a view based restriction on freedom of communication, which I will have to deal with in the context of the questions your Honours have raised with me.

Can I go now to forestry land, which is dealt with in propositions 5 to 9 of our outline. This is the *Forest Management Act*. I can be fairly brief about the Act. Can I just ask your Honours to note that the definition in the Act – and this captures your Honour Justice Edelman's point – the two Acts are intended to be closely linked because the definitions are linked. "Forest operations" in the *Forest Management Act* matches the definition of "forest operations" in the Workplace Act. "Forest product" – this is in the definition section, section 3 – is given a wide definition. The permanent timber production zone land, which is the area with which we are concerned, is:

Crown land declared to be permanent timber production zone land under section 10 –

Section 6 has the Forestry Corporation as a statutory corporation. Section 7 makes it the manager for permanent timber production zone land. I will not trouble you; it sets out the functions in section 8, which is to manage and control the land and undertake forest operations. It has the powers in section 9. Section 10 involves a reservation of Crown land which becomes permanent timber production zone land.

We have section 13 which your Honour Justice Gordon just raised with me, which requires a mandatory obligation to allow access for such purposes as are not incompatible and the evidence is that access is enjoyed. But I do stress that 13 is in terms of a mandatory obligation. But normally the public would have access to Crown land and would enjoy being able to be on it without being a trespasser.

GORDON J: But would they have the same right in relation to permanent timber production zone land subject to a declaration under section 10?

MR MERKEL: We say yes, your Honour, subject to what this Act provides which is for its own enforcement regimes. So this Act read as a whole gives the power, if you want, to not have a person's right to be on the land in some vacuum depending upon whether the mandatory obligation in 13(1) is fulfilled but it is clearly dependent upon the scheme of the Act which requires a direction to leave. After such a direction you might be called trespassing but prior to such a direction we say that under this scheme you could not properly be classified as a trespasser.

That comes up under – 15 and 16 deal with the wood production policy and 16 is critical – that is the obligation of the manager to make available wood for industry. Then we get to, lastly, 36 – I will come to 21 to 23, but 36 is significant because what we say is that this classically – and this is an important part of our case – is an executive arm of government. Under 36:

(a) the administration of this Act is assigned to the Minister for Energy and Resources; and

(b) the department responsible to that Minister in relation to the administration of this Act is the Department of Infrastructure, Energy and Resources.

I should say orders have been made changing that under the *Administrative Arrangements Act* that at all times this Act has been administered by a minister and the department responsible has been nominated under that Arrangements Act. Going now to sections 21 to 23 we say these are the sections that really cover the matters raised by your Honour Justice Gordon with me:

The Forest Manager may erect signs –

. . .

for the purposes of discharging its responsibilities or in the interests of safety.

It can state a road is a forest road and then:

A person must not, without lawful excuse, undertake an activity or engage in conduct on a forest road . . . contrary to the directions of the Forest Manager –

A fine of:

20 penalty units.

Then, under subsection (5), there can be a direction to leave:

A person who is given a direction by a police officer under subsection (5) must comply –

Fine 20 penalty units and they:

may arrest, without warrant –

Then you have the position in respect of similar – for leaving permanent timber production zone land. An authorised officer, under 22(3) may request a person "not to enter" or "to leave" or "to cease to undertake an activity" if it:

is preventing, has prevented or is about to prevent the Forest Manager from effectively or efficiently performing its functions.

Then there is specific prohibition in (4). There is again an offence and a fine. Then again in (6) not undertaking an activity:

contrary to the directions of a police officer –

and there is "Closure of forest roads" in 23 saying, in subsection (2):

(a) for the purpose of discharging its responsibilities; or

(b) in the interests of safety -

and so forth. Now, of course, this case is not challenging those provisions and the freedom to access Crown land in a timber production zone is subject to the exercise of these statutory provisions. But one of the problems with the case put against us is if these powers are exercised to prevent a political communication against forestry operations and that is the basis of the discretion that would be an unlawful and invalid exercise of discretion. An example would be *Wotton's Case*.

So there are a lot of questions that need to be answered before one gets to a statement that these are not areas to which the public had access. They had access subject to the exercise of powers which have not occurred in the present case and the exercise of those powers lawfully and they are big stepping stones and if a case comes up where that arises it no doubt will have to be tested, but that is not this case because this Act is not directed to the freedom of political communication and if powers were exercised to prevent the freedom being exercised that is not a proper purpose under this Act. So we say that they are dealing with discrete subject matters.

NETTLE J: Mr Merkel, just before you go to the Act, if instead of passing this *Workplace (Protection from Protesters) Act* the Parliament had amended section 13 of the *Forest Management Act* by putting in there provisions akin to section 6 of the antiprotest Act but confined to the production zone land, would it then be a contravention of the implied freedom of political communication?

MR MERKEL: We would have to look at the way it was done, that if it was targeting political communication the answer is yes, your Honour, because political communication – we will develop this at some length – is not connected as such with these activities. There is a disconnect between an object of preventing political communication and an object of preventing harm or enabling lawful business activities to be conducted.

NETTLE J: Was that to say that the Parliament or the government can grant a licence under 13 on some conditions but not on others, particularly if those others are directed against political communication?

MR MERKEL: Yes, we say that is what the

NETTLE J: That is the nub of it?

MR MERKEL: That is the nub of it, your Honour.

NETTLE J: So your answer would be that they could not have lawfully put into section 13 provisions like section 6 of the antiprotest Act?

MR MERKEL: Correct, your Honour. They would suffer from the same vice

NETTLE J: Even if they were confined to the timber production area?

EDELMAN J: You have to go even further than that, do you not? You have to say that it is not even that Parliament cannot put conditions on 13; it is that Parliament cannot put any conditions on a common law licence, because on one view section 13 is not even giving the licence at all. Section 13 is constraining the forest manager to what the forest manager can do but it is not being directed to what members of the public can do.

MR MERKEL: Your Honour, with respect, that seems to be accurate to me, but when you say "a common law licence" of course the common law has to give way to the implied freedom, not vice versa. So the common law licence could not be taken away for the purpose of preventing political communication.

EDELMAN J: That was one of the questions I asked you earlier, whether that is always the case. Does the common law always have to give way to the implied freedom? In other words, does the implied freedom even apply in, for example, a case of assault?

MR MERKEL: We would say that really does not arise, your Honour, because we are not talking about implied freedom operating in any area where a protester wishes to engage in any activity. We are talking about exercising a limitation on a freedom previously enjoyed. You never had a freedom to assault, so you cannot say "I can now assault you because I do not like your political opinion".

EDELMAN J: But at Federation you did not have a freedom to enter the premises or the land of another without a licence.

MR MERKEL: Well, we are in a different situation with Crown land, your Honour.

NETTLE J: Would there be any right to go upon the land other than section 13(1)?

MR MERKEL: I would, with respect, adopt what Justice Edelman said. It is a restriction rather than a grant. It is a restriction that assumes access can be enjoyed.

NETTLE J: You say there is a right to go upon that land?

MR MERKEL: I do not want to talk of it in terms of a right, your Honour. You would not be a trespasser on this land unless

NETTLE J: By reason of 13(1) or by reason of the general law?

MR MERKEL: By reason of it being Crown land, to which the public has access, save when a statute withdraws that right of access because it is not private land and you have to have a fence or you have to have some restriction which the government can impose or has imposed before people cease to have access – enjoy access. We do not need to talk of a right; it is more do you become a trespasser when you enter into a production timber

NETTLE J: You do not have to talk of rights. If you are talking about a right of freedom of political communication that overrides rights then it is a relevant consideration. I mean, you accept that you cannot override private rights of property.

MR MERKEL: No, you do not have private rights of property, but you enjoy access to the land and you are not a trespasser on it.

NETTLE J: You say by reason of the general law that there is a right to go upon this Crown land unless it be taken away by statute?

MR MERKEL: I would rather express it differently, to say that the public can enjoy access to this land unless a lawful act occurs which makes them a trespasser, which could be the regime under 20 to 23. It may be that there is an area of land where the government might have explosives and a fence and say no public can enter this land and that may be a lawful exclusion. But subject to any act which terminates that licence or that access, here the public can enjoy access without being a trespasser, which is all we need to say. We do not need to elevate it to anything more than that because if that enjoyment is removed by the Workplace Act, that is sufficient to attract the *Lange* questions.

EDELMAN J: The converse to that is that the Crown has the right to exclude people from land. So you have to say that the Crown's right to exclude people from land is burdened by the freedom?

MR MERKEL: It is burdened by the freedom, but the Crown's right is set out in this statute in respect of the relevant land and we say within the terms of this statute you only become a trespasser when the exercise of power occurs under

EDELMAN J: The Crown's right exists independently of the statute. The Crown has a right to exclude people from Crown land quite independently of these two statutes.

MR MERKEL: Your Honour, that, as a general statement, as the owner of land obviously the Crown has certain entitlements to declare areas to be areas people cannot trespass upon and therefore there is a revocation of any implied licence. But a step must be taken to withdraw the enjoyment of access before you could be called a trespasser, whether it is a sign, a fence – an exercise of statutory power. If that step were taken by government, an exercise of the common law entitlement or a statutory power, it has to accommodate the freedom of political communication because that is precisely what *Lange* was about, a defence to a common law

EDELMAN J: *Lange* was about a privilege which already was concerned with freedom of speech and it was aligning a freedom of speech privilege with a similar constitutional implication. It is no surprise that the United Kingdom did the same thing in *Reynolds* without a written Constitution .

MR MERKEL: Your Honour, the rationale underlying *Lange*, we would say, with respect, must be that the common law of defamation had to accommodate the requirements of the freedom of political communication, thus, the additional defence whether by a limitation of Parliament power on statute or a change of the common law to accommodate the *Lange* defence and that meant that the common law of defamation was accommodating the implied freedom because

EDELMAN J: It depends whether you speak in terms of accommodating or the common law being developed consistently with.

MR MERKEL: We say both things but it is an imperative either way, your Honour. It is not a discretion. That is how we put it but

NETTLE J: Can I just finish on 13? You say there is a freedom to go upon the Crown land, correct - which may be taken away by statute but if it be taken away by statute, that statute must comply with the implied freedom of political communication?

MR MERKEL: Or must not involve something inconsistent with the implied freedom of political communication, whether it be a statutory provision or exercise of a statutory discretion, but I also say, your Honour, that I do not say that a licence cannot be revoked but it would be subject to the same restriction.

GAGELER J: You do not need to go so far, do you, Mr Merkel? Your point is that the forest manager is not in the position of an owner of this land, the forest manager is a statutory officer exercising statutory functions and the grant of those statutory functions is subject to the constitutional limitation?

MR MERKEL: Yes, your Honour.

GORDON J: Can I ask about that question? Is your answer to Justice Gageler's question complete, having regard to the way in which the *Government Business Enterprises Act* works and the role that Forestry Tasmania has as the forest manager? As I read that Act it is treated as being a separate business entity with its own corporate arrangements. The land, as I understand it is, in effect, given to the control of that corporate body. I just want to make sure that I understand that the answer you just gave to Justice Gageler takes into account those provisions and the way in which they work.

MR MERKEL: Your Honour, it does and I will come to that Act in a moment but its function is a management, not an ownership function.

GORDON J: All right. That is the question. It is two questions. It is a function question and it is the relationship between that entity as a separate business entity or a separate corporate entity with the forestry land.

MR MERKEL: Your Honour, I will come to that Act but we say it does not change the framework. As Crown land which is subject to the provisions of the *Forest Management Act* and the exercise of power by the corporation as a manager, not as an owner, the Government Enterprises Act merely makes it clear, we say, that this is a function, it would appear, as part of the Crown when it is exercising its management functions but its functions are limited, we would say, to those set out in this Act.

I think I was going to go next and finally under the statutory scheme to the Government Enterprises Act. I should say the main and limited purpose I was going to that Act was to support the argument that the Forestry Corporation in this context can safely be regarded as part of the Crown which has its own consequences.

Can I just go to the definition. A "government business enterprise" means a statutory authority specified in Schedule 1, which is at the back of the Act. I do not need to take you there. There are seven corporations, one of which is the Forestry Corporation.

Can I go to section 7. That talks about it being a legal entity. At section 7(1)(b) it talks about performing "community service obligations" on behalf of the State. They are set out in Part 9, which is section 59 onwards. It sets out the powers in section 9, which do not take the matter any further, relevantly, for present purposes than the Management Act.

