

Opinion

I have been asked to advise on whether the following scenarios would attract criminal liability under the ***Workplaces (Protection from Protesters) Bill 2014***:

- **Salamanca Protests** Protesters at the 'Salamanca Protest' by the LGBTI community in 1988 having delayed the public from accessing stalls at the Salamanca Market
- **Fracking** A farmer denied access to his or her land to the holder of an exploration or mining permit that permitted them to engage in hydraulic fracturing
- **Supertrawler** Where protest vessels obstructed the entry or exit of a supertrawler to a port, docking or refuelling facility - If people protested at the docks and obstructed the refuelling or provisioning of a supertrawler
- **Pensioner's Rally** Where aged and disability pensioners who were involved in the protest march and rally against the CW budget on 25 June 2014 delayed the passage of a vehicle associated with a business
- **Industrial Action** Whether miners who create a picket line due to an unsafe workplace which delayed people coming to work at a mine

The Relevant Law

Preliminary Matters

When a court construes a statute the court's object is to ascertain and give effect to the (objective)¹ will of Parliament. As Gleeson CJ stated in *Wilson v Anderson* 'Parliament manifests its intention by the use of language and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will'.² Further, all statutory interpretation is text based. That is, the words of the text must be understood in their context, they do not exist in limbo.³

The modern approach to statutory interpretation was outlined by Hope JA in ***Kingston v Keprose Pty Ltd (No 3) (1987) 11 NSWLR 404*** at 423-424 (authorities omitted):

A purposive and not a literal approach is the method of statutory construction which now prevails. In most cases the grammatical meaning of a provision will give effect to the purpose of the legislation. A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act. The *Acts Interpretation Act 1901* (Cth), s 15AA, and the *Interpretation Act 1987* (NSW), s 33, both require this approach to statutory construction...

... Once the object or purpose of the legislation is delineated, the duty of the Court is to give effect to it in so far as, by addition or omission or clarification, the relevant provision is capable of achieving that purpose or object.⁴

¹ What is involved is the search for objective intention of Parliament not the subjective intention of Ministers or Parliamentarians: per McHugh J in *Eastman v the Queen* (2000) at 203 CLR 1 at 146-147

² *Wilson v Anderson* (2002) 213 CLR 401 per Gleeson CJ at [8]; See also *Singh v Commonwealth of Australia* (2004) 78 ALJR 1383 at [19]

³ See eg *Morris v Beardmore* (1981) AC 446 at 459 per Lord Edmond-Davies.

⁴ That the legal meaning will usually correspond with the grammatical meaning was reinforced in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at para 78 as was the fact that 'the context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'

In Tasmania the relevant statutory enactment is the *Acts Interpretation Act 1931*. S8A provides:

- (1) In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.
- (2) Subsection (1) applies whether or not the purpose or object is expressly stated in the Act.

Section 8B(1) makes clear that resort to extrinsic material is only necessary where:

- (1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation –
 - (a) if the provision is ambiguous or obscure, to provide an interpretation of it; or
 - (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, to provide an interpretation that avoids such a result; or
 - (c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision.
- (2) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be given to –
 - (a) the desirability of a provision being interpreted as having its ordinary meaning; and
 - (b) the undesirability of prolonging legal or other proceedings without compensating advantage; and
 - (c) other relevant matters.

Ordinary meaning means the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose or object of the Act.

Such material may include explanatory memoranda, second reading speeches, parliamentary committee reports and records of Parliamentary debates: s8B(3).

What is the stated purpose of the Bill?

The Bill's purpose is stated as follows:

An Act to ensure that protesters do not damage business premises or business-related objects or prevent, impede or obstruct the carrying out of business activities on business premises, and for related purposes.

Excerpts from the Second Reading Speech (before the lower house) on 26 June 2014 state:

The Bill regulates protest activity to ensure when the protesting starts to unduly interfere, interrupt, obstruct or hinder the ability of business to develop operative and productive, job creating ventures and for workers to go to work and do their jobs safely and productively then the protest action is going too far...

..... The Bill is about sending a strong message to disruptive and irresponsible extremist protest groups that protest action of that kind is not acceptable to the broader Tasmanian community.'

Who is a protester for the purposes of the Bill?

A protester is defined in Clause 4 of the Bill.

Clause 4 (1) states:

For the purposes of this Act, a person is a protester if the person is **engaging in a protest activity**.

Clause 4(2) specifies *what* constitutes a protest activity for the purposes of the Act:

For the purposes of this Act, **a protest activity is an activity** that

- (a) takes place on business premises, a business access area in relation to business premises, a road, a footpath or a public place **and**
- (b) is –
 - (i) in furtherance of; or
 - (ii) for the purposes of promoting awareness or support for –
an opinion or belief, in respect of a political, environmental, social, cultural or economic issue.

A business access area, in relation to business premises is defined in Section 3 of the Bill:

- . (a) means so much of an area of land (including but not limited to any road, footpath or public place), that is outside the business premises, as is reasonably necessary to enable access to an entrance to, or to an exit from, the business premises; and
- . (b) in relation to business premises consisting of a vessel or aircraft, includes a mooring, airport, and landing strip, at which the vessel or aircraft is, or is to be, stationed and so much of an area of land as is reasonably necessary to enable access to the mooring or airport;

Business Premises are also defined (see below)

A '**public place**' is defined in the *Acts Interpretation Act (1931)*:

A public place shall mean any place to which, at the relevant time, the public have access, whether on payment of money for admission thereto or otherwise;

The Bill does not define what constitutes a belief or opinion or an environmental, social, cultural or economic or political issue.

The Oxford Dictionary Online⁵ provides the following meanings:

Economic	Relating to economics or the economy
Social	Relating to society or its organization
Cultural	Relating to the ideas, customs, and social behaviour of a society:
Environmental	Relating to the natural world and the impact of human activity on its condition
Belief	An acceptance that something exists or is true, especially one without proof; a belief has also been held to include a religious conviction

⁵ Oxford University Press states that the Oxford Dictionary Online focuses on current language and it's practical usage; the *OED* shows how words and meanings have changed over time.

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A view or judgment formed about something, not necessarily based on fact or knowledge

The Butterworths Australian Legal Dictionary, 1997 also provides some insights:

A belief is an inclination of the mind towards assenting to, rather than rejecting a proposition based on facts that are sufficient to create that inclination of the mind in a reasonable person: *George v Rocket* (1990) 170 CLR 104. Belief may be something less than knowledge, as a person can hold a belief while having a degree of doubt about the matter, but it is more than mere suspicion: *R v Raad* [1983] 3 NSWLR 346 A political belief is a belief that bears on government. A belief is not political if it has no bearing on the form, role, structure, feature, purpose, obligation, duties or some aspect of government: *CPS Management Pty Ltd v Equal Opportunity Board* [1991] 2 VR 107.

Clause 4(3) specifies *when* a person is engaging in protest activity:

For the purposes of this Act, **a person is engaging in a protest activity** if the person participates, other than as a bystander, in a demonstration, parade, an event or a collective activity, that is a protest activity.

Clause 4(4)

For the purposes of this Act, an act done by a person is taken to have been done by the person while the person is engaging in a protest activity, even if (a) the act is unlawful or (b) the act itself is not a protest activity if the act occurs in the course of the person otherwise engaging in a protest activity.

It is submitted that the effect of this clause is that all acts (whether lawful or not, or whether protest activities as defined) that are done in the course of engaging in protest activity are subject to the relevant offence provisions.

Clause 4(5) states:

Nothing in subsection (3) or (4) is taken to limit the generality of subsection (1).

The manner of drafting this clause has the effect that Clause 4(3) is illustrative and does not supplant the general proposition stated in Clause 4(1). In effect, Cl 4(3) provides examples of the kinds of activities that occur when a person is engaging in a protest activity, but there may be other kinds.

The phrase 'collective activities' appears only in the *Industrial Relations (Commonwealth Powers) Act 2009* (Tas), but is not defined. In *Smith v Visser* [2001] TASSC 40 Crawford J at [24] made reference to the 'collective activities' of a number of protesters having contributed to delays but did not elaborate.

Reading the statute in context (by reference to the words with which it is associated) it is likely that a 'collective activity' is an activity done by people in a group. Whether this could extend to an activity carried out by one person on behalf of the group is a live issue given the effect of Cl 4(5) and the scope and purpose of the statute.

When is a person not taken to be engaging in a protest activity for the purposes of the Act?

A person is not to be taken to be engaging in a protest activity for the purposes of the Act in the situations outlined in Clause 4 of the Bill in subclauses (6)-(9).

Where a person is engaging in protest activity (as defined) in relation to business premises (or part thereof) or a business access area, they are not taken to be engaging in a protest activity where

(a) the business occupier consents – Cl 4(6)

For the purposes of this Act, a person is not to be taken to be engaging in a protest activity in relation to business premises, a part of business premises, or a business access area in relation to business premises, if the person has the consent, whether express or implied, of a business occupier in relation to the business premises –

- a. (a) to be on the premises, part or area; and
- b. (b) to engage in the protest activity on the premises, part or area.

(b) The person is a business operator in relation to the business premises or is a business worker at the premises who has consent of the business operator – Cl 4(7)

For the purposes of this Act, a person is not to be taken to be engaging in a protest activity in relation to business premises, or a business access area in relation to business premises, if the person is –

- a. (a) a business operator in relation to the business premises; or
- b. (b) a business worker in relation to the business premises who has the express or implied consent of a business operator in relation to the premises to engage in the protest activity.