Section 13 says, "Duty to notify Treasurer and Portfolio Minister of adverse developments". I only mention that because in *Lange* there is a reference to government – institutions or authorities being part of the Executive – and their Honours refer in a different context. But an obligation to report would be one of the indicia of being part of the Executive. That is why I take you to section 13(1). Section 13(6) provides a ministerial charter – again, this is another link to supervision by ministers as part of the exercise of their powers. Then, interestingly enough, at sections

BELL J: I am sorry - 13(6), did you say, in the *Government Business Enterprises Act* 1995?

MR MERKEL: Sorry, section 13(1), your Honour, was the duty to notify the portfolio Minister of adverse developments, and the charter is in section 36. I am sorry. Did I say it wrongly, your Honour?

GORDON J: You said 13(6). We read it as 13(6).

MR MERKEL: I am sorry, your Honour. Section 36 is the ministerial charter and the contents are in section 37. Sections 108 to 110 contain provisions for government enterprises that are not the Crown, and they do not include the Forestry Corporation. They are in Schedule 8, which just refers to the HydroElectric Corporation.

KEANE J: What is the relationship between the government enterprise, the Forestry Corporation, and the various premises that we are concerned with?

MR MERKEL: It manages forestry land under the *Forest Management Act* and has the powers conferred under that Act and this Act.

KEANE J: Including possession, and the right to possession?

MR MERKEL: Your Honour, in terms of a right to possession, it would have a right to such possession as it needs to discharge its functions. It would not have a right to possession, for example, of creeks, rivers and river beds where there are no forestry operations. It manages the land, but a manager would only have the rights and powers in the Act.

KEANE J: But in order to carry out those functions it must necessarily, must it not, have a right to possession?

MR MERKEL: As a manager, it would have an entitlement to enjoy rights of occupation for the discharge of its functions, but not necessarily exclusive. That is a different question, your Honour. This Act is not concerned with that because it is – if it were exclusive possession you would never have to have sections 21 to 23.

KEANE J: Except that if it is shared possession, it is hardly effective as a manager, surely. Anyone else can wander in and start providing assistance.

MR MERKEL: We are talking of a government corporation in respect of vast areas of Tasmania which are Crown land, which then get declared to be a permanent timber production zone in accordance with that Act, which attracts its own set of responsibilities and functions. We say one would not look outside the Act to find what it can and cannot do. It is all contained in the Act and exclusive possession is not something that the Act seeks to confer, nor is it necessary.

KEANE J: So it could not maintain an action for trespass against – I am not talking about your client; I am just talking about anybody. It could not maintain an action for trespass.

MR MERKEL: No, unless it exercised a power it has to say a person's licence to be in a particular area has been terminated or you have this notice regime.

KEANE J: Or one reads section 13 as contemplating that it will grant licences in conformity with it.

MR MERKEL: We would approach section 13 from the other end, your Honour. We would say under section 13 it is a limitation on power. It assumes people have an access and

KEANE J: No, does it not in terms oblige it to give it?

GORDON J: Does it not assume that there is no access and it is saying that you must give them access? Is it not working the other way, Mr Merkel? Otherwise it is not necessary, on your argument.

MR MERKEL: Your Honour, it concerns itself not with access in general; it says it must perform its functions and exercise its powers so as to allow access. It is a limitation on its functions and powers which we would say they cannot be exercised in a way that would prevent access. But we say there is no exclusive possession provision in this scheme that would start with it having an entitlement to grant and refuse access at will subject to section 13.

GAGELER J: Well, when it refers to functions and powers in section 13 it is referring to the functions set out in section 8 and the powers set out in section 9, I think, and the relevant function is to manage and control, and it is that function of managing and control any pertinent powers necessary to perform that function that is then subject to the mandatory requirement in section 13.

MR MERKEL: Yes, your Honour.

GAGELER J: I am not sure it has anything to do with licences.

MR MERKEL: With respect, we say that the question of trespass arises under sections 20 to 23 and that is not so much trespass as it is an offence to be on the land in breach of the direction.

NETTLE J: Section 14 talks about a right of access as if 13 were a provision intended to create one.

MR MERKEL: Which section, your Honour?

NETTLE J: Section 14.

MR MERKEL: Your Honour, that would appear to be a power to charge a fee in certain circumstances, but we would say it is just again another expression of a power it might have or a right of access.

NETTLE J: You are undoubtedly right if you are correct that there is a freedom to go upon the Crown's land. If that is correct then what everyone else has said here does not matter much

MR MERKEL: Except it is subject to an exercise of power by the manager as manager managing the land to charge a fee if the power is exercised inconsistently with its functions and the policy of the Act.

NETTLE J: No, I follow that. I am a little unsure is whenst arrives the freedom to go upon the Crown's land?

GORDON J: Then to add a gloss – Crown land which has been declared under section 10 to be permanent timber production zone land.

MR MERKEL: I suppose we are going – it is circular for us, your Honour, but we do say that because this is a management function, not an ownership function, it is part of the scheme of this Act that people have an enjoyment of access subject to exercise of powers under this Act that would restrict it.

NETTLE J: Is it this Act or something else which gives one the freedom to go on the Crown's land?

MR MERKEL: Can I come back to that, your Honour, because it is Crown land then it becomes relevantly, for us, permanent timber production zone land which brings us into this statutory scheme but can I come back to your Honour with that?

NETTLE J: Yes, thank you.

MR MERKEL: Just going back to our outline, we reached the point where we get to the conclusion based on that statutory scheme which we set out in paragraph 9 that the Forestry Corporation is part of the executive arm of government and the effect of the Workplace Act is to effectively immunise it from – or significantly immunise it from scrutiny, criticism and political protest. We have set out paragraphs in

the special case which I will not take you to but can I just take you briefly to those attachments which we refer to?

Attachment B gives your Honours an indication of a plan which operated at Lapoinya Forest but, once this plan comes into operation under the *Forest Practices Act*, one can see, at page 77, boundaries for harvesting are set out and for other matters. If one goes to pages 81 through to 83, which talk about conservation values, so that activities on the land are intricately bound up with protection of the environment and the requirements that it be protected. We say that the effect of stopping protest activities is an immunisation of scrutiny in respect of these kinds of areas.

You have a map which takes us back to where we are operating in, at page 88, the Lapoinya Forest, which shows that this is not a simple question of looking at a boundary with a fence. We have areas coloured in. The red line is the boundary of the forest management production zone. The blue are the watercourses and the greens are areas where there are constraints for precious habitat, and white is called private land – that would be the Crown land which is subject to the Act and is the area where timber would be harvested. So it is not a simple matter in respect of land of this kind, treating it as if it were private land and then when we go to

GAGELER J: Are you saying that private land is actually Crown land?

MR MERKEL: My understanding – again, my learned friend the Solicitor might correct me on this – is that the white land is Crown land that has been declared a permanent timber production zone within the boundary of the Lapoinya forestry, but I may be wrong on that.

GAGELER J: Why are we looking at the map?

MR MERKEL: That is my understanding, your Honour.

BELL J: The map suggests it is private land.

MR MERKEL: That is just the map, your Honour. It is Crown land which is a permanent timber production zone.

GAGELER J: Mr Merkel, sorry, what are we getting out of the map?

MR MERKEL: All we are saying, your Honour, is that this is the area of land in respect of which the Workplace Act is to operate to identify business premises and business access areas.

GAGELER J: I see.

MR MERKEL: It shows how complex, uncertain and arbitrary it might be to treat forestry land as if it were business premises, which is what has occurred in the present case. Can I go to Attachment I which is the map of Tasmania which shows the areas with which we are concerned? I think it is some 800,000 hectares of land. But all the green areas in the map are I.

BELL J: What page is that?

MR MERKEL: Sorry, page 110, your Honours. So the green is the areas that become permanent timber production zone land. We have set out in paragraphs 5 to 9 the paragraphs of the special case which give the history of environmental protest in Tasmania and, importantly, the consequences of that protest. Can I just give your Honours the example? In Attachment H which is page 106, the way the special case has put this attachment which is at paragraph 60, at page 64:

> Protests have historically been a means of bringing about political and legislative change on environmental issues. Onsite protests have also been a catalyst for granting protection to the environment in a particular place. Onsite protests have contributed to governments, in Tasmania and throughout Australia, granting legislative or regulatory environmental protection to areas not previously protected. A table of protests in Tasmania and elsewhere, together with the current status of the land on which the protest took place, is set out in **Attachment H**.

Attachment H, your Honour, which is largely in Tasmania unless it is set out elsewhere, shows how many of the protests have resulted in protection and World Heritage listing. So, that is three pages of outcomes from environmental protests which are onsite protests that have been a catalyst for change. We say that takes us very close to the heart of the communication that the freedom is seeking to protect.

BELL J: But the freedom seeks to protect communication whether it is effective or not. What is the point of taking us to Attachment H?

MR MERKEL: What your Honour says is undoubtedly correct, but one aspect of this case we pick up is the observations in AidWatch about agitation for change lying central and at the heart of what political freedom is about. This is agitation for change, not in a vacuum, but in a real world context where it is actually achieved. So when you are looking at the burden and the nature and extent of the burden, it is a burden on agitation for change which has, in the past, shown a very significant public benefit and a likelihood of successful outcome. But we just do not put it any more highly than that, your Honours.

> In the special case, which sets out the history of protest and its role and its benefits, which we have dealt with in detail in our outlines – and I will not take your Honours back to it – we have set out passages under paragraph 9. But can I just – again, without taking your Honours to the cases – ask your Honours to note in *Nationwide News* Justices Deane and Toohey, at pages 71 to 72, observed that control of some or all of the communications relating to government or government institutions is more difficult to justify. Chief Justice French, at paragraph 43, page 31, in *AttorneyGeneral (SA) v Corporation of the City of Adelaide* – that is, *Corneloup's Case* – referred to the common law freedom of speech is:
>
> never more powerful than when it involves the discussion and criticism of public authorities and institutions, be they legislative, executive or judicial.

That is the territory that we are in in respect of forestry land. Can I now go to applying the two *Lange* questions to the agreed facts. Can I just make two observations which we say should not be controversial, but in a case which is dealing with political communication and political association as the burden, which is direct and substantial, we say that in both questions this Court has more recently treated the second question, but we say equally the first, when it refers to political communication or the system of representative and responsible government, having the words added "of which the freedom of political communication is an indispensable incident".

> Can I just give your Honours the passage where that has come up. It first arose – again, I will not take your Honours to the passages but I will just explain how we use them. In *Wotton's Case* at paragraph 25 there was a reference back to *Aid/Watch* at paragraph 20 and say that the representative and responsible government arises in the context of the freedom discussed in *Aid/Watch*, which is very much about agitation for change of political communication.

Then in *AttorneyGeneral v City of Adelaide*, Justice Hayne at paragraphs 137 to 221 – and also in *Monis* – when his Honour referred to the second question, added the words "of which the freedom of political communication is an indispensable incident". I will give your Honours the paragraphs in *Monis* which pick that same theme up: Chief Justice French, at paragraph 73, Justice Hayne at paragraph 97 and your Honours Justice Crennan, Kiefel and Bell at paragraphs 278 and 281.

We say it is helpful to see both questions in that context because of how that freedom directly arises, directly here, rather at the more abstract level of representative government and also because of the provisions I have taken you to in section 11(7) and (8) about group protest.

We say that this raises the observations made by your Honour Justice Gageler in *Tajjour* at 142 to 143 about the freedom of association being part and parcel of the freedom of political communication, whether it be called a corollary of it, as was said in *Wainohu*, we say it is central, and also in *Unions New South Wales* at paragraph 29 at page 551, there is a reference to Archibald Cox's writings referred to in *ACTV* of the power of people to participate. There can be no more effective participation and significant participation than people in association. So they are directly raised by the *Workplace Act.*

Can I go now to the first *Lange* question. I hope I have already made it clear that we are focusing on the operation of the key provisions. So we put safety and damage to property to one side because that is not the focus which we wish to pay attention to. When we ask ourselves does the Act impair the freedoms previously enjoyed by citizens in respect of political communication and association to put their views in the way they believe would have the greatest impact it is not contentious in the present case that there is such a burden and the first question is answered yes.

We stress they are views in the way protesters believe would have had the greatest impact, bearing in mind what your Honour Justice Nettle said in *McCloy* at paragraph 240 at pages 263 to 264. There is an added point we would like to make before identifying the burden precisely, but in *Levy*, Chief Justice Brennan – again, I do not need to read the passage – at 595, point 2 to 595, point 6, referred to a law which denied the opportunity to engage in political protest was to be televised:

would be as offensive to the constitutionally applied freedom as a law which banned political speechmaking on that issue.

What your Honours are now dealing with is no longer an *ACTV* world where political communication was broadcast in a significant way and to a significant extent through broadcasting on licensed broadcasting stations. We are dealing now in a world where, for example, the Bob Brown Foundation has its own access to YouTube, Facebook and social media which enable onsite protest activities to be recorded by the protesters and in that way, through their domain, sent out to the public.

So it is an expanded sense when his Honour talked of broadcasting to prevent or impede the ability to protest and photograph and film what you are doing and putting it out there into the social media as part of your communication.

KIEFEL CJ: The world today has drones too.

MR MERKEL: It does have drones too, your Honour.

KIEFEL CJ: It might render it less necessary to actually be there.

MR MERKEL: We may be entering that world but thus far we have not got there yet, your Honour. That will be for another day, but today it is a YouTube and Facebook and Instagram world; tomorrow we will have to worry about what is going to happen. We say that what his Honour said about the nature of the burden is particularly apt here and that the facts in the special case make it very clear about the significance of onsite protest and how it operates.

Now, we say in answer to the first question, the provisions that we have outlined in their terms, operation and effect impose a prohibition upon and, therefore, a prevention of onsite political protest opportunities that were previously enjoyed by those wishing to engage in onsite protest individually or in association with others, which is what we set out in proposition 10, and that is not contentious.

But that is the nature of the burden. We say it is not to be defined, with respect, in terms of legal rights or legal analysis. The cases have referred to this in terms of opportunities previously enjoyed. So it is a real world like we are living in; we are not in a private home with a trespasser.

In *Levy* Justice Brennan said that it is the location which counts rather than the physical right to be there or not to be there. We say when those passages of Justice McHugh were

cited in *Mulholland* it was a very, very different topic that was being addressed. It was a statute that created a right to registration and therefore was not, by limiting that right, taking away something otherwise enjoyed. Two of their Honours disagreed but to transport that principle to the common law, with all the questions that we have already discussed this morning, is a big step.

We say that it is a step that this Court should take very hesitantly because it somehow allows into what is a constitutionally protected freedom it to be diminished in ways the common law has yet to deal with. So we say the first *Lange* question is to be answered yes and we do not perceive any dispute by that which takes us to the second *Lange* question and this question of compatibility testing.

We do have a bit to say about the purpose. We set out the nature of the burden in paragraph 12 - and I will not repeat it - in its various aspects and I will deal with the common law later when I come to the extent of the burden, adding to what I have already said, but the purpose of the Act - and we say this is the critical question in paragraph 14 of our outline.

Tasmania puts six purposes which are set out in the appeal book at page 144 in paragraph 44 of their amended defence and one of the problems with that approach, and we do not criticise them for it because we challenge the Act as a whole and on reflection it is clear that one needs to focus on an overriding purpose, is that they really are referring to specific provisions rather than the operation of the primary provisions of the Act as a whole. Identifying so many purposes gives rise to the paradox that if some purposes are legitimate and others not because of compatibility testing that really requires severance from the Act of the illegitimate purposes of the provisions that give rise to the illegitimate purposes and leaving in the Act the provisions that give rise to the legitimate purpose.

We say that is not really what is in issue in this case. It might arise in another context but what we try and capture in paragraph 14 is the overarching purpose which is a fair definition of the operation of the provisions which we essentially seek to impugn in paragraph 1 of our outline and we say critically that the key provisions can be identified as the prevention of onsite political protests onsite meaning as we put it that could or would prevent, hinder or obstruct business activities at or near the site.

We then talk of the means employed are the enforcement and police direction regimes provided for in the Act, though when we come to *McCloy* - and can I take your Honours to *McCloy* (2015) 257 CLR 178 - the way in which the question was framed in the joint judgment at paragraph 2 at page 194, this is 2B, we say is the purpose of the law – by that we mean the key provisions – and the means adopted to achieve that purpose compatible with the system of representative government, and we would add of which freedom of communication is an

indispensible element. We say that arises in this context. Then in the joint judgment, your Honours say at paragraph 31, expressing it slightly differently, the purpose is not to:

impede the functioning of that system and all that it entails. So too must the means –

and can we just remind your Honours, Justice Hayne in *Monis* at paragraph 184 when his Honour said ascertaining purpose of principle of construction contrasted that with a political purpose of the Act such as that set out in the second reading speech where his Honour referring to a discussion in a different context of Justice Dixon talked of "external motive or purpose" being a political purpose of course with which we are not concerned here.

So we have tried to encapsulate that purpose in paragraph 14 and we say the provisions we have taken you to and the extraordinary police powers and the manner in which they operate we say make it undeniable that this can be seen as an Act which has that purpose of prevention of the political protests by the enforcement and police directions regime which are the means for it.

We say that in directly targeting – sorry, in giving effect to that purpose the legislature has entered the realm of incompatibility in a number of respects. The first we would rely upon is the discriminatory effect, and while your Honours still have *McCloy*, at paragraphs 43 and 45, the analysis of *ACTV* more recently in this Court has been based upon the discriminatory effect and its incompatibility. This is in the section dealing with incompatibility at 43, your Honours in the joint judgment say in about the last six lines down at the bottom of the page:

The legislation struck down in that case did not give equality of access to television and radio to all candidates and parties. The constitutional vice identified by Mason CJ was that the regulatory regime severely restricted freedom of speech by favouring the established political parties and their candidates. It also excluded from the electoral process action groups who wished to present their views to the community without putting forward candidates.

Then at paragraph 45:

Equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution* . In *ACTV*, the law which was struck down was inimical to equal participation by all the people in the political process and

this was fatal to its validity. The risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action –

and so forth. So at the heart of this concept, this discrimination, are what we have set out in paragraphs 2 and 3. By the law operating with respect to the content of communications, namely only applying to political communication, has discriminated against those communications and left the area of protest for nonpolitical communications unburdened by this Act.

I have given your Honours an important area where it would apply such as the protest in respect of industrial issues, some of them may become political but onsite protests have the potential to be discrete from what may fall within the definition of political issues, but there may also be a whole range of issues where activities, protest activities would hinder and prevent conduct of business activities that have been left outside this Act.

So that shows, by the contentbased description being political there is that discriminatory effect, but also in paragraph 3 of our outline we have looked at the problem of viewpoint discrimination because it is essentially in its proper operation and an integral part of its purpose to prevent protest against business activities.

If there were any doubt about that purpose, the last paragraph of the second reading speech makes it abundantly clear that that is the message being sent to the people of Tasmania. Business activities in wealthcreating organisations are not to be interfered with by protesters who are protesting against those activities.

So we say that they are the first two grounds on which we say incompatibility necessarily arises. We notice what your Honour says and can I take your Honours to it. Justice Nettle, at paragraph 236, talked about - again referring to Justice Mason in *ACTV* - this is at page 262:

whether a restriction . . . which discriminates against a particular group or groups is justified calls for a balancing of the public interest in free communication against the competing public interest which the restriction is designed to serve. If the restriction imposes a burden on free communication which outweighs the competing public interest, it is indicative that the purpose and effect of the restriction is to impair the implied freedom -

I should say – and I will give your Honours the reference – Justice Gaudron, in *Cunliffe* at 368 and *Levy* at 388 to 389, expressed similar observations where, if the burden on the freedom was demonstrably disproportionate then that may show that the true purpose is something other than the socalled proclaimed purpose.

> We say that takes us through to paragraph 15, which is the third ground of objection to purpose, which is that there is a disconnect of the kind in *Unions NSW* between preventing political communication and preventing the proscribed disruption to business activity. There is simply no logical connection between political communication and that disruption.

> So, we say that there are two ways but it may fall over at the first step of the second stage of this question. But we say it must be relevant to purpose to show that the discrimination against political communication shows that, in truth, the object is, as we have set out in paragraph 14, to prevent that communication.

KIEFEL CJ: The approach in *Unions NSW* to there being no rational connection only works, though, if you are addressing the purpose of the Act in the terms in which Tasmania contends, that is, if the purpose is said to be to protect businesses then you say there is no rational connection with something which is addressed to preventing freedom of speech. I do not think you proceed from your premise that the purpose is actually to prevent freedom of speech because once you invert it you do not have the same argument as was available in *Unions*.

MR MERKEL: Your Honour, we have put that at paragraph 17. I think we have put it at paragraph 17 which takes that – we only get to paragraph 17 if we get the purpose of Tasmania that is to prevent disruption to business.

KIEFEL CJ: I just thought you were relying upon "no rational connection" test at this point.

MR MERKEL: Sorry, I am now putting it that – I am putting - at this point in paragraphs 14 to 16 we are putting it on the compatibility testing before we get to the rational connection. So we say

KIEFEL CJ: I misunderstood you.

MR MERKEL: I am sorry, I probably have not been clear. It does arise on incompatible purpose because if there is a lack of rational connection, it shows the true purpose. For example, if the true

purpose in *Unions NSW* – on the lack of rational connection – was to stop unions from contributing to a political party, one would not get to the second stage of the questions because you would fail, or the legislation would fail on incompatibility.

> These submissions are being put on the basis of the way in which it is put at paragraph 14. We get to proportionality testing. If, contrary to our submission, the purpose, as Tasmania puts it, which is that it is designed to disrupt - prescribing conduct designed to disrupt business activities rather than to prevent political communication. I should have made that clear. So we only get to proportionality testing as in *McCloy* if Tasmania's purpose rather than ours is accepted. But we still say it fails under the proportionality testing limb set out in *McCloy*. In that context, and I am sorry if I have not been clear about it

GAGELER J: I am sorry. I am really not quite following this. If you take the purpose of the Act as identified in the first sentence of your paragraph 14, are you saying that that purpose itself is incompatible with the constitutional system of government?

MR MERKEL: Yes, your Honour. We rely on the discriminatory provisions I have talked about. We rely upon targeting

GAGELER J: That is the means by which the purpose is pursued.

MR MERKEL: Yes.

GAGELER J: I understand that. But that purpose – it is a big ask.

MR MERKEL: Your Honour, on this compatibility testing we are talking about the object and the means employed. That is clearly what is embraced in the joint judgment in *McCloy*. We say there is no rational basis to separate that because the means and the object for the purposes of compatibility are critical. If the object is prevention of political communication we say that is not a legitimate purpose.

GAGELER J: But you do not identify the object that way. If you identified the object as a prevention of onsite political protests, then I would fully understand your argument on incompatibility, but you identify it much more narrowly.

MR MERKEL: Your Honour, of course, that gives rise to the – we say that at the higher level it is, but we do recognise that there is a qualification because the onsite political protest must have that second quality. But we do say that

GAGELER J: I would understand your argument if it were to the effect that the disconnect between the two elements that you identify in the first sentence of paragraph 14 really demonstrates that the object is not truly to protect the business activities but really to control political protest.

MR MERKEL: Yes.

GAGELER J: But you do not seem to be putting it that way.

MR MERKEL: Your Honour, I should say we would put it in both ways as an alternative. We say that truly understood the object is prevention of onsite political protests, full stop, and that is the only explanation for the fourday power, the extraordinary powers given to police to direct people to leave and prevent a protest. We say properly understood that is what this Act is designed to do and that is its objects and the means to achieve that object are incompatible.

> Alternatively, we would say, if it had added to it the prevention of business activities we say there is still a disconnect between political communication and disruption to business activities which we say should be fatal to the purpose test because it shows that the true purpose is preventing onsite protests. So we put them as two alternatives.

GORDON J: Is that what paragraph 15 is directed to?

MR MERKEL: Yes, your Honour.

GORDON J: The second argument.

MR MERKEL: The disconnect argument, yes, your Honour.

BELL J: What if there was a history of onsite political protests preventing, hindering or obstructing business activity?

MR MERKEL: Yes, your Honour, we would then get into the ICAC territory in *McCloy* but there is no such history in this case. That is why I said to your Honours that this came about as an election commitment, nothing wrong in that of course, but this was not designed to deal with any identifiable mischief. Your Honours can go through the whole of the special case book and find just a few paragraphs which talk of a newspaper report, a prosecution, a conviction, over 35 years, all related to forestry. Nothing anywhere else and we say when you come to identify what mischief this was designed to address, one is bereft of any answers.