(c) The person is undertaking protected industrial action or a State service employee is participating in lawful industrial action⁶:

Clause 4(8)

For the purposes of this Act, a person is not to be taken to be engaging in a protest activity on business premises, or a business access area in relation to business premises, if the protest activity is – **protected industrial action** within the meaning of the **Fair Work Act 2009** of the Commonwealth; or part of lawful industrial action undertaken by a State Service officer or State Service employee.

(d) The activity is within a class of activities prescribed by Regulations not to be protest activities:

Clause 4(9)

For the purposes of this Act, a person is not to be taken to be engaging in a protest activity if the activity is within a class of activities prescribed not to be protest activities for the purposes of this subsection.⁷

Bystanders

Note also the effect of Cl 4(3) - a bystander to a protest activity is not taken to be engaging in a protest activity.

What constitutes business premises and business access areas in relation to business premises for the purposes of the Bill?

The Bill provides numerous definitions in regard to businesses - (business access area, business activity, business occupier, business operator, business premises, business-related object and business worker) - see clause 3.

⁶ The meaning of this subclause is discussed in further detail in the specific scenario involving a strike and picketing by miners.

⁷ Obviously no current class exists.

What constitutes business premises for the purposes of the Bill is set out in clauses 5(1) and 5(2):

- (a) Premises⁸ on which –
- . (i) mining; or
 - . (ii) mining operations; or
 - . (iii) exploration for minerals –
 - . within the meaning of the Mineral Resources Development Act 1995, is or are being carried out or is or are authorised under an Act to be carried out; and
- (b) premises that are forestry land⁹; and
- . (c) premises used for agriculture, horticulture, viticulture, aquaculture, commercial food production or commercial food packaging, or as an abattoir, or for any associated purposes; and
 - . (d) premises used for manufacturing, building, or construction, for the purposes of a business activity; and
 - . (e) premises used as a shop, market, warehouse or professional offices or for the sale of food or drink; and
 - . (f) premises used for the purposes of the administration or management of the conduct of business activities; and
 - . (g) premises occupied by a government business enterprise; and
 - . (h) premises that are used as, or intended to be used as, business premises, within the meaning of subsection (2); and
 - . (i) a part, of residential premises, that is used by a resident of the premises for the purposes of a business activity and at which customers or clients periodically attend for the purposes of receiving goods or services from the resident; and
 - . (j) a vehicle, vessel, aircraft, or other mobile structure, used for the purposes of a business activity; and
 - . (k) premises used for purposes ancillary to the carrying out of a business activity on business premises; and
 - . (l) any prescribed place, or any place that is within a prescribed class of places, that is occupied for purposes related to the carrying out of a business activity.
- (2) Premises are used as, or intended to be used as, business premises for the purposes of paragraph (h) of the definition of business premises in subsection (1) if –
- . (a) the premises are ordinarily used as business premises; or
 - . (b) the premises are designed or intended for use as business premises and are owned, leased, or occupied, for use as business premises; or

⁸ **Premises** are defined in clause 3 of the Bill – a building, an area of land, a building floating on any waters on an area of land and any other place, or object on a place that is within a prescribed class of places.

⁹ See clause 3 of the Bill

(c) the premises consist of premises (including but not limited to a road, public place or footpath or an intended road, public place or footpath) on which works are, or, but for persons engaging in a protest activity, would be, lawfully being carried out.

[Works are defined in clause 3 of the Bill – to include

- (a) development and
- (b) repair or maintenance, other than repairs or maintenance that are carried out by a person other than for profit and
- (c) actions on a site of works, preliminary to the carrying out of works on the site of works, including but not limited to including
 - (i) works referred to in (a) or (b)
 - (ii) mapping, surveying, testing or designing, and
 - (iii) any works that are prescribed and
- (d) all prescribed works.]

Clauses 5(3) and 5(4) specify what are not business premises for the purpose of the Bill

(3) For the purposes of this Act, a public road, public footpath or a public place is not to be taken to be business premises UNLESS –

- (a) subsection (2)(c) applies in relation to the road, footpath or place; or
- (b) it–
 - (i) is being used as a market or a place at or from which goods are sold or traded or as a site for an event for which a person is required to pay a fee to attend; and
 - (ii) is not established for the purposes of a protest activity.

(4) The following premises are not to be taken to be business premises for the purpose of this Act, except in relation to a part, of such premises, that consists of premises to which subsection (2)(c) applies:

- (a) a hospital that is owned, leased or occupied by, or on behalf of, a government entity;
- (b) a day-procedure centre, a private hospital, or a residential care service, each within the meaning of the Health Service Establishments Act 2006;
- (c) a prison or detention centre;
- (d) a primary school, high school or tertiary institution;
- (e) premises occupied by a charitable, volunteer or religious organisation, except in so far as the premises are used –
 - (i) as a shop; or
 - (ii) as a warehouse for the storage of goods for sale;
- (f) any premises that are a member of a class of premises that is prescribed for the

purposes of this paragraph

What are the offences created by the Bill?

1. Clause 6(6) of the Bill provides that 'a person commits an offence if he or she contravenes subsection (1), (2), (4), (3) or (5)'.

Clause and Subclause	Prohibited Act	Mental Element	Penalty
6(1)	<p>Cl 6(1) A protester must not enter business premises, or part of a business premises if</p> <p>(a) entering the business premises or the part or remaining on the premises or part after entry, <i>prevents, hinders or obstructs the carrying out of a business activity</i> on the premises by a business occupier in relation to the premises and (b)</p> <p>Business Activity as defined in Cl 3 of the Bill means a lawful activity carried out –</p> <p>(a) for the purposes of profit or in the course of or in relation to carrying out an activity undertaken for the purposes of profit; or</p> <p>(b) by a GBE (govt business enterprise) or</p> <p>(c) as part of an activity carried out on a business premises by a business occupier in relation to the premises or ancillary to, or connected with such an activity; or</p> <p>(d) for a prescribed purpose that is related to the carrying out of an activity to which para (a) (b) or (c) relates – but does not include an activity that is prescribed to not be a business activity for the purposes of this definition.</p>	(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	<p>Where an infringement notice issued = see Cl 16(1)</p> <p>(a) in case of body corporate – fine \$10K or</p> <p>(b) individual- fine \$2K</p> <p>Cl 19 (1)</p> <p>Where a court convicts a body corporate – the court must impose a penalty not < \$50K and not > \$100K ; an individual (and (2)(b) does not apply¹⁰ must impose indiv – 19(2)(a) no < \$5K and not > \$10K</p> <p>If it is a further offence judge <u>must</u> impose in respect of the further offence a</p>

¹⁰ That is the offence is not a further offence

Clause and Subclause	Prohibited Act	Mental Element	Penalty
			term of imprisonment of not < 3 m and not > 2 y: CI 19(2)(b) [the same applies for (2), (3), (4)and (5)]
6(2)	<p>A protester must not do an act on business premises, or on a business access area in relation to business premises if –(a) the act prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier in relation to the premises and (b)</p> <p>NOTE CI 6(9) but that it does not limit the generality of this section (discussed below).</p>	(b) the protester knows, or ought reasonably to be expected to know, that the act is likely to prevent hinder or obstruct the carrying out of a business activity on the premises by a business occupier in relation to the premises.	As above
6(3)	<p>A protester must not do an act that prevents hinders or obstructs access by a business occupier in relation to premises, to an entrance to, or to an exit from –</p> <p>(a) business premises: or (b) a business access area in relation to premises if</p>	The protester knows or ought reasonably be expected to know, that the act is likely to prevent, hinder or obstruct such access.	As above
6(4)	<p>A person must not do an act on a road, footpath, public place, or <i>another area of land</i>¹¹ if</p> <p>(a) the act is done - (i) in furtherance of; or</p> <p>(ii) for the purposes of promoting awareness of or support for -</p> <p>an opinion or belief in respect of a political, environment, social, cultural or economic issue; and</p> <p>(b) as a result of the act the movement of a vessel, vehicle, or aircraft used by a business occupier is prevented, hindered or obstructed: and</p>	(c) the person knows, or ought reasonably be expected to know that the act is likely to prevent, hinder or obstruct the movement of that particular vehicle, vessel or aircraft or other vehicles, vessels or aircraft of a business occupier in relation to particular business premises.	As above
6(5)	<p>A protester must not – (a) remain on business premises after having been directed by a police officer under section 12 to leave the</p>		As above

¹¹ The Bill defines an 'area of land' to include any waters on the area of land – see clause 3 of the Bill.

Clause and Subclause	Prohibited Act	Mental Element	Penalty
	<pre> premises; or (b) enter business premises within 4 days after having been directed by a police officer under section 12 – (i) to leave the premises; or (ii) to leave a business access area in relation to the business premises </pre>		

The phrase '**ought reasonably to be expected to know**' is opaque. In Tasmania three acts use this phrase¹²:

- (a) *Land Use and Planning Approvals Act 1993* (s80F)
- (b) *Plastic Shopping Bags Ban Act 2013* (s4(2))
- (c) *Workers Rehabilitation and Compensation Act 1988* (s143 J)

Unfortunately there is no case law as to how this is interpreted. Although it is a phrase often used in legislation in the Northern Territory largely in relation to environmental offences¹³ and in South Australia in the *South Australian Public Health Act 2011*. There is also dearth of case law in those jurisdictions as to what factors, circumstances or individual characteristics might be relevant in assessing what a person 'ought reasonably be expected to know'.