> We say that is quite a telling point because that feeds into the submissions we put at paragraphs 14 to 16, that the true object is to prevent political protest and that disconnect makes the point because, if your Honour's example put to me that there is an anarchist society that went around burning down trees before they were being logged and so forth, of course you would have a *McCloy*type situation where there is a real mischief which of course the government were entitled to address and if political communication were the anarchists' activities of engaging in unlawful conduct, it would be no different to the example Justice Edelman put to me, you cannot engage in and assault someone because you do not like their political views but this special case book is bereft of any material that would support that kind of mischief.

KIEFEL CJ: That might be a convenient time, Mr Merkel.

MR MERKEL: Thank you, your Honour.

KIEFEL CJ: The Court will adjourn until 2.15pm.

AT 12.43 PM LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.14 PM:

KIEFEL CJ: Yes, Mr Merkel.

MR MERKEL: If the Court pleases. Can I just indicate to your Honours on the issue of trespass, there is an offence of trespass under section 14B of the *Police Offences Act* 1935 (Tas). Can I add that would not ordinarily apply to forestry land. I will come back to that in a moment. But also the debate about access does not – or trespass cannot extend to public access areas which are public land, usually footpaths and roadways. So, it really, in effect, relates to private land and this issue about the status of forestry land.

> But the special case does deal specifically with the forestry land at Lapoinya. Can I take your Honours to page 57, paragraph 18. This is talking about – after forestry operations were said to have commenced – prior to that it:
>
> had been used by members of the local community for walking, horse riding and dirt bike riding.

More generally, at page 68, in paragraph 75, it sets out that:

> Forestry Tasmania is required by s 13 of the FMA to perform its functions . . . so as to allow access to permanent timber production zone land for such purposes as are not incompatible . . . According to Forestry Tasmania's Forest Management Plan of January 2016, "[a]ctivities that are compatible with Forestry Tasmania's strategic objectives may be undertaken on PTPZ land". This includes dedicated recreation sites, organised events, recreational vehicle use, hunting and firearm use, fossicking and prospecting, firewood collection, indigenous rights use, commercial or private access, apiary sites, mineral exploration and mining and tourism.

I had mentioned this morning the way in which Chief Justice Mason had in *ACTV* at page 129, point 5, and I will not read it to you, talked of the test being in terms of the freedom of communication previously enjoyed, but could I add to that what Justice Heydon said in *Mulholland* at paragraph 361 – *Mulholland* 220 CLR 181 and the relevant passage is at page 306 – and his Honour talked of *ACTV* and after saying "There is no analogy" with the legislation in that case with the one considered in *Mulholland*, his Honour added:

The legislation in that case was characterised as constituting a prohibition on a traditional category of political communications being conducted through ordinarily available media. It thus burdened an ordinary mode of communication in such a way as seriously to impede discussion about elections. This is quite distinct from the enactment –

We say that is the correct way to approach this case and, indeed, the special case has been very much constructed and the facts agreed on the basis of the communications that are the subject of this Act have been traditionally or ordinarily carried out without attracting trespass to any significant extent or attracting the private common law claims of nuisance.

Just before lunch I had mentioned to your Honour Justice Bell the paucity of material that might be said to be the mischief, and that is set out at paragraphs 57 onwards at page 63, and essentially this is what the parties have put before the Court as facts about the mischief from 1979 to 2013 and examples of mischief start in 1979 at paragraph 62(a) in New South Wales – so this is broader than just Tasmania – and then you have the Franklin Dam protests in paragraph (b) at page 12 which did lead to World Heritage listing.

Then you have paragraph 64 being the few cases where prosecutions concerning obstruction to equipment in forests being used without the outcome mentioned, save in (c) and (d). Then you have descending down from actual prosecutions or court cases police reports or media reports of protest activity in paragraph 65 said to be "for the purpose of obstructing" and again you have that over a period from 2006 to 2011, and you then have a distinct protest in paragraph 66 and then some "media reports" in paragraph 67 and that is it. So that is the evidence over that 35 year or more period.

We do say there is a problem about the case, that this Act merely replicates the common law. We say it is not right, but it does raise that problem. If that is the mischief then it does support our argument, which I was just finishing at lunchtime, about the true purpose of this legislation if it does no more. But we do say it does a great deal more.

Can I just indicate not only does trespass not apply to large areas of the land with which we are concerned – and we are not talking about a right to protest in private premises once you are a trespasser in those private premises – but if one looks at the law of private nuisance, there are reasonable user and public interest defences not extending to the freedom of political communication. That is yet to be tested.

Can I give your Honours just a few references. In our list of authorities we have referred to *Dollar Sweets*, which has been cited by Justice Gummow and *Sid Ross Agency*. In *Dollar Sweets*

[1986] VR 383 at 388 to 389, obstruction required harassment or something considerably more engendering fear about crossing a picket line or someone who was seeking to beset premises. So hindering and so forth goes much further than that. Justice Gummow approved that formulation in *Australian Builders' Labourers' Federated Union of Works – Western Australian Branch v JCorp Pty Ltd* (1993) 42 FCR 452 at 457 .

There is an example of reasonable justification as a defence in *Lyons & Sons v Wilkins* [1899] 1 Ch 255 at 267 to 268 . There is more recently a Supreme Court decision in the United Kingdom in *Lawrence v Fen Tigers* [2014] AC 822 at 831 in paragraph 5 where Lord Neuberger approved of an earlier observation by Lord Goff that liability for nuisance is kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land under which those acts necessary for the common and ordinary use and occupation may be done.

Also, in recent cases in Australia, the nuisance to constitute unlawful conduct in a tort must be unreasonable having regard to a number of factors, including the extent of harm – harm is usually an element that is required – but also the social or public interest value in the activity; again, not in this context. That was discussed by President McLure in *Southern Properties v Executive Director of the Department of Conservation* [2012] 189 LGERA 359 at 382 at paragraph [118] .

We do say that the common law has requirements substantially in excess of those that this Act deals with and we say that this Act does impose, on the basis of the test we say should be applied, a very, very substantial burden.

Finally, can I just add that, in terms of both plaintiffs, neither was trespassing on the land when they were directed to leave under this Act. So in respect of their personal circumstances, the direction to leave, which was the exercise of the police powers under section 11, was the reason why they could not continue to stay and why they were each charged with an offence.

So we do say that, on the facts of the special case, what we really see in fact is that, under ordinary usage of the land with which we are concerned, there is a traditional tradeoff which has occurred between the rights of people carrying on business and the right of the public to engage in freedom of political communication.

Necessarily in circumstances, the communication, protest marches and so forth may interfere with the conduct of business for a period of time, but when you are getting into

damaging property, risking safety, locking yourself onto business equipment, that is an area discussed in some of the examples but that is not the area with which this Act is concerned. It is concerned with a far broader and far wider range of activity.

Can I return to where I was just before the adjournment. We have considered an inconsistency in our submissions. I think it is more accurate to say, in paragraph 1(a) and also paragraph 14, that the true purpose of the key provisions is the prevention of onsite political protest. The inconsistency is that we put that at the compatibility testing stage, and if we are right on that, that means that those provisions that have that purpose which we have identified are invalid.

But if that is not the purpose but, rather, it is the purpose put forward by Tasmania, which can be fairly described as proscribing conduct designed to disrupt business activities rather than to prevent political protest then it is that purpose that becomes the subject of proportionality testing because, if it were to prevent political communication, we would not get to proportionality testing. That is very much a contest that really exposes the different position of the parties.

On reflection, our case really is that the width of the power given to the police, which I have taken your Honours to this morning, is so broad that its purpose is properly identified in the way in which we put it and that what was 1(b) is really not appropriately described as part of that purpose because of the width and the way in which the powers would be used in their normal practical application, as we saw them used in the present case in relation to the two plaintiffs. These are classic instances. When you see the video and look at what occurred, there was no real obstruction but a perception that there might be an impingement on some forestry operations.

BELL J: What is it about the width of the powers that are conferred on the police that tells you that the purpose is the purpose in 1(a) and no more?

MR MERKEL: Because, your Honour, probably the most revealing power is if you give a direction no one can return within four days, irrespective of the purpose or reason for returning; secondly, when you look at the power to talk to protesters as a group and each one must be taken to have heard a direction to leave, that power can only logically be used in a practical sense to break up a protest.

Also, when you look at the width of this statutory scheme, before I even get to whether "seriously" is to be put in before "hinder and prevent", it relates to any business activity and the use of any object, irrespective of how minor or how major, and then you get to "hinder

and prevent" and its practical application in the mind of a police officer establishing a reasonable belief which triggers the pathway to these direction powers, and we say they are unique.

I will take your Honours to some other comparable statutory regimes, none of which go so far and the special facts which do not produce any mischief, as I said to your Honour before lunch, that would warrant the kind of response that this legislative scheme has.

BELL J: So in part it is the power to give the direction which has the automatic fourday consequence. Does the argument also take up the broad discretion conferred on the police to include in the direction the nonreturn for three months?

MR MERKEL: Yes, your Honour – nonreturn, but the threemonth period is related to engaging in an activity that is essentially

BELL J: It requires a contravention under 6(1), (2) or (3)?

MR MERKEL: Yes, or the associated 7(4)(b) and (c) provisions and the circumstances in which ordinarily this power would be used. Of course, the other factor that is critical to my answer to your Honour is, I have taken you to the special case facts and there is not one factor there outside environmental protest.

So if there is a mischief, whatever it may be, it is in respect of Crown land managed by the executive arm of government on environmental protest, for which there is necessarily a give and take having regard to all of this. That is, we say, critical to an understanding both the mischief and the sections to the real underlying purpose.

GORDON J: Just so I am clear, Mr Merkel, is your answer to Justice Bell the width of police powers given to police limited to both those matters – section 8(1)(b), the four days and then section 11(6) being, in effect, the police injunction?

MR MERKEL: Yes. Well, it is not limited to that – it is the totality – because there is also Part 4 which has extraordinarily harsh punitive measures.

GORDON J: But that is not the width of the power given to police. That is the way you put your submission.

MR MERKEL: Yes, your Honour.

GORDON J: Your case was the width of power given to police is so broad is that its purpose is (1)(a) and not (1)(b).

MR MERKEL: Not just the width. That takes you back to section 6, section 7(4)(c), section 13(3). But, also, your Honour, the means – we say, the prevention has regard to the means which have an extraordinary consequence here. We have indictable offences – up to four years imprisonment, a compensation scheme for what might, alternatively, have been no more than an infringement in the first place. We say that enforcement regime plus the police direction regime are the means by which that purpose is achieved. So, when we are looking at compatibility testing, we are looking both at purpose and means. We say that is an important way of understanding how this statutory scheme works.

> So that is our submission on why the purpose is incompatible. We then go to – what I might call – what your Honours have called in a point of proportionality testing – and consistently with what we have said on purpose, on our case one only gets there if our purpose is rejected and the competing purpose properly is described as proscribing conduct designed to disrupt business activities.
>
> It is there that we get to our alternative submission which was not expressed as clearly as we would have liked in paragraph 17 – the lack of rational connection between political communication and that purpose. In that context, we draw an analogy with *Unions NSW* and that is why we say, on the submissions we have already put in paragraph 17, that the…..provisions of the Act focus on protesters is not suitable. Can I now deal

NETTLE J: Just before you go. This is different to *Unions* in that ex facie it is directed at actions which prevent, hinder or obstruct business. There is that logical connection between the prohibition and the mischief which is sought to be achieved.

MR MERKEL: Except not political communication. If your Honour said protesters unburdened by any other definition and protesters were engaging in conduct that was hindering, the answer to your Honour would be yes. But the qualifier of political communication is irrelevant to the purpose.

NETTLE J: Yes, I see.

MR MERKEL: It takes us back to those earlier propositions. But, we say, that is the comparator that we would use for *Unions NSW*.

GORDON J: So, if this Act said Workplaces (Protection of Economic Interests) Act it would be fine. Is that the position?

MR MERKEL: If it provided - if its provision was not in respect of protesters and political protest, I would not have that point. If it still applied only in respect of forestry, that would be a different question because that might be just an indirect way of attacking the same protest but that is not what we are concerned with.

GORDON J: No, but if you took it out and just dealt with it as protection of economic interests at large

MR MERKEL: Yes, that would

GORDON J: If you took out section 4 for example, you would not have a case.

MR MERKEL: This case

GORDON J: There would be no complaint.

MR MERKEL: I do not know what case we would have because this case is geared to that Act. There are many ways in which the government might come back and try and kill environmental protest but the answer to your Honour's question is the criticisms we make would not be the ones we would be making of such an Act because we would be in a very different situation.

GORDON J: That is a lovely answer, Mr Merkel.

MR MERKEL: Can I go now to what I will call the necessity aspect of the second part of the *McCloy* questions. We have proffered examples in our submissions at paragraphs 64 to 69 but we must accept an Act in New South Wales and a Bill in Western Australia has not been enacted that deal with obstruction and deal with physical intervention and so forth. We have to accept that they do not meet the necessity criterion as fulfilling a purpose, and the means employed in the impugned provision, quantitatively, qualitatively and probability wise because this Act targets a much broader range of activity and has its own directions regime which does not satisfy the necessity test.

But we say the alternatives we rely on in this case do serve another role and that is that they help identify whether this statute goes further than is reasonably necessary to give effect to the legitimate object which we have to accept if we are in this range - and we say that the section 92 jurisprudence did not evolve in the way in which the necessity criterion has evolved and courts have looked at alternative means of securing the legitimate object which suggest the purpose of the law is not to achieve that object but rather to effect a form of prohibited discrimination.

We give *Castlemaine Tooheys* 169 CLR 436 at 472 as an example and another one which your Honours are very familiar with is *North Eastern Dairy Co v Dairy Industry Authority (NSW)* (1975) 134 CLR 559 at 616 where Justice Mason referred to the impugned regime as not being the only practical and reasonable mode of regulating the trade in milk and similar observations were made by Justice Gaudron in this context in *Cunliffe* at 368 and *Levy* at 388 to 389.

So, it is that context that we approach alternatives which show, for example, in New South Wales and Western Australia where the parliaments have taken on board the kind of mischief with which we are concerned and came up forward with a regime that was far less restrictive and far less a burden on freedom of communication.

Can I hand up to your Honours just a brief summary of those regimes which are referred to in our submissions because on the *McCloy* analysis this will arise as part of the balancing process and the Western Australian Code deals with physical

KIEFEL CJ: As part of the balancing process or the test of reasonable necessity?

MR MERKEL: We would say it would be part of the balancing process because we have to accept that these items of legislation serve a much narrower purpose and function than the Workplace Act, nor do

they have the means of the Workplace Act. On that basis, our assumption – we would be delighted if we were wrong – is that we fall short of being able to establish that these Acts are capable of fulfilling the same purpose as the means employed by the impugned provisions quantitatively, qualitatively and so forth.

> We say that this becomes part of one of the factors amongst others that would be taken into account in the balancing process showing this regime goes further than is reasonably necessary by looking at comparable regimes that did not have to single out political communication, did not have to have discriminatory aspects of which we complain and did not have to give police the extraordinary powers that we say are at the heart of the problem with the Workplace Act.

> It is in that context that we ask your Honours to look at these provisions. We have set out the relevant provisions of the Act and also the relevant provisions of the associated police powers in different legislation.

KIEFEL CJ: Mr Merkel, the question of what is reasonably necessary in that particular legal sense discussed in *Unions New South Wales* and in *McCloy* does not just compare provisions, it identifies the purpose and then looks to see, for example, in other legislation, if there are other less restrictive means which have been able to be addressed to achieve the same purpose. It is not a comparison of provisions.

MR MERKEL: I accept that, your Honour. I am jumping too far ahead of myself. We would put this under "necessity". Alternatively, if it does not meet necessity it is a factor relevant to balancing.

NETTLE J: Are these obvious and compelling alternatives?

MR MERKEL: We say they are. The alternative is to take account of the freedom of political communication, otherwise there will be no obvious and compelling alternative because no other Act targets political communication.

KIEFEL CJ: It has to be in that sphere because the point of this tool of analysis is to determine if there is some way of achieving the statutory objective that is less burdensome on the freedom.

MR MERKEL: Then we put these forward in that context, your Honour, and they are very close to the kind of mischief that is suggested in the special case. In the Prevention of Lawful Activity Bill in

Western Australia is an offence for physical prevention of lawful activity; 68AA2 sets out the proscribed conduct. "Physically" is defined, including physical force. The second reading speech tells us the kind of conduct it was designed to address.

In terms of means, Western Australia has its own general powers in respect of unlawful conduct, which are then set out in paragraph 6 and have far more limited operation than we do in the present case. We have the moveon powers in paragraph 7, which again are very limited. An order cannot be given under subsection (1) and there are limitations on the broad powers to move on, as in subsection (2). The period in (2)(b) must be no more than 24 hours and you have to give careful consideration to the effect of the order on the person.

So we say that is a regime that goes no further than reasonably necessary to deal with the mischief and to secure the legitimate end of obstructing lawful activity on business premises without intruding on the political communication freedom. The New South Wales Act is a different regime. That goes to "inclosed lands" which overcomes and answers much of the trespass discussion that happened this morning, and we have an offence in paragraph 11 of unlawful entry on closed land. We have a definition of "inclosed land":

any land, either public or private, inclosed or surrounded by any fence –

and so forth. Then we have the arrest powers which again are limited - and to stop repetition of the offence is a standard one but the offence is a far narrower one, but importantly subparagraph (8) of subparagraph (1) of section 99 deals with safety and welfare of a person, which might be contrasted to public order which is a purpose for removing a person.

Then you have the moveon power which contains the kind of provision that does seek to acknowledge the freedom of political communication because the moveon power cannot authorise police under subsection (2) to give a direction in relation to a demonstration, procession and so forth except as provided in the subsequent paragraphs and that is that there is a permit provision for processions and so forth on public places and the demonstration is without a permit authorised by a police officer in charge to give the moveon order and the direction is limited to the persons who are obstructing traffic.

They are examples of a legitimate object preventing obstruction to lawful activity which show that the Tasmanian legislation goes further than is reasonably necessary. We have also given examples of the *Police Offences Act* in our submissions and the Forestry Act, sections 21 to 23, which would protect forestry land provided the direction was used – power to direct was exercised lawfully. So we say that on necessity the

KIEFEL CJ: Just on the test of necessity, of course it is not required in every case that legislation with comparable purposes be found. It is possible to show that there are less drastic means available by the legislation itself, by the impugned legislation. But do we take it that what you have said already is meant to address that question?

MR MERKEL: No, I have dealt very much –we have tried to deal with that topic at paragraph 18, your Honour. We then go on away from the alternative and ask about this Act. What we say is startling about this Act is that it does not make any endeavour to balance the competing interest of freedom of communication.

We compare *ACTV* where the denial of air time was offset by free air time, given discriminately, but there was an endeavour to offset. In *AttorneyGeneral v City of Adelaide* there was a speaker's corner provided, there was a certain albeit narrow exception for election period and critically, certainly as far as Justice Hayne would appear to be concerned, there was a permit power given to enable permits for the persons concerned to engage in the activities that they wanted.

His Honour at paragraphs 140 to 141 read the permit power as only being able to be used for the purposes of the Act which was a reasonable control of traffic. If the permit power was used to prevent a political communication, then it would have run into problems with the implied freedom. But his Honour at 141 concluded that, so construed, the Act was reasonably appropriate and adapted to a legitimate object.

In *McCloy*, of course, you had the same free air time, which was not in issue in the case. So there were offsetting provisions in the statutory scheme to accommodate the freedom of political communication, likewise, in *Unions New South Wales*. So we say that for those reasons the only offsetting provision one might find in this Act, or meaningfully offsetting provision, but even if it is something we ascribe a very small operation to, it is section 6(5), but even that is only a defence if there is nothing more.

So we say that section 6(5) as an offset, given the facts in the special case and the importance of freedom of political communication in the context with which we are concerned, we say that that is a significant failure at the necessity stage and this Act could have provided for a permit scheme and that would have produced a very different case again.

GAGELER J: Is section 6(5) a defence to a section 11 prosecution?

MR MERKEL: No, I think, your Honour, initially the intention was, but I think the way it worked is

GORDON J: It does not constitute an offence.

MR MERKEL: Yes. It only operates now under subsection (4), so you only get there if you contravene a requirement in a direction under 11(6).

GAGELER J: So if you just get a direction under 11(1) because a policeman believes that you are about to commit an offence under section 6(1), then you cannot come back at all for any purpose

MR MERKEL: No.

GAGELER J: In the next four days, irrespective of your intention and irrespective of the effect that your presence would have on the business operations.

MR MERKEL: Even if you went back under 6(5) it would not operate to exculpate you, as I understand it.

GAGELER J: No.

MR MERKEL: The final point we want to say is that there is also the point made in *Lange*, which of course could apply analogously with the law of nuisance, that the statute could have provided something more meaningful than section 6(5) to be protective of political communication – in other words, allow for some provision for political communication that would not constitute an offence under the Act that was meaningful in a sense, going far further than 6(5) would accommodate in its limited circumstances. This is not a question of what would be reasonable because we never get there. We say there is nothing reasonable.

> We say for those reasons we find that this Act does not satisfy the necessity criterion, and to the extent our learned friends' submissions are accepted by the Court we have not fallen within necessity. We say they are relevant and can be relevant to balancing.

We have set out our balancing submissions at paragraph 19. I think I have covered the area of why we say the discriminatory burden is direct, why it is discriminatory, and we have set out references to where citations would say those matters, according to those authorities, would comfortably fall within the facts in our special case.

The last point I want to address under this heading is just a few final comments on the submissions that our burden is slight because the common law would restrict us in any event. I think I have dealt with that substantially. I think I have covered most of the points I wanted to say. But I do want to emphasise one important feature that I may not have emphasised sufficiently, and that is, however the trespass and common law regime may apply, they do not operate in respect of the key feature of this regime to which I have taken your Honours to, which is the police power to prevent political protests on the basis of the reasonable belief regime. That is a critical difference to anything that one might refer to in respect of the common law.

Finally, can I just say, in terms of justification in paragraph 20, the onus is on Tasmania to demonstrate the requisite justification. Again, I will give your Honours just brief references. In *Cunliffe* Chief Justice Mason, at page 301, point 9, said justification requires consideration of the scope and extent of the mischief aimed at and 304, point 4:

it is generally not enough simply to assert the existence of facts said to justify . . . The relevant facts must either be agreed or proved –

or taken judicial notice of. We say that the paucity of evidence gives Tasmania a very high hill to climb on the question of justification.

On the question of *McCloy*, we say that the Court should not reopen *McCloy*. We have set out our submissions at paragraph 21 and we say, ultimately, on our submissions, the result of the case does not turn on the answer to whether to *McCloy* is reopened or not because whether it be *McCloy*, the second *Lange* question asked in its original form, or any other test, we say in this case we get the same answer.

We would say in respect of the questions asked in the special case at page 69, question 1 is no longer in issue between the parties and we say that the *Workplace (Protection from Protesters) Act* is invalid in its entirety because if our arguments are accepted on the key clauses, there is so little of the Act left to apply, that it could not be said to be the intention of the legislature

that it apply in that mutilated form without those key provisions. But, alternatively, if we are unsuccessful on our case in respect to the whole of the Act, we say it should not apply in respect of forestry land for the reasons that we have indicated to your Honours.

GAGELER J: Sorry, the whole of the Act in respect of forestry land or just the key provisions in respect of forestry land?

MR MERKEL: The key provisions in respect of forestry land, your Honour. There may be nothing left, nothing of significance left. We say the whole of the Act – sorry, we say that the key provisions, but it would be a matter for the Court as to whether they are severable but we are only challenging the key provisions. We made that clear at the outset. There may be a question of severance which we

KIEFEL CJ: And the key provisions you identify are?

MR MERKEL: In paragraph 1, your Honour, of our submissions.

KIEFEL CJ: Your outline.

MR MERKEL: Sorry, our outline, yes, your Honour.

KIEFEL CJ: That is section 6 and associated provisions.

MR MERKEL: Sorry, your Honour, they are underneath.

KIEFEL CJ: The ones at the conclusion of paragraph 1.

MR MERKEL: Yes, your Honour, and I should say could your Honours please, on the basis of the submissions that we have made this afternoon, delete – treat paragraph 1(b) as deleted and delete the words in paragraph 14 "that could or would prevent, hinder or obstruct business activities at or near the site". So that gives the two cases a fair and square contest between Tasmania's view of the Act and the view we put forward.

If your Honours could just excuse me for a minute. I am reminded by my learned junior, I should correct one bit of my answer to your Honour Justice Gageler. We do attack section 7 by reference to its focus on protesters. That was the discriminatory burden.

GAGELER J: This is 7(4)(c) and (d).

MR MERKEL: No, 7(1), (2), (3) and (4). All the subsections of 7 by discriminating against protesters suffer from the discriminatory submissions we made but not the other submissions. I am sorry I did not answer that accurately, your Honour.

GAGELER J: So it is 6, the whole of 7, 8, 11, 13(3) and Part 4.