Further there are offences for which no mens rea has been specified. It is not clear whether these offences are strict liability or absolute liability offences, or whether subjective mens rea would apply.

When will an act on business premises (or on a related business access area) 'prevent, hinder or obstruct' the carrying out of a business activity on those premises?

Relevant terms

A business occupier in relation to business premises means¹⁴

- (a) business operator in relation to the premises and
- (b) business worker in relation to the business premises

A business operator, in relation to business premises means all of the following persons and entities in relation to the premises:

¹² They use 'ought reasonably be expected' as opposed to 'ought reasonably to be expected'.
¹³ *Marine Pollution Act 1999* (NT); *Energy Pipeline Act 1982* (NT); *Meat Industries Act 1996* (NT); *Waste Management and Control Act 1998* (NT); *Private Security Act 1995* (NT)
¹⁴ The use of the word *means* (as opposed to *includes*) means it is an exhaustive complete definition. Where it says includes it does not limit the definition from including other things.

- (a) owner, lessee, or lawful occupier including a government entity that is an owner, lessee or lawful occupier, of the premises
- (b) a government entity in which the premises are vested or that has management or control of the premises
- (c) a person who carries out a business activity on the premises under a contract (other than a contract of service) arrangement or agreement with a person who in relation to the premises is a business operator
- (d) a person who under a permit licence or another authority issued or granted under an Act is entitled to carry out a business activity on the premises
- (e) a person who is a member of a prescribed class of person who are concerned in the management and carrying out of a business activity and who carries out a business activity on the premises

A business related object in relation to business premises means an object that belongs to, or is in the possession of, or is to be used by a business occupier in relation to the business premises.

A business worker – in relation to business premises means

- (a) a person who is under a contract of service, employed by a business operator in relation to the premises and
- (b) a person who is a member, in relation to the premises, of a prescribed class of persons who carry out business activities in relation to the premises.

Clause 6(9) provides

Without limiting the generality of subsection (2), an act on business premises, or a business access area in relation to business premises, prevents, hinders or obstructs the carrying out of a business activity on the business premises by a business occupier in relation to the premises if the act

(a) prevents, hinders or obstructs the use, by a business occupier (operator or worker) in relation to the business premises, of a business-related object on the business premises; or

(b) causes a risk to the safety of a business occupier in relation to the business premises.

The section has been drafted in such a way that a protester (as defined for the purposes of the Act) is prohibited from doing *any act* on business premise or a related access area that 'prevents obstructs hinders' the carry out of a business activity on the premises by the business operator or business workers.

Cl 6(9) thus provides examples of such acts – in effect acts which prevent, hinder or obstruct the use of a business related object (eg a vehicle used for deliveries or machinery or a computer) or those that cause a risk to the safety of the business operator and his employees in relation to those premises (such as a person chaining themselves to a tree and workers having to compromise the manner in which they normally perform their work).

The words 'prevent, hinder or obstruct' appear in Commonwealth and Queensland legislation¹⁵ but there has been no judicial exposition.

The words 'hinder and obstruct' (or 'hindrance and obstruction') have been considered by courts particularly in relation to obstructing or hindering police in the execution of their duties. Recent cases¹⁶ state the sections containing these words they rarely examine their meaning.

¹⁵ Eg *Transport Operations (Road Use Management) Act 1995* (s100); *City of Brisbane Regulation 2012* (s50); *Approved Defence Projects Protection Act 1947* (s4)

¹⁶ For instance those relating to permit holders in the workplace context - see s502 *Fair Work Act 2009*

Irrespective of context, courts presume their previous interpretation of a word or phrase applies if parliament uses the word or phrase again without defining it.¹⁷

Some guidance as to what may constitute 'obstruct and hinder' may be gleaned from *Hayward- Jackson v Walshaw* [2012] WASC 107, a case involving an appeal against conviction for resisting arrest¹⁸ whilst protesting against aboriginal deaths in custody. Heenan J observed that there are many authorities dealing with what constitutes 'obstruction' under comparable legislation, several of which were collected in *Carter's Criminal Law of Queensland* (18th ed) [340.30]:

As to what amounts to obstruction, see *Bastable v Little* [1907] 1 KB 59; *Betts v Stevens* [1910] 1 KB 1 (giving warning); *Pankhurst v Jarvis* (1910) 22 Cox CC 228; *Despard v Wilcox* (1910) 22 Cox CC 258 (refusal to disperse); *Hinchcliffe v Sheldon* [1955] 3 All ER 406 where it was held that "to obstruct" means to do any act which makes it more difficult for the police to carry out their duty. See also *Rice v Connolly* [1966] 1 QB 414; *Green v Moore* [1982] 1 QB 144; *Hills v Ellis* [1983] 1 QB 681; *Lewis v Cox* [1985] 1 QB 509. In *Carmichael v McGowan* [1967] WAR 11 it was held that the ordinary meaning of the word "obstruct" includes hinder, impede, retard and delay¹⁹ and the offence is not confined to physical obstruction. *Rice v Connolly* was explained and distinguished in *Ingleton v Dibble* [1972] 1 QB 480; where it was held that although a refusal to act could not amount to obstruction unless the accused person was under a legal obligation to act in the manner requested by the police officer, there was not a ground for saying that where the obstruction consisted of a positive act it must be unlawful independently of its operation as an obstruction of a police officer.

This approach was adopted in *Cumby v Rhodes* (unreported, WASC, Library No 5367, 29 May 1984) where the Full Court observed that the offending conduct should be such as to make the performance of the police officer's functions more difficult. That case was cited and applied in *Howell v City of Perth* (1984) 56 LGRA 354 at 358 (Brinsden J). Similarly, in *Plunkett v Kroemer* [1934] SASR 124 hindering was established by any obstruction or interference which made the duty of the police officer substantially more difficult in performance. In *Hinchcliffe v Sheldon* [1955] 3 All ER 406 the obligation was expressed in like terms where the court held that obstruction was constituted if it was established that the offender had done any act which made it more difficult for the police to carry out their duty. Some caution about the uncontrolled application of that test was sounded by Owen J in *Arevalo v Fallows* (unreported, WASC Library No 920705, 19 December 1992) where his Honour gave the example that a refusal or failure to answer questions from a police officer would not amount to an offence but to lie deliberately to a police officer so as to prevent him or her obtaining information which the officer had a duty to obtain would be a contravention of s 20 of the former Police Act.

In the Tasmanian case of *Smith v Visser* (referred to above) by 'tree sitting' construction vehicles and equipment could not attend to the construction of the proposed road, in this situation the offender's conduct amounted to 'interference'.

Whilst the legislature has given some examples of the types of acts that 'prevent, hinder and obstruct' it has left open the degree of interference required.

Despite the Minister's subjective intention of targeting extremist groups and those 'unduly interfering' with business activity, is likely that the degree of interference required to commit an offence could amount to nothing more than some positive act; something more than 'passive indifference'. In effect, the degree of interference could be slight. This lack of clarity as to what is required to

¹⁷ Michelle Sanson, Thalia Anthony, David Worsick 'Connecting with Law' (Oxford University Press, 2nd edition, 2010) 328

¹⁸ The relevant legislation, s172(2) of the Criminal Code Western Australia contained a definition of obstruct - 'includes to prevent, to hinder or to resist'.

¹⁹ This formulation is consistent with an unreported Victorian judgment *Stanhill Pty Ltd v Jackson* [2005] VSC 160 at [34] where Morris J held the ordinary meaning of the word 'impede' was 'to retard, obstruction or hinder' but not prevent.

commit the offence may well offend the principal of legality.²⁰

Are there any circumstances where a person forms part of a procession, march or event that they do not commit an offence?

Clause 6(7) provides that 'a person' does not commit an offence against subsection (6) 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 in relation to business premises – at a reasonable speed, once per day.

In effect if a person is part of a procession, march or event that passes business premises or a business access area in relation to those premises at a reasonable speed once in a day that person does not commit an offence.

2. Clause 7 of the Bill creates offences in relation to damage (and threatened damage) to business premises

Cl 7(1)	<p>A protester must not do an act that causes damage to business premises and></p> <p>Damage is defined in clause 3 of the Bill: in relation to business premises or an object, includes to destroy, or the destruction of, the business premises or object.</p> <p>An object includes machinery and a vehicle, vessel, aircraft, or other mobile structure.</p>	The protester knows or ought reasonably to be expected to know, that the act is likely to cause damage to the business premises	<p>Body corporate – a fine not > \$250K</p> <p>Individual – fine not > \$50,000 K or imprisonment for a term not > 5 y, or both</p>
Cl7(2)	<p>A protester must not do an act that causes damage to a business related object that</p> <ul style="list-style-type: none"> (a) is on business premises or (b) is on a business access area in relation to business premises and is being taken to and from the business premises – and> 	the protester knows or ought reasonably be expected to know, that the act is likely to cause damage to such a business related object.	<p>Body corporate – a fine not > \$250K</p> <p>Individual – fine not > \$50,000 K or imprisonment for a term not > 5 y, or both</p>
Cl 7(3)	<p>A person²¹ must not issue a threat of damage in relation to business premises-</p> <ul style="list-style-type: none"> (a) in furtherance of; or (b) for the purposes of promoting awareness of or support for - <p>an opinion or belief in respect of a political, environment, social, cultural or economic issue;</p> <p>[The threat to damage is not limited to</p>		<p>Body corporate – a fine not > \$250K</p> <p>Individual – fine not > \$50,000 K or imprisonment for a term not > 5 y, or both</p>

²⁰ Simply put, the principle of legality requires that laws be clear, ascertainable and non-retrospective . For further reading see James Spigelman AC, The Principle of Legality and the Clear Statement Principle (2005) 79 *Australian Law Journal*, 769

²¹ A threat may not issue from business premises, a business access area, a road a footpath or a public place.

	areas in Cl 4(2)]		
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What constitutes a threat of damage for the purposes of Cl 7(3)?