MR MERKEL: Yes, your Honour. If your Honour pleases.

KIEFEL CJ: Solicitor-General for Tasmania.

MR O'FARRELL: May it please the Court. Your Honours, might I start initially by addressing some of the aspects of the legislative scheme – the ones that we consider are essentially important to the understanding of this legislation.

The first is that where the Act refers to "business premises" and "business access area", those two areas are effectively mutually exclusive. So you are either standing in a business premises or you are standing in a business access area. That was essentially the problem that confronted the DPP and you will see in the special case book there is a press release that effectively a police officer misapprehended the direction that he was required to give. In the result of this case, it turns out that Dr Brown was not standing in either, which I will come back to in due course.

The next relevant definition if I can stop there just for a minute, with "business access area", the Act says that firstly it has to relate to business premises; secondly, it is limited in its scope because it:

> means so much of an area of land . . . that is outside business premises, as is reasonably necessary to enable access to an entrance to, or to an exist from, the business premises –

So we say there is an immediate limitation as to place in respect of business access areas. Clearly business premises have a more significant limitation. "Business activity", your Honours, is expressly defined as "lawful activity", so it does not comprehend an activity being conducted either in a business access area or on business premises which are, for some reason, being unlawfully conducted. So again, there is a significant limitation in that aspect of the matter.

> A business operator is "an owner, lessee, or lawful occupier, of the premises, including a government entity" and that is Forestry Tasmania that is such a person. So the Act apprehends that there will be lawful occupation. So far as owner is concerned, your Honours will have regard to the definition of "owner" and specifically:

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

> > (a) if the premises are Crown land that is permanent timber production zone land within the meaning of the *Forest Management Act 2013* – the Forestry corporation within the meaning of that Act –

For the purpose of this Act, Forestry Corporation is deemed to be an owner. I will come back to the *Forest Management Act* shortly. Your Honours will also notice that business operators may also be people who are – or in relation to business premises people carry out business activities "under a contract" or "under a permit, licence", et cetera. "Premises", your Honours, are defined in section 5 and we submit these provisions apply to a wide range of premises identified by the Parliament to be those sorts of premises that might suffer from the interruption by protest activity, so the premises used for mining, "premises that are forestry land" and that is particularly relevant here, of course. When one goes to the definition of "forestry land", you will see that in (a) it is:

> an area of land on which forest operations are being carried out –

That has some practical effect on the operation of the Act, as well as for various other purposes but for our purposes here it is probably sufficient to concentrate on subparagraph (a) of that definition.

GAGELER J: Mr Solicitor, these forest roads, were they within the definition of subparagraph (a)? Were they land on which forest operations are being carried out, or are they really part of a business access area? I really just want to know are they business premises or business access area – the roads?

MR O'FARRELL: Your Honour, I would submit that they properly form part of the business access area because they, for the purpose of effectively getting access to the relevant forestry coupe, although there might be some argument about that quality, your Honour. If you look at the definition of "forest operations", it means:

> work comprised of, or connected with –

a number of things – "harvesting" which is this case –

> and includes any related land clearing, land preparation, burningoff or access construction –

In fact the road on which Dr Brown, for example, gained access to where he was eventually directed to leave was a road which was then being cleared.

GAGELER J: So you have a road that goes through the coupe, does it?

MR O'FARRELL: Well, it can either go through or to, your Honour.

GAGELER J: Insofar as it goes through the coupe, is it forestry land and therefore business premises or is it a business access area?

MR O'FARRELL: Well, your Honour

KIEFEL CJ: It is a defined term under the *Forest Management Act*, is it not, "forest road"?

MR O'FARRELL: It is, your Honour. That is correct. I am not sure that that advances us

GORDON J: Mr Solicitor, I understood that in relation to the Protesters Act, the business access area included "any road" –

> area of land . . . not limited to any road –

so it includes a road

MR O'FARRELL: Yes.

GORDON J:

> that is outside the business premise, as is reasonably necessary to enable access to . . . or to an exit from –

but the definition of "forest operations" included:

> land clearing, land preparation, burningoff or access construction.

MR O'FARRELL: Correct, your Honour.

GORDON J: So that you would have to answer Justice Gageler's question is the position that you have got a business access area in relation to roads already constructed give you access to it, but where you are seeking to construct those sorts of things they fall as part of forest operations.

MR O'FARRELL: Yes, your Honour, that is correct, but Broxhams Road was already in existence. It is very much a factual question. I do not want to deflect the inquiry but the road was already in existence and the vegetation on either side of it was being cleared in order to allow better access to the forestry coupe for the purpose of the operations. Does that answer your Honour's question?

GAGELER J: Well, are we talking here about the circumstances of Dr Brown?

MR O'FARRELL: Yes.

GAGELER J: So which subsection of section 6 was engaged? I am sorry, I just like to relate constitutional arguments to facts whenever possible.

MR O'FARRELL: No, I am submitting, he engaged – I think it was section 6(2). I just need to make sure I am correct about this, your Honour.

GORDON J: I had thought that:

> he was charged with one count of failing to comply with direction to leave a business access area contrary to s 8(1)(a) –

and that is found in the case book at paragraph 49.

MR O'FARRELL: Yes, your Honour. I am sorry, and that is what I was looking for. That is correct, and the difficulty that arose with respect to Dr Brown was that he was effectively – well, the question was whether or not the police could successfully charge him for being on a business access area when he was on a place where land was being cleared and access was being constructed. I will check this overnight, your Honour, to make sure that I am absolutely certain about this. But there was effectively, the difficulty was whether or not he was, in fact, not on the area in respect of which the direction was given, but I will make sure that we clarify that for your Honour.

> For present purposes, though, the premises that are forestry land, as I have indicated, land on which forestry operations are being carried out, forestry operations is the definition which is directly reflected in both Acts – that is, the impugned Act and also the *Forest Management Act,* and I will come back to that. Your Honours, if I can then go to section 4 of the Act. So:

> a person is a protester if the person is engaging in a protest activity.

Then, as my learned friend – my learned friend has taken you to the next subsection and this, of course, the subsection which brings into sharp focus the relevant:

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

Subsection (3) as well:

> engaging. . . in a demonstration, a parade, an event, or a collective activity, that is a protest activity.

But, your Honour, that section is critical to understanding the breadth of section 6 when we come to that. So, effectively, under section 6(1), for example, a protester is a person who is at the relevant land, for the purpose of section 6(1), on the business premises – that is, premises which are lawfully occupied, and who is effectively conducting – not effectively – they are conducting a protest activity within the meaning of the Act. They will be caught by the section on the basis of two conditions. Firstly, that they have entered:

> the business premises . . . or remaining on the premises or part after entry, prevents, hinders, or obstructs the carrying out of a business activity –

but also that they know that when they do that their conduct – or they reasonably would to be expected to know that when they do that by entering and remaining they are likely to have that effect.

> So the Act is not only directed to the simple act of participating in a protest activity; it is actually directed to people who set out to engage in a protest activity with the intention that is as described in the Act, so it is not only a subjective intention, but it might be imputed to them, but with that intention, in those terms, to effectively stop or hinder or obstruct a business person who is carrying out lawful activity on the business access area from going about that business.

BELL J: So a group of people standing outside a bank each holding a placard complaining about some alleged malfeasance on the part of the bank, knowing that that might hinder bank customers from entering, contravene the provisions of this legislation?

MR O'FARRELL: That could be so, your Honour. If a bank is a relevant business premises, which I do not think a bank would get caught. It effectively applies to mines, forestry land, agricultural uses, manufacturing, building and construction for the purpose of a business activity, premises used as a shop, market or warehouse, and then it goes onto the more incidental uses and government business enterprise uses, et cetera. So it probably would not get a bank

BELL J: All right; standing outside a government business enterprise complaining about asserted misfeasance by the employees of the government business enterprise. They are on a public street, they are holding placards or something of that character, and they ought reasonably to know that some people wanting to gain access to the government business enterprise may be hindered by the fact of their presence on the public street.

MR O'FARRELL: Correct, and by doing so, your Honour, they have that effect. So you would have to have a person there who was in fact hindered, prevented, I think – we are talking about subsection (2) here, your Honour, because they would be on a business access area.

BELL J: Yes.

MR O'FARRELL: Yes, and that the act would have to prevent, hinder or obstruct the carrying out of a business activity on the premises by a business occupier in relation to the premises.

BELL J: Yes, likely to prevent.

MR O'FARRELL: No, your Honour.

BELL J: I am sorry; I am looking at 6(3).

MR O'FARRELL: Your Honour, can we deal with each in turn – (2) and just using paragraph (a), the condition is that the act, that is

BELL J: Standing with the placard on the public street.

MR O'FARRELL: Exactly:

> prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier –

BELL J: Customers coming into the government business

MR O'FARRELL: I cannot serve my customers. So it relates to whether the business occupier's lawful activity is being carried out.

BELL J: Yes.

MR O'FARRELL: Yes, and that the protester knows or ought reasonably to know that it will have that effect, but both conditions have to be satisfied.

KEANE J: Is the "Forest road", is a forest road a public street? It is defined to exclude a state highway, a subsidiary road or local highway.

MR O'FARRELL:
Your Honour, that could be a big question. The question of whether it is a public street, of course, depend on the purpose of the legislation in respect of which it was applying but there are any number of forest roads in Tasmania which are used regularly by the public and would ordinarily constitute a public street, for the purpose of the *Traffic Act*, for example. So

EDELMAN J: Is not the short question whether there is an implied licence to be there? Either implied by the construction of the relevant statute or implied by all of the relevant circumstances and the history of use.

MR O'FARRELL: Yes, your Honour, I will accept that.

NETTLE J: Mr Solicitor, section 24 of the *Forest Management Act* especially provides for the government to declare forest roads to be public roads. Can they become public roads other than by such a declaration?

MR O'FARRELL: Your Honour, can I take that on notice?

NETTLE J: Sure, certainly, yes.

MR O'FARRELL: Again, I would submit, probably not but I would need to just follow those provisions through.

KIEFEL CJ: That might not be exactly the same question as whether or not the public have some limited licence for access because if it is a public road it might rather be that it is dedicated to public use. So that it might be a complete answer if it is a public road dedicated to that use but there might be other lesser rights with respect to roads that are not public roads.

MR O'FARRELL: Well, yes, your Honour, I would doubt that, but again I will check this, that a forestry road would be required to be open for all purposes at all times without the Forestry Corporation being able to close them in the event of forestry operations being taken out on an area of land contiguous to them, but we will follow that through overnight your Honours. But that, I suppose, brings me to how the *Forest Management Act* works insofar as has been discussed today.

> The first point we would make about it is that the functions of the Forest Manager, which is of course the Forestry Corporation, "to manage and control all permanent timber production zone land" and those words "manage and control" mean, in our submission, effectively the land is, to all intents and purposes, in the Forestry Corporation's lawful possession, subject only to whatever restrictions can be found in the Act. So the second function which is

KEANE J: And as a general proposition, does that include forestry roads as well?

MR O'FARRELL: Include?

KEANE J: As a general proposition, does that include the forestry roads that are within that zone as well?

MR O'FARRELL: Within that zone, yes, your Honour. Yes, I would submit that to be the case, and also, your Honours

GORDON J: I think this borne out by the section that Justice Nettle just took you to, 24, because what it says in 24 is that it is not to be declared a public road, that it may be with the consent of the forest manager and, if there is such a declaration, that it ceases to be permanent timber production zone land. So it picks up, as I understand it

MR O'FARRELL: Yes, your Honour. Again, we will make sure we understand that but in general, your Honour, yes. Now, the second function under section 8 is:

> to undertake forest operations on permanent timber production zone land for the purpose of selling forest products –

and that relates, of course, to its functions as a GBE to act commercially. But more importantly, the whole notion of forest operations on permanent timber production zone land brings into focus other things that the Forestry Corporation has to do in respect of that land.

> In harvesting operations, there will necessarily be large machinery operating. There will be chainsaws and other dangerous machinery which brings upon the forest manager significant other responsibilities including work health and safety responsibilities and also responsibilities just in their capacity as the relevant occupier of the land. So this Act has to be, in my submission, construed on the basis that they will be taking out large and important and in some cases dangerous forest operations. The forest manager, under section 9, has whatever:

> powers as are necessary to enable it to perform its functions.

And in answer to your Honour Justice Keane's question of my learned friend this morning whether it could sue, I would submit it could sue without doing any more for a person who trespasses on its land where it was conducting forestry operations and had done some act to exclude that person, at least from the land, and the person would not leave and that would not depend on the exercise of the powers under sections 22 or 23.