S7(4) A threat of damages in relation to business premises is a threat to the effect that

(a) damage to a business-related object that is on business premises has been, is being, or is to be, caused by a person; or

(b) damage to a business-related object that –

(i) is on a business access area in relation to business premises; and

(ii) is being taken to or from the business premises –

has been, is being, or is to be, caused by a person; or

(c) the use of a business-related object that is on business premises has been, is being, or is to be, prevented, hindered or obstructed by a person; or

(d) the use of a business-related object that –

(i) is on a business access area in relation to business premises; and

(ii) is being taken to or from the business premises –

has been, is being, or is to be, prevented, hindered or obstructed by a person; or

(e) an act, to which section 6(4) relates, in respect of a business-related object, has been, is being, or is to be, carried out; or

(f) a risk to –

1. (i) the safety on business premises; or

2. (ii) the safety on a business access area in relation to business premises –

of a business occupier in relation to the premises has been, is being, or is to be, caused by a person.

When does an act cause damage to business premises, or a business related object?

Clause 7(6)

Without limiting the generality of subsection (1) or (2)²², an act causes damage to business premises, or to a business-related object, if, as a consequence of the performance of the act, the use of any business-related object by a business occupier in relation to the premises causes, or would be likely to cause –

(a) damage to the business premises, the object or any other business-related object; or

(b) a risk to the safety of a business occupier in relation to the business premises.

²² See discussion re 6(9) same reasoning applies.

3. There are also further offences created pursuant to clauses 8, 9 and 10 of the Bill:

Clause and subclause	Prohibited Acts	Mental Element	Penalty
Cl 8(1)	<p>A person must not –</p> <ul style="list-style-type: none"> . (a) remain on a business access area in relation to business premises after having been directed by a police officer under section 12 to leave the business access area; or . (b) enter a business access area in relation to business premises within 4 days after having been directed by a police officer under section 12 to leave – (i) the business premises; or (ii) a business access area in relation to the business premises; or . (c) remain on an area of land, or enter the area within 4 days, after having been directed by a police officer under section 12 to leave the area of land. 		<p>Where an infringement notice is issued pursuant s16(1)</p> <ul style="list-style-type: none"> (a) in case of body corporate - \$10K or (b) individual - \$2K <p>If matter proceeds to court + conviction:</p> <ul style="list-style-type: none"> . In the case of <ul style="list-style-type: none"> . (a) a bodycorporate, a fine not less than \$10 000 and not more than \$100 000; or . (b) an individual, a fine not less than \$5 000 and not more than \$10 000.
Cl 9(1)	<p>A person must not prevent, hinder or obstruct a police officer from taking action under section 13 [to remove obstructions]</p>		<ul style="list-style-type: none"> . In the case of <ul style="list-style-type: none"> . (a) a bodycorporate, a fine not less than \$10 000 and not more than \$100 000; or . (b) an individual, a fine not less than \$5 000 and not more than \$10 000.
Cl 10(1)	<p>A person [body corporate or individual] must not incite a person to commit an offence against clause 6</p>		<p>In the case of a</p> <ul style="list-style-type: none"> (a) body corporate, a fine not > \$100K or individual = a fine not > \$10K

Clause and subclause	Prohibited Acts	Mental Element	Penalty
Cl 10(2)	A body corporate or an individual must not incite a person to commit an offence against clause 7		In the case of a (a) body corporate, a fine not > \$250K or individual = a fine not > \$50K
Cl 11 (2)	A person to whom a requirement is imposed under clause 11(1) ²³ must not (a) fail or refuse to comply with the requirement; or (b) in response to the requirement state a false name, address, DOB or give false evidence of their identity ²⁴		Fine not > \$2000

Are there any defences available to a protester?

In short the onus is on the defendant to prove they had a lawful excuse for committing the offence.

Specifically,

Clause 6(8) provides: It is a defence to an offence against subsection 6(6) if the defendant proves that he or she had a lawful excuse for committing the offence.

Clause 7(5) provides It is a defence to an offence against subsection 7(1) or 7(2) if the defendant proves that he or she had a lawful excuse for committing the offence.

Clause 8(2) provides It is a defence to an offence against subsection 8(1) if the defendant proves that he or she had a lawful excuse for committing the offence.

Clause 9(2) provides It is a defence to an offence against subsection 9(1) if the defendant proves that he or she had a lawful excuse for committing the offence.

Clause 10(3) provides It is a defence to an offence against subsection 10(1) and 10(2) if the defendant proves that he or she had a lawful excuse for committing the offence.

Clause 10(4) provides It is a defence to an offence against subclause (1) and (2) if the inciting person can prove that the person they incited to commit the offence also has a defence against that offence under the Act (paraphrased)

²³ Subsection (1) allows a police officer who reasonably believes that a person has committed, is committing or is about to commit, an offence against of the provision of this Act may require the person to state the person's name and date of birth and the address where they normally reside and to give the officer any evidence of their identity that they have in their possession.

²⁴ Where an officer reasonably believes a person has failed to provide their correct name, address and DOB the officer may search the person.

Mandatory recording of convictions, mandatory penalties, mandatory prison sentences - is there more?

The specific penalties for each offence under the Act have been tabled above. At present, despite Cl17 being headed 'Certain offences to be indictable', all offences against a provision of this Act appear to be an indictable offence. Hopefully common sense would prevail and only the most serious would be proceeded by way of indictment but offences proceeding by way of indictment do so in the Supreme Court and the provisions of the *Criminal Code Act 1924* will apply procedurally. In effect s7 *Criminal Code Act 1924* (Tasmania) provides:

Except as otherwise provided by the Code or an Act, proceedings in the Supreme Court against any person for a crime shall be initiated by indictment, and shall be prosecuted in accordance with the provisions of the Code relating thereto

Further, a court that finds a person guilty of an offence against a provision of Pt 2 must convict the person of the offence: Cl18.

This has the consequence that if a term of imprisonment exceeding 6 months is imposed then, as this is not considered a 'minor conviction' under the *Annulled Convictions Act 2003* (Tasmania)²⁵ there is no possibility of removal of that conviction from that individual's criminal record. This may have enduring consequences in terms of entry to other jurisdictions and may constrain employment and travel opportunities.

For offences committed against clauses 6(6) and 8(1) the police have discretion as to whether or not to issue an 'on the spot' infringement notice: ²⁶

- . **Cl 16(1)** A police officer may issue and serve on a person an infringement notice if the police officer reasonably believes that the person is committing, or has committed, an offence against section 6(6) or section 8(1).
- . (2) An infringement notice –
 - . (a) is to be in accordance with section 14 of the *Monetary Penalties Enforcement Act 2005*; and
 - . (c) is not to relate to more than one offence.

The penalty is \$2,000: see Cl 16(3)(b).

If the individual elects to have the matter heard in court and he or she is ultimately convicted, an increased fine (of not less than \$5000 and not more than \$10,000) will be imposed: see Cl 19(2)(a); further if he or she is convicted of a *further offence* against clause 6(6) a mandatory term of imprisonment of not less than 3 months and not more than 2 years must be imposed: see Cl 19(2)(b)

In effect Cl 19(2)(b) provides:

²⁵ See ***Annulled Convictions Act 2003 (Tasmania)*** ss 3 (definition of 'minor conviction'), 6 (annulment of convictions for good behaviour), 9 (effect of annulment).

²⁶ There is no infringement notice option for the more serious offences such as causing or threatening to cause damage (Cl 7) or inciting another to commit an offence against clauses 6 and 7 (Cl 10).

A court that convicts an individual of an offence against s6(6) must if the offence is an offence (**a further offence**) *that is committed by the person after the person was convicted by a court for another offence* against section 6(6) impose in respect of the further offence a term of imprisonment of not less than 3 months and not more than 2 years.

This clause would only apply to subsequent offences – ie those *committed after the person was convicted* for another offence or offences and does not apply where offences arise out of the same set of facts and more than one offence has been charged.

What laws govern 'protests' in Tasmania at the present time?

Pursuant to s49AB of the *Police Offences Act 1935 (Tasmania)*

(1) A person must not organise or conduct any of the following activities without a permit if it is to be held, wholly or partly, on a public street:

- (a) a demonstration;
- (b) a fundraising drive;
- (c) a procession;
- (d) a road cycle race;
- (e) a road cycle event.

Penalty:

Fine not exceeding 10 penalty units.

[**A public street for the purposes of the *Police Offences Act*** has the same definition as in the *Traffic Act 1925 (Tasmania)*:

public street means any street, road, lane, thoroughfare, footpath, bridge, or place open to or used by the public, or to which the public have or are permitted to have access, whether on payment of a fee or otherwise;

(2) A permit for this section **may** be issued by a senior police officer and any person may apply in writing for such a permit.

(3) In the case of fundraising –

(a) a permit may only be issued to or in respect of an organisation that is permitted under section 5 of the Collections for Charities Act 2001 to solicit funds or contributions for a charitable purpose; and

(b) the number of fundraising days authorised by permit in any one city or town in any one year is not to exceed, in aggregate, 45 or, if another number of days is prescribed, the prescribed number.

(4) In determining whether or not to grant an application for a permit, a senior police officer may consider –

(a) the safety and convenience of the public; and

(b) the arrangements made for the safety and convenience of participants in the proposed activity; and

(c) such other considerations as appear relevant having regard to the time and nature of the proposed activity and its location or, if applicable, its route.

(5) A permit –

(a) is to be in such form as the senior police officer issuing it determines; and

(b) may be made subject to such conditions as that officer considers necessary or expedient for the safety and convenience of participants and the public, including, if applicable, conditions about public notification, compliance with police directions, marshals and escort vehicles; and

(c) may be made subject to a condition that the organisers of the activity enter into a policy of insurance regarding any deaths, personal injuries or property damage that may arise from the activity; and

(d) must specify the name of the permit holder and the name, or a description, of the activity for which it is issued; and

(e) must specify the location or, if applicable, route of the activity for which it is issued and the date, dates or period when that activity will be held.

(6).....

(7) A permit may be surrendered but is not capable of being amended, renewed or transferred.

(8) The holder of a permit must –

(a) comply with its conditions; and (b) immediately produce it to any police officer who demands to see it.

Penalty: Fine not exceeding 10 penalty units

Are there any laws already in place that would protect Tasmanian businesses?

Several provisions of the ***Police Offences Act 1935 (Tasmania)*** and other Acts are already capable of protecting Tasmanian businesses.

By way of example:

Section 14B. Unlawful entry on land

(1) A person, without reasonable or lawful excuse (proof of which lies on the person), must not enter into, or remain on, any land, building, structure, premises, aircraft, vehicle or vessel without the consent of the owner, occupier or person in charge of the land, building, structure, premises, aircraft, vehicle or vessel.

(2) A person who is convicted of an offence under this section is liable to a penalty of–
(a) a fine not exceeding 10 penalty units²⁷ or imprisonment for a term not exceeding 12 months, in respect of entering or remaining in a dwelling-house; or

(b) **5 penalty units or imprisonment for a term not exceeding 6 months**, in respect of entering into, or remaining on, any other land, building, structure, premises, aircraft, vehicle or vessel.

(2A).....

(2B).....

(3)....

Section 37. Offences relating to property

(1) A person shall not unlawfully destroy or injure any property.

(2) A person shall not unlawfully and maliciously kill, maim, or wound any animal the property of any other person.

(2A) A person who contravenes subsection (1) or (2) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 10 penalty units or to imprisonment for a term not exceeding 12 months.

(3).....

(3A)....

(4) A person shall not carelessly or negligently break, throw down, destroy, or damage a lamp erected to light a street in a town or a post, iron, cover, or other furniture of such a lamp.

²⁷ See ***Penalty Units and Other Penalties Act 1987*** – the value of a penalty unit from 1 July 2014 - 30 June 2015 equals \$140.00

(4A)....

(5) A person who contravenes subsection (4) or (4A) is guilty of an offence and is liable on summary conviction to a penalty not exceeding one penalty unit.

Section 35. Common assault and aggravated assault

(1) A person shall not unlawfully assault another person.

(1A) A person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 20 penalty units or to imprisonment for a term not exceeding 12 months.

(2) Where any person is charged with having unlawfully assaulted any other person, the court, if it considers the assault is of an aggravated nature, may sentence the offender to pay a fine not exceeding 50 penalty units or to imprisonment for a term not exceeding 2 years.

(3).....

(4).....

(5).....

Section 13. Public annoyance

(1) A person shall not, in a public place –

(a) behave in a violent, riotous, offensive, or indecent manner;

(b) disturb the public peace;

(c) engage in disorderly conduct;

(d) jostle, insult, or annoy any person;

(e) commit any nuisance; or

(f) throw, let off, or set fire to any firework.

(2) A person shall not recklessly throw or discharge a missile to the danger or damage of another person or to the danger or damage of the property of another person.

(2A).....

(2B).....

(2C).....

(3).....

(3AA) A person who contravenes a provision of subsection (1), (2), (2A), (2B), (2C) or

(3) is guilty of an offence and is liable on summary conviction to –

(a) a penalty not exceeding 3 penalty units or to imprisonment for a term not exceeding 3 months, in the case of an offence under subsection (1) or (3); or

(b) a penalty not exceeding 5 penalty units or to imprisonment for a term not exceeding 6 months, in the case of an offence under subsection (2); or

(c) a penalty not exceeding 10 penalty units or imprisonment for a term not exceeding 6 months, in the case of an offence under subsection (2A), (2B) or (2C).

(3A) A person convicted in respect of an offence under this section committed within 6 months after he has been convicted of that or any other offence thereunder is liable to double the penalty prescribed in respect of the offence in respect of which he is so convicted.

.....

a magistrate may order that the liquor be given to a person the magistrate is satisfied has a right to its possession but if no such order is made or sought within a reasonable time the Commissioner may dispose of the liquor in such manner as the Commissioner considers most appropriate, and shall pay any proceeds into the Consolidated Fund.

.....

Section 15B. Dispersal of persons

(1) A police officer may direct a person in a public place to leave that place and not return for a specified period of not less than 4 hours if the police officer believes on reasonable grounds that the person –

(a) has committed or is likely to commit an offence; or

(b) is obstructing or is likely to obstruct the movement of pedestrians or vehicles; or

(c) is endangering or likely to endanger the safety of any other person; or

(d) has committed or is likely to commit a breach of the peace.

(2) A person must comply with a direction under subsection (1).

Penalty: Fine not exceeding 2 penalty units.

Section 55. Arrest

(1) Any police officer may arrest, without warrant, any person found offending against any of the provisions of –

- (a) Division I of Part II;
- (b) Parts III to V; or
- (c) section 15B, 15C, 15D or 15F; or
- (ca) section 20K; or
- (d) section 37J(1).

(2) Where a police officer is empowered to arrest any such person, it is the duty of such officer to exercise such power unless he has reasonable grounds for believing that the purposes of this Act, or of the Act conferring such power, as the case may be, will be adequately served by proceeding against the offender by summons.

(2A) A police officer may arrest, without warrant, any person found offending against section 14A.

(2B) Subject to subsection (2C), a police officer may arrest, without warrant, any person whom he believes on reasonable grounds to be on any land, building, structure, premises, aircraft, vehicle or vessel without the consent of the owner, occupier or person in charge of the land, building, structure, premises, aircraft, vehicle or vessel.

(2C) The power of arrest conferred by subsection (2B) is not exercisable –

(a) unless the police officer has previously requested the person in relation to whom he seeks to exercise the power to leave the land, building, structure, premises, aircraft, vehicle or vessel concerned and that person has refused or failed to comply with the request or, having complied with the request, returns to the land, building, structure, premises, aircraft, vehicle or vessel concerned within 14 days after so complying without the consent of the owner or occupier; or

(b) if the police officer has reasonable grounds for believing that that person has some reasonable or lawful excuse for being on that land, building, structure, premises, aircraft, vehicle or vessel.

(2D) A police officer may, without warrant, arrest any person whom the police officer has reasonable grounds for believing has committed an offence under section 13A, 13B, 13C, 21, 21A or 35.

(2E) A police officer may, without warrant, arrest a person to facilitate the making of an application for a restraint order under Part XA of the Justices Act 1959 or a family violence order, if the police officer has reasonable grounds for believing–

(a) that the person has intimidated another person; and

(b) that the intimidation is likely to continue and give rise to an assault.

(2F) For the purposes of subsection (2E), intimidation may be verbal, physical or both verbal and physical.

(2G) A police officer, without warrant, may arrest any person the police officer has reasonable grounds for believing has committed an offence under section 37B.

(3) Any person may arrest, without warrant, any person found offending against any provision of this Act if such offence involves –

(a) substantial injury to the person of another;

(b) serious danger of such injury;

(c) loss of any property of the person so arresting, or of any person by whom he is authorized to effect the arrest; or loss of any property of which the person arresting has charge;

(d) serious injury to any property; or

(e) injury to the property of a public authority.

(3A) The power of a police officer to arrest a person under this section is subject to the limits imposed on the power of arrest by sections 24 and 24A of the Youth Justice Act 1997.

(4) For the purposes of this section, an offence shall be deemed to involve any of the matters specified in subsection (3) if the person arresting has reasonable grounds for believing that such matter has been, or will be, the consequence of any act of the offender in committing such offence.

(5) For the purposes of this section, a person is said to be "found offending" if he does any act, or makes any omission, or conducts or behaves himself, and thereby causes a person who finds him reasonable grounds for believing that he has, in respect of such act, omission, or conduct, committed an offence against this Act.

The *Criminal Code Tasmania* 1924 also makes provision for offences including those relating to unlawful assemblies (s73); the *Roads and Jetties Act* 1935 (s49) also creates an offence relating to the willful obstruction of the use or enjoyment of any road.

The *Road Rules Act* 2009 make it an offence for pedestrians to cause a traffic hazard or obstruction (s236) whilst s43 of the *Traffic Act* 1925, s49 of the *Roads and Jetties Act* 1935 and s247 of the *Crown Lands Act* 1976 contain provisions that deal with the removal of obstructions on roads.