GAGELER J: What is the cause of action?

MR O'FARRELL: Trespass, your Honour.

EDELMAN J: Why does it have to do some act to exclude the person in the first place? You are presuming that the person has an implied licence to be there and, if so, where does that come from?

MR O'FARRELL: Well, I will take your Honour's question as some assistance to our case. If there is any implied licence it has to be found somewhere within section 13. We were attempting to avoid analogies with licences, but the direction to the forest manager who has management and control of the land is that you have to manage and control that land so as to allow access for such purposes as are not incompatible with that management.

EDELMAN J: But how does that give the first and second plaintiff a right or a licence to be there?

MR O'FARRELL: We say it gives them no right or licence, your Honour. I think I have badly expressed myself in respect of the functions under section 9(1) but, in my submission, they would have an action in trespass for a person on that land in respect of which they are in lawful possession and it is really that simple. So they could trot off and ask the court for an injunction in order to enjoin the person from remaining.

GAGELER J: You get lawful possession out of section 8.

MR O'FARRELL: Yes, your Honour.

GAGELER J: That gives rise to what, a common law action in trespass

MR O'FARRELL: Yes, your Honour. I would submit that is correct.

GAGELER J: to Crown land?

MR O'FARRELL: Well, it is Crown land, your Honour, and the Crown has effectively vested its management and control in the Forestry Corporation. It must follow it has lawful possession.

GAGELER J: Are you aware of any civil action in trespass to Crown land ever?

MR O'FARRELL: No, your Honour, but can I take the Court to

GORDON J: This is Crown land that is not subject to the *Crown Lands Act*.

MR O'FARRELL: That is right.

GORDON J: So that when I read your *Crown Lands Act* it carves out of the operation or the limits that it is subject to that Act because it is permanent timber production zone land.

MR O'FARRELL: Correct.

GORDON J: So you are directed back, as I understand it, on your submission, entirely to the *Forest Management Act* and then the Workplace Protesters Act.

MR O'FARRELL: Correct, your Honour, that is correct. Your Honours, can I take you to a case in our list of authorities – *Waverley Municipal Council v Attorney-General* (1979) 40 LGRA 419, page 426 .

GORDON J: Sorry, what was that page?

MR O'FARRELL: Page 426, your Honour. This case related to public land under the *Local Government Act* and it is really the passage from the judgment of Justice Windeyer which is extracted at the bottom of the page. This is a passage from *Randwick Municipal Council v Rutledge*:

> "In principle, for land to be used for public recreation and enjoyment, so as to be in some sense akin to a public park . . . on that account exempt from rating, two conditions must be fulfilled. The land must be, in the relevant sense, open to the public generally as of right; and it must not be a source of private profit. As to the first: It is not necessary for all members of the public to have free access to all parts of the land at all times. It is not incompatible with a public reserve that persons can be excluded for misbehaviour or for any similar sufficient reason. It is not incompatible with a place being dedicated for public recreation and enjoyment that its use be regulated, and that persons using it must use it having regard to the particular form of recreation and enjoyment which takes place there – whether, for example, it be a golf links, tennis court, ocean beach . . . It is not incompatible with a public park or reserve that at particular times, as for example at night, the public are wholly excluded.

This land, your Honour, permanent timber production zone land, is public land. The *Forest Management Act* tells the Forestry Corporation that, all things being equal, it has to make it available for public use which is not incompatible with forest operations. Your Honours have been taken to the special case book today showing you that the Forestry Corporation in fact has a charter or a management plan which says that is what it will do. But, in my submission, that does not then convert Dr Brown and Ms Hoyt's occupation of the land or entry onto the land into some sort of freestanding right to just come on, conduct a process, scrutinise forest operations effectively with impunity and under the banner of the implied freedom. That is effectively what Justice McHugh was saying in *Levy*.

EDELMAN J: That is effectively your second proposition on your sheet.

MR O'FARRELL: Yes.

EDELMAN J: How does that fit with your first proposition? Does not acceptance of the second proposition mean that there is nothing for the freedom to operate on?

MR O'FARRELL: In relation to business premises which are permanent timber production zone land, yes, our first proposition would not arise if that is all the Act was directed at. But there may be cases, for example a protest outside a shop

EDELMAN J: But that is not this case.

MR O'FARRELL: That is not this case.

EDELMAN J: Yes.

MR O'FARRELL: But we accept that there may be a burden imposed by the Act but it does not arise here.

EDELMAN J: Yes.

NETTLE J: Why does it not arise here? Because there was no right to be on the land anyway, is that it?

MR O'FARRELL: Well, it arises in a number of ways and we get back to this difficulty that I have got to clear up overnight. Firstly, if you assume that they were on business premises then they are on permanent timber production zone land and that makes good the point about *Levy*: they were trespassing; they had no general law right which supported their entitlement to be there. That is the first thing. If they are on

GAGELER J: That is ignoring section 13, is it? I just do not understand how you put that.

MR O'FARRELL: How I ignore section 13, your Honour?

GAGELER J: Yes.

MR O'FARRELL: Well, because, your Honour, in my submission, the right to be there depends upon the land being available for uses which are compatible with, amongst other things, forestry operations.

GAGELER J: Sorry, I suspect my difficulty is with this notion of a right.

MR O'FARRELL: Yes.

GAGELER J: It is really an absence of prohibition. Would you accept that there was an absence of prohibition?

MR O'FARRELL: Not entirely, your Honour. I would submit, firstly, your Honour, that the Forestry Corporation with management and control of the land is entitled to administer it subject to the functions under the Act – one of which is forestry operations. Where forestry operations are being carried out, that is, certainly in some circumstances if not all, particularly where there is heavy machinery, incompatible with public access. So, section 13 does not require the Forestry Commission – or the Forestry Corporation should I say – to allow people to come onto the land.

NETTLE J: For incompatible purposes.

MR O'FARRELL: Yes. It is that simple.

KEANE J: And whether they are allowed to come on or not depends on a judgement to be made about compatibility.

MR O'FARRELL: That is correct, your Honour. That is correct.

KEANE J: And there is no suggestion that it has made a judgement that it is compatible in this case.

MR O'FARRELL: That is correct, your Honour.

GAGELER J: Or incompatible, for that matter.

MR O'FARRELL: Well, no, no. But one could infer that the judgement has been made, your Honour. There were forestry operations being carried out on the land at the time and the police turned up.

NETTLE J: There had been no section 22 direction, though, had there by the Forestry Commission?

MR O'FARRELL: No, your Honour, but I would submit that was not necessary in order to render the person a trespasser.

NETTLE J: It just would have manifested a determination that the purposes of the trespasser were not compatible with the management of the forest area.

MR O'FARRELL: Yes, yes. But, in any event, your Honour, even if it was necessary for Forestry Tasmania to say, leave the land, a police officer – your Honours will perhaps look at the videos – but there were forestry personnel in attendance. The police officer directed Dr Brown and his friends to leave the land. Surely, that is sufficient to put him on notice that he is there

EDELMAN J: The relevant roads had been closed, had they not, as well?

MR O'FARRELL: I was just coming to that, your Honour. If your Honour looks at pages 56, 57 of the special case book, you will see at paragraph 16 at the bottom of 56, there was a decision made to close Maynes Road and Broxhams Road in reliance upon section 23(3)(b) of the *Forest Management Act*. And we see over the page that, in the case of Maynes Road, there were two signs erected – Broxhams Road signs and identical terms, and two days later on 20 January two chains and steel posts were, effectively, put across the entrance to the forest roads.

GORDON J: But is not the more important point that once the road was closed under the *Forest Management Act*, under section 4:

> A person must not –
>
> . . .
>
> (b) be on or otherwise use –

a forest road . . . that has been closed –

MR O'FARRELL: Yes, your Honour.

GORDON J: It is not just the fact of the closure; it is the consequence that follows from its closure.

MR O'FARRELL: Correct, your Honour.

BELL J: That consequence would flow to anyone entering upon the forest road. We are looking here at a power under an Act which would not have empowered a police officer to give a direction to a party of hunters and fishers but did give a power to issue a direction by reason of a view that what was involved here was political protest activity.

MR O'FARRELL: Yes, your Honour, I accept that that would be the effect of it.

Now, your Honours, the only other thing I wanted to say about the *Forest Management Act* was my learned friend took the Court this morning to section 36 of the Act. In my submission, that is not relevant to any issue that your Honours may need to consider here. The *Administrative Arrangements Act* is simply a legislative mechanism to allocate all of the Acts that are currently in force in Tasmania to various ministerial portfolios – and that is basically its function – and also to assign different responsibilities to different departments of government. So even the Hydro Corporation Act – and Hydro Tasmania is not an emanation of the Crown, but, of course, that is taken up as part of a ministerial portfolio. Your Honours will not need to resort to section 36.

The only other thing I should say about the Act, your Honours, is that my learned friend, correctly, has said that in our submissions we have made no concession about the construction of the Act with reference to the principle of legality in section 3 of the *Acts Interpretation Act*. Having looked at the submissions of Victoria and New South Wales we, on mature reflection, consider that that is an appropriate construction to be applied.

That is, the phrase "prevents, hinders or obstructs" should be read consistently with the principle of legality and, to the extent it also should be read to restrict those acts or those results to substantial offences against the Act or contraventions.

So if I can then turn to section – sorry, the first proposition in our outline. I am sorry it has taken me so long to get there. We can see the burden for the reasons that I have outlined to Justice Edelman.

GAGELER J: Sorry, can I just test what you have just put?

MR O'FARRELL: Yes.

GAGELER J: Was Dr Brown within the scope of "prevents, hinders or obstructs" when he was walking along the road, on your submission?

MR O'FARRELL: He may have been, your Honour, at a point.

GAGELER J: Can you tell me what he would have to do on your submission to be preventing, hindering or obstructing?

MR O'FARRELL: Your Honour, he walked along a forestry road. He passed through signs which told him he should not go there, that they had been closed. He walked for some distance and there was machinery operating, probably 100 to 150 metres away from him, and upon his presence being observed there, the machinery stopped, effectively, and there was then, as I understand it, a long wait before the police arrived and during that period the forestry operations were brought to a halt because – well, they were brought to a halt, your Honour. There is no other fact which will assist the Court about that.

GAGELER J: Did his standing 100 metres away from the machinery constitute preventing, hindering or obstructing forestry operations? That is really what – I am just trying to understand your construction.

MR O'FARRELL: Your Honour, I simply cannot answer that on the facts of the case. The fact of the matter, he was not eventually charged or the charge against him was eventually dropped for other reasons but the point at which the factual inquiry about the effect of his conduct that day has never been reached.

EDELMAN J: The only basis upon which it could be said that his conduct was preventing, hindering or obstructing would be an inference that the presence of a person in an area after roads had been closed was such that it would necessarily or substantially cause the operations to cease. That is the only possible basis upon which

MR O'FARRELL: Correct, that is the only possible basis, Justice Edelman, but that question of fact was never arrived at.

GAGELER J: So to "prevent, hinder or obstruct" you have to do something that necessarily causes the relevant operation to cease, is that what you are saying?

MR O'FARRELL: Well, no, "prevent" yes, "hinder" no, the operation might continue in some lesser way having been disabled, as it were, or "obstruct", that should be given its ordinary meaning. If, for example, Dr Brown had put himself in front of the machinery while it was operating he would have obstructed it.

BELL J: If you give it its ordinary meaning, it may be you are not giving it a meaning consistent with the submission made a few moments ago that you adopt the approach taken in, for example, the Victorian submissions, which, at paragraph 35 identify a serious interference with the carrying out of business activity as the purpose of the Act, and it is in that context, as I read the Victorian submissions, that it is contended that one reads down "preventing, hindering or obstructing". It may be that you do not get that out of the Act, but I just do not know quite where your submission takes you. If it is the ordinary meaning of "obstruct", what is your concession?

MR O'FARRELL: Well, your Honour, the concession is, for the purpose of assisting the Court to construe the Act, given its consequences in a narrow way or a way which effectively permits it to operate on the basis which I would submit it was intended to operate, and I would make that submission consistently with the submission I make about the mens rea point.

> In order for this Act to get up and work, you actually have to have somebody there who is not only doing the act but they are expecting some consequence or you could infer that they were expecting some consequence – that is, that they were preventing or obstructing. So it is

no minor transgressions, your Honour, that the Act is thinking about or contemplating. It actually has a purpose behind it.