The provisions of the *Mineral Resources Development Act* 1995 also deal with

those who hinder or obstruct authorised entry: see ss 84, 67N and 23; as do s256 *Living Marine Resources Management Act 1995* and s92 *Marine Farming Planning Act 1995*.

Application of the Act to the scenarios provided

- **The Salamanca Protests** Protesters at the 'Salamanca Protest' by the LGBTI community in 1988 having delayed the public from accessing stalls at the Salamanca Market

To be a protester for the purposes of the Bill the person must satisfy the following criteria:

Cl 4(1) A protester is a person who engages in a protest activity

Cl 4(2) A protest activity is an activity that takes place in relation to business premises, a related business access area, a road, a footpath or a public place and is in furtherance or for the purpose of promoting support and awareness for an opinion or belief, in respect of a political, social, cultural environmental or economic issue.

Cl 4(3) sets out examples of what constitutes engaging in a protest activity

Cl 4(4)

Cl 4 (5) makes clear that subclauses 4 and 5 do not limit the generality of subclause 1 (ie a protester is a person who engages in a protest activity, the section clearly contemplating other forms of activity that might fit this bill.

Normally a public road or public footpath or public place is not a business premises: Cl 5(3)

A public road however will be a business premises when *inter alia* it is being used as a market or a place at or from which goods are sold: Cl 5(3)(b)(i) **and** it is not established for the purposes of a protest activity (in other words where there is no legal authority to conduct a protest).

By definition (Cl 4(1), Cl 4(2), Cl 4(3) and by virtue of Cl 5(3) in this instance) the individuals involved would undoubtedly be protesters for the purpose of the Bill.

Cl 6(3) prohibits a protester from doing an act that would 'prevent hinder or obstruct' a business occupier's **access** to an entrance or an exit from the business premises or access area associated with those premises and the protester knows (or ought reasonably be expected to know) their act would be likely to prevent hinder or obstruct such access.

Cl 6(2) prohibits a protester from doing an act on business premises or on a business access area if the act would prevent hinder or obstruct the business occupier **carrying out the business activity** on those premises and the protester knows (or ought reasonably be expected to know) that their actions would likely prevent hinder or obstruct the carrying out of that business activity.

Cl 6(9) **without limiting the generality of Cl 6(2)** provides examples of when an 'act' on business premises or on a business access area prevents hinders obstructs the carrying out of a business activity by a business occupier in relation to those premises i.e. when it prevents the use of a business-related object or causes a risk of damage to the business operator and business workers.

If *only customers* were delayed in reaching the stalls then this would not fall within the ambit of Cl 6(3). It would only do so if the *business occupier's* entry or exit from his or her stall (and associated access area) were blocked. If it was thus even slightly blocked and the protester knew (or ought reasonably be expected to have known) that his actions would be likely to prevent, hinder or obstruct access then it may be that the protester has committed an offence.

However by delaying customers from accessing stalls this would by definition have hindered and obstructed the business occupiers from selling their goods. It would not be difficult to infer that the protesters in this situation would be reasonably expected to know that their actions would be likely to prevent hinder or obstruct the stall keepers from selling their goods.

If the protesters delayed the public from accessing stalls in the knowledge that their actions would be more likely to prevent stall keepers from selling their wares, those protesters would attract a criminal liability under the legislation and therefore be subject to the mandatory sentencing provisions of the legislation.

Their penalties would be \$2000 for an on the spot fine, or not less than \$5000 and not more than \$10,000 if they are convicted by a court. Subsequent offences would result in a gaol sentence of not less than 3 months and not greater than 2 years.

However it must be remembered that to be a business activity the business (or related activities) must be for *profit* (see Cl 3 definitions) so if the stalls 'hindered' were set up for a non profit purpose or perhaps even if goods were traded as opposed to sold it is likely they would not fall within Cl 6(2).

If the protesters had a 'lawful excuse' then by definition they would not have committed an offence. Such an excuse might be that they had a permit to protest. It is worth noting the discretionary nature of that process.

- **Fracking** A farmer, in furtherance of his opinion that hydraulic fracturing would damage the environment of his farm or the business of his farm, denied access to his or her land to the holder of an exploration or mining permit that permitted them to engage in hydraulic fracturing

Business premises as defined in Cl 5(1) of the Bill include premises on which mining operations or exploration for minerals within the meaning of the *Mineral Resources Development Act 1995* is or are being carried out or is or are authorised to be carried out: see Cl 5(1) (i), (ii) and (iii)

The holder of an exploration or mining permit is by definition both a business occupier and a business operator (Cl 3), the permit entitling the holder to carry out a business activity on the premises, provided that that activity falls within the scope of the permit.

Cl 6(3) prohibits a protester from doing an act that would 'prevent hinder or obstruct' a business occupier's access to an entrance or an exit from the business premises or business access area associated with those business premises and the protester knows (or ought reasonably be expected to know) their act would be likely to 'hinder' that access.

Cl 6(2) prohibits a protester from doing an act on business premises or on a business access area if the act would prevent hinder or obstruct the business occupier carrying out the business activity on those premises and the protester

knows (or ought reasonably be expected to know) that their action would likely prevent hinder or obstruct the carrying out that business activity.

CI 6(9) **without limiting the generality of CI 6(2)** provides examples of when an 'act' on business premises or on a business access area prevents hinders obstructs the carrying out of a business activity by a business occupier in relation to those premises (see above).

If the permit holder can't enter the business premises because entry (access) to the land is obstructed, he can also not carry out business activity (as broadly defined in s3).

Offences under both CI 6(2) and CI 6(3) can be contemplated. Of course the protester would have to possess the requisite mental state – that is he knew or ought to reasonably be expected to know that the denial of entry would prevent access (CI 6(3)) and preclude the miner from mining or exploring as the case may be (CI 6(2)) It is noted that to constitute obstruction physical obstruction is not necessary: see above.

A live issue in this scenario is whether the farmer is a protester for the purposes of the Bill:

CI 4 (1) A protester is a person who engages in a protest activity

CI 4(2) An activity is a protest activity if it takes place in certain areas and for certain purposes

CI 4(3) Provides examples of when a person is engaging in a protest activity – when carrying out a demonstration, parade, event, march or collective activity, *that is a protest activity*.

CI 4(5) Nothing in CI 4(3) or 4(4), limits CI 4 (1)

Is the farmer engaging in an activity (here blocking the entry of the permit holder to the farm) that:

(a) takes place on business premises or a business access area? Yes

(b) and that activity, is it in furtherance of or for the purposes of promoting awareness or support for an opinion or belief in respect of a political, environmental, social, cultural or economic issue? Yes

If a farmer denies access to his or her land to the holder of an exploration or mining permit that permitted them to engage in hydraulic fracturing, and does so in furtherance of his opinion that hydraulic fracturing would damage the environment of his farm or the business of his farm, that farmer would attract a criminal liability under the legislation and therefore be subject to the mandatory sentencing provisions of the legislation.

Their penalties would be \$2000 for an on the spot fine, or not less than \$5000 and not more than \$10,000 if they are convicted by a court. Subsequent offences would result in a gaol sentence of not less than 3 months and not greater than 2 years.

Without knowing whether the farmer is doing this for one of the listed purposes in CI 4(2)(b) (or if he had a lawful excuse) it is impossible to answer this definitively.

If the farmer was considered to be a protestor (and had no lawful excuse as defined by Cl 4 there would be little difficulty inferring the requisite mental state, and it is likely he would be convicted under both ss6(2) and (3).

An aside

As previously noted the legislation fails to define 'collective activity'. Does it mean simply that the act has to be done in a group or that there are multiple people performing multiple different acts or would it suffice if there was one person performing an act as a representative of the group? The Bill caters for a protestor of one (Cl 4(1)) even though its examples are obviously of group type protesting activities.

- **Supertrawler Where protest vessels obstructed the entry or exit of a supertrawler to a port, docking or refuelling facility and if people protested at the docks and obstructed the refuelling or provisioning of a supertrawler**

A vessel is a structure that floats and is capable of planned and ordered movement: *Steedman v Scofield* [1992] 2 Lloyd's Rep 163 at 166: see *Butterworths Australian Legal Dictionary*, Ed 1997.

A supertrawler would clearly be a vessel.

Business premises as defined in Cl 5 of the Bill include 'vessels (vehicles, aircraft and other mobile structures) used for the purposes of a business activity': see s5(1)(j).

Thus by definition the supertrawler is both a vessel *and* a business premises (given that the supertrawler is engaged in trawling for seafood for profit).

Where business premises are vessels a business access area will also include a mooring where the vessel is stationed and so much of *an area of land* as is reasonably necessary to enable access to the mooring.²⁸

Cl 6(2) prohibits a protestor from doing an act on business premises or on a business access area if the act would prevent hinder or obstruct the business occupier carrying out a business activity on those premises and the protestor knows (or ought reasonably be expected to know) that their action would likely prevent carrying out that business activity.

Cl 6(9) **without limiting the generality of cl 6(2)** provides examples of 'acts' on business premises or on a business access area which are considered to prevent hinder or obstruct the carrying out of a business activity by a business occupier in relation to those premises.

A business activity is defined very broadly. Of relevance here it is a lawful activity carried out for

- (a) for the purposes of profit or in the course of or in relation to, carrying out an activity undertaken for the purposes of profit: Cl 3 *business activity*, (a) and

²⁸ **An area of land** by definition includes any waters *on the area of land*.

(b) as part of an activity carried out on business premises by a business occupier in relation to the premises or ancillary to, or connected to, such activity: Cl 3 *business activity*, (c)²⁹

Cl 6 (3) prohibits a protester from doing an act that would prevent hinder or obstruct a business occupier's access to an entrance to, or exit from, the business premises or business access area related to those business premises, if the protester knows or ought reasonably be expected to know their act would likely prevent, hinder or obstruct that access.

Cl 6(4) A person must not do an act on a road, footpath, public place or another area of land (by definition includes any waters on the area of land) if the act is done in furtherance of or for the purposes of promoting awareness of or support for an opinion or belief, in respect of a political, environment, social, cultural or economic issue and as a result of the act the movement of a vessel vehicle or aircraft *used by a business occupier in relation to business premises*, is prevented, hindered or obstructed and the person knows or ought reasonably be expected to know that the act is likely to prevent hinder or obstruct the *movement of that particular vehicle...* of a business occupier in relation to *particular business premises*.

1. Protesters preventing the supertrawler coming into dock or leaving the dock

In this example, Cl 6(4) would apply. The supertrawler constitutes a business premises but it is also a vessel (which is not defined in the Act). Cl 5 definitions as to business premises cite 'a vehicle, a vessel, aircraft or other mobile structure', which reinforces that vessel refers to a boat or ship.

If the vessel is moored in the harbour and this is a public place, then if the supertrawler's movement was hindered or obstructed and the protesters knew or ought reasonably be expected to know that their actions were likely to prevent, hinder or obstruct the movement of *that particular vessel of a business operator in relation to particular business premises*, and they had no lawful excuse, they would attract a criminal liability under the legislation and therefore be subject to the mandatory sentencing provisions of the legislation.

Penalties would be \$2000 for an on the spot fine, or not less than \$5000 and not more than \$10,000 if they are convicted by a court. Subsequent offences would result in a gaol sentence of not less than 3 months and not greater than 2 years.

If the protestor(s) were considered to be a corporation the mandatory imprisonment provisions of the legislation would not apply, but the monetary penalties would be a fine of \$50 000 - \$100 000 if they are convicted by a court.

2. Protesters protesting at the docks not preventing movement but preventing the supertrawler refuelling or re provisioning

Protesters obstructing the exit by a business occupier from either a business premises or an associated business access area would be guilty of an offence under Cl 6(3) if this were done with the requisite mental state – that is if the protester knows or ought reasonably be expected to know that the act is likely to hinder or obstruct such access.

²⁹ In effect some activity that supports the primary business activity relevantly here, such as obtaining provisions or refuelling.

By preventing refuelling and the obtaining of provisions it is possible that the protesters may also be committing an offence under CI 6(2) given that by obstructing the exit from the business premises (or access area) the obstruction prevents the carrying out of a business activity on the premises by the business occupier, given especially the very broad definition of business activity and in particular (c).

Hence, if the protestors prevent a supertrawler from refuelling or reprovisioning, and they had no lawful excuse, they would attract a criminal liability under the legislation and therefore be subject to the mandatory sentencing provisions of the legislation.

Their penalties would be \$2000 for an on the spot fine, or not less than \$5000 and not more than \$10,000 if they are convicted by a court. Subsequent offences would result in a gaol sentence of not less than 3 months and not greater than 2 years.

Liability owner v crew

The act targets protesters *per se* and is silent as to distinctions of this kind. Arguably if an owner of a protest vessel had no knowledge that his vessel was being used for that purpose then it would be difficult to say he was 'engaging' in a protest activity.

However if the owner had knowledge that his vessel was to be used in this way it raises the question as to whether even though not physically present he could be construed to be participating in that activity (having knowingly provided the vessel for that purpose), especially given that section 4(5) states that subsections (3) and (4) are 'not taken to limit the generality of subsection (1)'.

- **Pensioner's Rally Where aged and disability pensioners who were involved in the protest march and rally against the Commonwealth budget on 25 June 2014 delayed the passage of a vehicle associated with a business**

Newspaper clippings state that the 'rally' took place on the 'lawns of Parliament'. The purpose of the protest was to draw attention to the dire consequences of the Abbott Government's proposed changes to pension indexation and disability income support, \$7 GP co-payment and higher costs of prescriptions.

Are the pensioners protesters for the purpose of the Bill?

As previously stated a protest activity is defined in CI 4(2) as an activity that takes place on business premises, a business access area in relation to business premises, a road, a footpath or a public place and which is in furtherance of or for the purposes of promoting awareness or support for an opinion or belief in respect of a political environmental, social cultural or economic issue.

Clearly here the activities took place on both the road and the lawns of Parliament. The lawns of Parliament³⁰ and the road would both clearly constitute a public place. The protests were clearly directed at economic issues and the

³⁰ Parliament would not be a 'government business enterprise' by definition, so the lawns could not be seen as a 'business access area'.

'march' and 'rally' would clearly fall within Cl 4(3). Undoubtedly the pensioners are protesters for the purpose of the Bill.

What is the effect of delaying a vehicle associated with a business?

Cl 6(4) states: A person must not do an act on a road, footpath, public place or another area of land if the act is done in furtherance of or for the purposes of promoting awareness or support for an opinion or belief in respect of a political, environmental, social cultural or economic issue **and**

as a result of the act the movement of a vessel, vehicle or aircraft used by a business occupier is prevented hindered or obstructed and the person knows or ought reasonably know that the act is likely to prevent, hinder or obstruct the movement of **that particular vehicle**, vessel or aircraft of a business occupier in relation to **particular business premises**.

Unlike the supertrawler example unless the pensioners could have known that their actions would obstruct a *particular vehicle* that would affect a business occupier in relation to *particular premises* Cl 6(4) will not apply.

Do ss 6(2) or 6(3) apply in these circumstances?

Unless the protesters had a 'lawful excuse', provisions 6(2) and 6(3) may well apply given the purpose of the legislation. In effect if the protesters could foresee that businesses along their route would be affected (and perhaps even those further flung) given that their presence may block access to businesses (thereby preventing business activities on the business premises from being undertaken) then they may have committed an offence if they knew or ought reasonably be expected to know that their actions were likely to have this effect.

In that case the protestors would attract a criminal liability under the legislation and therefore be subject to the mandatory sentencing provisions of the legislation.

Their penalties would be \$2000 for an on the spot fine, or not less than \$5000 and not more than \$10,000 if they are convicted by a court. Subsequent offences would result in a gaol sentence of not less than 3 months and not greater than 2 years.

- **Industrial Action whether miners who create a picket line due to an unsafe workplace which delayed people coming to work at a mine**

Pursuant to s19 of the *Fair Work Act 2009* industrial action is:

- Employees performing work in a manner different to how it is normally performed
- Employees adopting a practice that restricts, limits or delays the performance of work
- A ban, limitation or restriction by employees on performing or accepting work
- **A failure or refusal by employees to attend for work or perform any work**³¹
- The lockout of employees from their employment by the employer

Similarly industrial action is not:

- Action by employees that is authorised or agreed to by the employer
- Action by an employer that is authorised or agreed by, or on behalf of, employees
- Action taken by an employee if

³¹ This is by definition a 'strike'.

- It was based on a reasonable concern about an imminent risk to their health or safety and
- The employee did not unreasonably fail to comply with a direction of their employer to perform other work that was safe and appropriate for them to do.

***When is industrial action protected under the Bill?*³²**

Clause 4(8) states that for the purposes of the Bill, if a person is engaging in protected industrial action as defined under the Fair Work Act 2009 (or their actions are part of lawful industrial action undertaken by a State Service Officer or State Service Employee) then they are not taken to be engaging in a protest activity on business premises or a business access area in relation to those premises.

To constitute 'protected industrial action' certain preconditions must be met. These are set out in s 413 *Fair Work Act* (2009) (Cth):

- the existing agreement must have passed its nominal expiry date³³ (see s417)
- the parties have genuinely tried to reach an agreement
- the action is authorised by a protected action ballot
- the notice requirement for action is met (see s414)
- the action taken is in support of claims about 'permitted matters' the action taken is not about unlawful terms
- there is no 'pattern bargaining'.

Further s417 (1) of the *Fair Work Act* 2009 makes clear that no industrial action can be organized or engaged in until the nominal expiry date has passed irrespective of whether the industrial action relates to a matter dealt with in the agreement or not.

In effect, all other industrial action is unlawful, and is thus not protected. Put alternatively unless the preconditions are met the industrial action (striking and picketing) taken by the miners is unlawful and not protected.

If the miners are classed as protesters for the purpose of the Bill (Cl 4(1))³⁴, as their actions are causing interference (delaying people coming to work)³⁵ and they would know (or ought reasonably be expected to know) that their actions would be likely to both delay entry and delay or prevent work at the mine, they would be committing offences against both clauses 6(2) and 6(3).

In this case the protestors would attract a criminal liability under the legislation and therefore be subject to the mandatory sentencing provisions of the legislation.

Their penalties would be \$2000 for an on the spot fine, or not less than \$5000 and not more than \$10,000 if they are convicted by a court. Subsequent offences would result in a gaol sentence of not less than 3 months and not greater than 2 years.

³² See Australian Government Fair Work Ombudsman site.

³³ As defined this is the date specified as the agreement as its nominal expiry date.