KEANE J: Why is not that provision sufficient control over the scope of the operation of the Act, so that you do not need to have resort to words that are not there, like "serious" or "substantial"? In terms of its practical operation, that is the control, is it not?

MR O'FARRELL: Yes, your Honour, I would agree with that. We have made that point in our written submissions.

NETTLE J: But it would work then, too, if the test is that it must be a substantial hindrance, then in order to convict you would have to have circumstances which ought make someone reasonably appreciate that it would constitute a substantial interference or hindrance, would you not?

MR O'FARRELL: Yes.

NETTLE J: So you still come back to the question of whether or not the accused has to realise it is just a hindrance or whether he has to realise it is a substantial hindrance, do you not?

MR O'FARRELL: Yes, your Honour.

NETTLE J: And you are going now with substantial hindrance, are you not, as opposed to any hindrance, or are you not?

MR O'FARRELL: I am going, effectively, firstly, with a deliberate hindrance – that is, they are actually prosecuting a hindrance or they are doing acts which anybody ought reasonably be able to work out are going to have the requisite effect.

NETTLE J: I mean, for example, an accused might reasonably appreciate that standing 150 or 100 yards away from timberfelling operations may hinder it but not substantially so, for example.

MR O'FARRELL: That would be correct, your Honour, although the question might be different were it to be shown that the relevant accused was well aware that Forestry Tasmania had a selfimposed restriction on it, and I say this hypothetically, that within, say, a radius of 150 metres it would not operate machinery in the presence of other people in the vicinity.

NETTLE J: Yes.

MR O'FARRELL: But if they were there with that knowledge that that would have that affect, then there would be question of fact as to whether or not they have done an act for that purpose and with that effect.

NETTLE J: Thank you.

MR O'FARRELL: Having said all that, your Honours, I will embark on the next bit with a bit of trepidation. If I can just address under the heading of burden make some submissions about the extent of the burden which will become relevant later on in the argument. Your Honour, our submission is that the operation of the Act is triggered in limited circumstances. Now, we put this apart from any consideration of the general law relating to trespass. We simply say that this is how the Act works.

> The protester has to be a person engaging in protest activity and I have outlined to your Honours the two conditions which basically have to be satisfied in respect of each contravention which are classic actus reus and mens rea considerations. So, the target of this Act goes to what I would submit is a relatively small number of people who want to carry out protest on business premises or within a business access area with a particular purpose – that is, they set out or they ought to be able to work it out that in doing what they are doing they will disrupt lawful activities. We say it is a strong theme in this Act that the only disruption hat can possibly occur is the disruption of a lawful activity.

BELL J: But the Act is not aimed at protecting business operators in the exercise of their lawful activities from any conduct by any member of the public that happens to "prevent", "obstruct" or whatever the other word is

NETTLE J: "Hinder".

BELL J: the activity. So the hunters and fishers are unaffected by it.

MR O'FARRELL: It is a very good example, your Honour, but we would also submit that it does not necessarily, and my learned friend put it this morning that it is a necessary condition of the Act that it will target political communication, and we submit not. It is not a necessary condition. The only necessary condition is that it has the requisite effect on business activity.

We agree with our learned friends that in the majority of cases this Act will come into operation in the case of political protest activity. We do not shrink from that. But you can imagine circumstances in which it might operate in a social context devoid of any political considerations whatsoever.

If I can give your Honours an example, if you will bear with me for a minute: there was a report in the local newspaper a little time ago relating to a lady who lived next to a vineyard. You will notice in the business premises provision it relates to viticulture. She was outraged at the vineyard setting off a birdscare gun at 5.30 or whenever the sun came up every morning in order to scare birds away from the grapes.

So without any element of political polemic about the debate, she took it to the media, and that is as far as I know about it. But taking that example a little further, she may garner community support for her plight. She might say to her neighbours, "I cannot put up with it; what about you?" and they might stage a small protest rally at the vineyard gate, for example, and during that they might impede the vineyard owner from accessing the vineyard or leaving it during his ordinary working day. Those are circumstances which might arise without any politician or any other political person becoming in the least bit interested in the argument.

They hold a social opinion or belief that this person should not use the birdscare gun at 5.30 every morning and they would equally be caught by the Act without any political element involved at all. The purpose remains the same. The purpose is the disruption of business activity. So it is capable of operating, albeit in confined circumstances, I admit, but without any necessary infringement of the implied burden. So we say that is how to discover the purpose of the Act. It is a purpose which relates to the protection of business activity.

Now, we have taken your Honours to the definition sections; we have taken your Honours particularly to what I submit is a meagre allowance for a business access area – only so much of an area of land that is reasonably necessary – so it does not constitute the whole of a roadway. People can just as easily protest on the side of the road, entering a forestry coupe without necessarily obstructing it. They can protest on a footpath in order to make a point about a shop that sells goods that they think should not be sold, provided they do not stop

people coming in and out of the shop to have the effect of preventing, hindering or obstructing the business activity in it.

GAGELER J: That is physical obstruction of customers, is it? Are you limited to that?

MR O'FARRELL: It could be that obstruction

GAGELER J: I suppose we are just going back to the construction point that I just do not know where you are at.

MR O'FARRELL: I am sorry, your Honour. It could be the customers. It could be the business occupier, your Honour. It could be anyone who requires access or egress to the

GAGELER J: But it is physical obstruction?

MR O'FARRELL: Yes, your Honour.

GAGELER J: Thank you.

MR O'FARRELL: So, your Honour, we submit that even in its own terms, the burden of the Act is likely to be slight. It only applies in very limited circumstances and for a very limited purpose. Can we make some submissions, your Honours, about our paragraph 3 – sorry, our paragraph 2. The implied freedom is of course not a personal right. I will not take your Honours to the authorities about that but can I say, your Honours – or draw your Honours' attention to a couple of things? Firstly, paragraphs 57 and 58 of the plaintiff's outline – sorry, written submissions:

> The importance of Tasmania's asserted legitimate ends must be weighed against the fact that the communication at which the Act is directed in the present context is a fundamentally important mode of communication about environmental matters concerning Tasmania's forests.

I will add to that, your Honours. We do not say that environmental matters concerning Tasmania's forests are not political matters. We agree that they are.

> Dr Brown's experience is that "onsite protests, and broadcasting images of parts of the environment at risk of destruction, are the primary means of bringing environmental issues to the attention of the public and politicians", and "the wider public is more likely to take an interest in an environmental issue when it can see the environment sought to be protected" –

and it goes on. We submit, your Honours - and, indeed, from our learned friend's submissions this morning - that there is some sort of freestanding entitlement to be on business premises, particularly forestry land, permanent timber production land, is merely - and really, shorn of all other rhetoric about it - the assertion of a personal right. It is to say that Dr Brown considers himself entitled to be on land from which, on any view of it, he has been excluded. He ought to have known that he was excluded because he walked through a chain and two steel posts with a sign on it saying "These roads have been closed".

> So the whole facts of this case suggest that there is effectively an entitlement that Dr Brown considers he has and certainly also the other plaintiff, Ms Hoyt, in similar circumstances, must have considered that she had, to go to the land to see what was happening on it.

> We submit that the implied freedom does not support a particular way or, effectively, the selection of the way that a person wants to voice their protest and that is plain from the cases that we have referred to under 2, particularly *Tajjour* and I think *Unions New South Wales.* So we make the submission that, effectively, in the absence of any right to be there, right of general law, as per Justice McHugh in *Levy*, then it must be simply an assertion that there is a personal right inhering in Dr Brown to be on that land.

> Your Honours, can we then turn to legitimate purpose. We have dealt with this at paragraphs 49 to 51 of our written submissions. I do not think I want to say too much more about that.

BELL J: What do you say to the submission that Mr Merkel makes, that the width of the powers conferred on the police, in particular the provision in relation to the direction with the automatic fourday exclusion consequence, points to a purpose other than that which you identify?

MR O'FARRELL: Your Honour, I am not sure that we can say much more than we have said in our written submissions.

BELL J: Where do you deal with it?

MR O'FARRELL: I will pick that up for your Honour. It is at page 8, your Honour, where we say something about this. Paragraph 42 is the one that particularly relates to it. We say, your Honour, that one should look at the fourday exclusion in the context of the Act and what would have had to have happened in order for that exclusion to bite.

You start with a proposition under 6(1), as we have identified, that the person is there with some element of knowledge of the effect that they are going to have on the activity. The police officer comes and tells them under section 11(2), with or without a requirement also under section 11(6), that they should leave and, as we have said at paragraph 40 of our written submissions, they then have an election - they can decide to stay or they can leave.

At least they know at that point that the police officer takes the view or has formed the reasonable belief – and we will come to the reasonable belief in due course – that, firstly, they have been hindering, obstructing or preventing and, secondly, that they knew or ought to have known that that is the case. If they were ever in any doubt that they reasonably ought to have known, then they reasonably ought to know at that stage that at least the police officer has identified, has formed a reasonable belief that that is what has occurred.

So when one gets to section 8(1)b), we accept it provides for a fourday exclusion of that person in those particular circumstances and the question really is whether that is a legitimate legislative selection for the Parliament. In order to relieve the business occupier of this person's presence for some period, it will be at least four days before the person will return.

Now, we say, that is not an unreasonable restriction in the circumstances and it has to be looked at in the circumstances. We accept that it is a restriction but it is not unreasonable and we say it is legitimate legislative purpose. We also submit that if, contrary to the plaintiff's submissions that lawful excuse will never be available under this Act, it is a provision – well, there is a defence provision in section 8(2) which provides a transgressor with a defence of lawful excuse. Say, if they have a lawful excuse to return to the land, then that would be available to them which ameliorates its effect.

GAGELER J: Would it be a lawful excuse to return to the land with no intention of injuring or obstructing or carrying out the activity but to protest otherwise?

MR O'FARRELL: Your Honour, as your Honour will know, the question of lawful excuse is a fairly broad and malleable concept. In my submission, it would depend on the circumstances but certainly one would need to be, at the very least, on the land with no particular intention to disrupt any further business activities. They might, for example – they might return to the business access area and stand in the business access area holding a placard and then immediately upon seeing a vehicle proposing to enter, move to the footpath. That may not be objectionable in the circumstances.

My learned friend, in answer, I think, to a question by Justice Bell this morning, referred you to those parts of the special case book which related to prosecutions and the like. We submit that that is at least some evidence of justification. We submit that this is really to the point where the judicial and legislative powers meet.

From that evidence, and from any number of other imponderables that parliamentarians must take into account in considering what legislative policies they will take forward and legislate about, they are entitled to make those selections. This is a broad, general proposition. Of course, they are not entitled to do so where the burden is too great, but that is some evidence upon which they might say, "Well, we think at that time we brought in some legislation for this".

My learned friend has quite correctly told your Honours that this legislation was brought in shortly after the present government was elected to office and he provided your Honours with extracts from a fact sheet which, just to clear that point up

KIEFEL CJ: We are guessing the status of the fact sheet.

MR O'FARRELL: We would agree, your Honours, that it is capable of constituting extrinsic material for the purpose of 8B(3)(e) of the *Acts Interpretation Act* 1931. It is certainly made available to Members of Parliament for the purpose of debating it.

KIEFEL CJ: Is it a public document?

MR O'FARRELL: It is published on the parliamentary website, your Honour. In the second reading speech, which I think your Honours will have – I do not want to spend too much time on this – you will see at page 2 of the second reading speech that policy objectives are referred to.

GAGELER J: Is this a transcript?

MR O'FARRELL: Your Honour, it is. It is a transcript, again, published on the parliamentary website. I am not entirely sure of the provenance, but I think that is where it would have been found because they are routinely published in this form on the website. Yes, your Honour.

GAGELER J: Both of them?

MR O'FARRELL: Yes.

KIEFEL CJ: Are they the same?

NETTLE J: One is the Council; one is the Assembly.

MR O'FARRELL: I am sorry. I am reading from the one in the House. The relevant one we need is the one in the Council.

KIEFEL CJ: You are referring to the one in the House, not the Council? Perhaps you could clarify that overnight. Mr Solicitor, it would I think be of assistance to the Justices if you were able to prepare a note in relation to the questions of access that were raised and discussed earlier.

MR O'FARRELL: Certainly, your Honour.

KIEFEL CJ: And have it available before Court commences tomorrow morning – if you could make that available to the Court.

MR O'FARRELL: Certainly, your Honour.

KIEFEL CJ: The Court will adjourn.

AT 4.15 PM THE MATTER WAS ADJOURNED UNTIL WEDNESDAY, 3 MAY 2017