³⁴ This depends on whether the strike action/picketing is in furtherance of or for the purposes of promoting awareness or support for an opinion or belief, in respect of a *political, environmental, social, cultural or economic* issue. Arguably the definitions are so broad that it would be at a minimum a social issue.

³⁵ Note Bryson J in *Barloworld Coatings (Australia) Pty Ltd v Australian Liquor Hospitality & Misc Workers Union* [2001] NSWCS 826 (a case involving picketing) His Honour held that obstruction can take many forms – standing in the way and moving about in some way that interfered with the passage of other persons (eg by vehicles or by foot).

A further issue?

The laying of a number of overlapping offences arising out of the same act or incident clearly raises issues relating to 'double jeopardy'. Double jeopardy is an expression used in connection with several different stages of the criminal justice process: prosecution, conviction and punishment. It is best known as no one should be tried or punished twice for the same offence.

The general rule reflects the importance of finality of verdicts in the resolution of disputes, particularly the status conferred by an acquittal.³⁶ It also reflects a number of other important considerations such as where 2 or more offences arise out of the same facts, it is wrong to punish a person twice for overlapping ingredients.³⁷

Once double punishment issues are dealt with, questions relating to cumulation and concurrency³⁸ of sentences can be assessed. The ultimate sentence imposed must reflect the overall criminality of the offender.³⁹

Whilst courts are well versed in engaging in this task, it is important to note that such issues are often a fertile ground of appeal with the potential of increasing costs for both the individual and the State.

Is a constitutional challenge possible were the Bill to remain in its current form?

Introduction

Any legislation enacted by a State parliament in Australia must be in conformity with the Commonwealth Constitution, otherwise it will be invalid.

There are no express terms in the Constitution regarding freedom of speech, movement or association. However, over recent years in a series of decisions the High Court has determined that there is an implied freedom of communication regarding political and governmental matters. At this stage it is not settled whether freedom of association exists in a stand-alone fashion,⁴⁰ or is merely ancillary to the implied freedom of communication. This question is presently the subject of an appeal before the High Court.⁴¹

Freedom of political communication is an essential prerequisite for the system of representative and responsible government that the Constitution supports. Specifically, s7 and s24 require that representatives are directly chosen by the people at periodic elections. In order for there to be 'free elections', there should be the minimal encumbrance on the flow of information that may inform voters' decisions and allow citizens to organise politically.

³⁶ Although statutory modifications have made inroads into the rule: eg *Criminal Code Act 1924* (Tasmania) Ch XLIV ss 390 – 397AF, *Criminal Procedure Act 2009* (Victoria) Ch 7A ss 327A -327S, *Criminal Procedure Act 1986* (NSW) Pt 2 ss 15-27,

³⁷ *Pearce* (1998) 194 CLR 610 at [40]

³⁸ Factors pointing to concurrency include: where offences arose from a single course of criminal conduct ('one transaction'), the offences were committed within a short period of time, they have common features, where one offence is committed for the purposes of committing another and where one offence is little more than incidental to another: See *Newman* [2012] NSWCCA 69 at [28], [8] and [31]; *Natoli* [2009] NSWCCA 36 at [34],[37]; *Hendricks* [2011] NSWCCA 204 at [42]; *Mack* [2009] NSWCCA 216 at [52] and *Harris* [2007] NSWCCA at [43] respectively.

³⁹ *Postiglione* [1997] 189 CLR 295 at 340

⁴⁰ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 117 CLR 106 at 212 per Gaudron J

⁴¹ *Tajjour v State of New South Wales*, No. S36 of 2014; *Hawthorne v State of New South Wales*, No. S37 of 2014.

This constitutional guarantee does not support any individual right to 'freedom of speech'. Rather, it places a constraint on legislative or executive power, which can only be exercised in a manner that does not curtail the protected freedom of communication.

The implied freedom is not confined to election periods, and applies to communication regarding all kinds and levels of governmental activity, including statutory authorities and public utilities. Further, it is recognised that in an age of integration "political" communication can encompass a broad range of social, economic and cultural issues (as these all have the potential to influence the selection of representatives by voters).⁴²

The "communication" does not have to be verbal – non-verbal communication (e.g. conveyed through symbols, signs, gestures or images) is also protected, provided it relates to political or governmental matters. There is no requirement that the communication be reasonable, detached and calm.⁴³ It is recognised that political discourse (particularly in Australia) can arouse strong feelings, is not always rational and can sometimes involve invective.⁴⁴

However, this freedom is not absolute, as some forms of communication need to be restricted because of other public interests. As Brennan CJ observed in *Levy v Victoria*:

... non-verbal conduct may, according to its nature and effect, demand legislative or executive prohibition even though it conveys a political message. Bonfires may have to be banned to prevent the outbreak of bushfires, and the lighting of a bonfire does not escape such a ban by hoisting of a political effigy as its centrepiece ... Such a law prohibiting or controlling the non-verbal conduct, if it be reasonable in extent, does not offend the constitutional implication.⁴⁵

In *Lange v Australian Broadcast Corporation* [1997] HCA 25 (as subsequently modified in *Coleman v Power*) the court set out a two-limb test for determining whether a law infringes the constitutional implied freedom of political communication:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ...

In cases that have come before the High Court, the first limb has generally not been in contention. Here there would be no question that the proposed legislation imposes such a burden.

Regarding the application of the second limb, there has been considerable variety in the factual circumstances and legal issues where the implied freedom of communication has been raised, with significant division in the Court regarding the appropriate approach [see particularly Heydon J in *Monis v The Queen* [2013]

⁴² *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211 at 264 per McHugh J

⁴³ *Levy v Victoria* [1997] HCA 31 per McHugh J

⁴⁴ *Coleman v Power* [2004] HCA 39 at [239] per Kirby J

⁴⁵ *Levy v Victoria* [1997] HCA 31 per Brennan CJ

HCA 4]. This makes it difficult to be confident in how the Court would respond to the provisions in this particular proposed legislation.

The second limb involves a “compound conception”, requiring consideration of both legislative ends and means. In determining whether a law serves a “legitimate end”, it is *not* sufficient that the object simply falls within a head of legislative power, or serves some public interest. The legislative object must be compatible with the implied freedom (as this is an ‘indispensable component’ of representative and responsible government). If the end is legitimate, then it must be considered whether the means to achieve it are ‘reasonably appropriate and adapted’ (i.e. proportional) in a manner that is also compatible with the implied freedom (i.e. it is not unduly burdened).⁴⁶

Some issues that have been considered.

The purpose of the legislation

In *Australian Capital Television*, Mason CJ distinguished between restrictions which directly targeted ideas or information (which requires compelling justification) from those which restrict an activity or mode of communication by which ideas or information are transmitted (which could include protest activity).

In either case there is the need to balance the public interest in free communication with the public interest which the restrictions are designed to serve. If the restriction imposes a disproportionate burden in the attainment of the competing public interest, the effect of the restriction is to infringe the Constitutional guarantee.⁴⁷

In *Levy v Victoria*, Gaudron J makes a different distinction (subsequently approved by Gleeson CJ in *Coleman v Power*):

If the direct purpose of the law is to restrict political communication, it is valid only if necessary for the attainment of some overriding public purpose. If, on the other hand, it has some other purpose, connected with a subject matter within power and only incidentally restricts political communication, it is valid if it is reasonably appropriate and adapted to that other purpose.⁴⁸

McHugh J in *Coleman v Power* adopted a somewhat different approach:

Hence, a law that imposes a burden on the communication of political and governmental matter may yet leave the communication free in the relevant sense. Thus, laws which promote or protect the communications or which protect those who participate in the prescribed system, for example, will often impose burdens on communication yet leave the communications free. On the other hand, laws that burden such a communication by seeking to achieve a social objective unrelated to the system of representative and responsible government will be invalid, *pro tanto*, unless the objective of the law can be restrictively interpreted in a way that is compatible with the constitutional freedom.⁴⁹

⁴⁶ *Monis v The Queen* [2013] HCA 4 at [123]-[147] per Hayne J

⁴⁷ *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45 at [143] per Mason CJ

⁴⁸ *Levy v Victoria* (1997) 189 CLR 579 at 619 per Gaudron J.

⁴⁹ *Coleman v Power* at [98]

Regarding the proposed legislation, the protection and promotion of business activity in itself is an objective that is not intrinsically incompatible with the implied freedom. It is perhaps more difficult to argue that business activity *per se* promotes or protects freedom of political communication, as commercial interests do not necessarily align with this freedom.

However, the proposed legislation aims to achieve the goal of protecting and promoting business by directly limiting one form of political communication. In this situation the Court would need to be satisfied that there was an overriding public interest to justify such an imposition on the implied freedom.

To illustrate, in *Levy v Victoria*, the direct purpose of the relevant legislation was to prevent protestors entering authorised hunting areas during duck season. It was acknowledged that the protestors were making a political communication through their efforts to disrupt the duck hunt, and were motivated in their actions to increase public awareness through garnering media attention. However, as there were firearms and strong emotions involved, the overriding consideration was public safety. In keeping with the requirements of *Lange*, the measures were proportionate as they were limited in geography (to the authorised hunting areas) and time (duck season), but still sufficient to attain the relevant purpose (public safety).

Proportionality and the burden on the implied freedom.

Even where there is a legitimate purpose, in order to be valid a law must not in its manner of operation or effect impose an undue burden on the implied freedom. As a matter of statutory interpretation, Courts are required to restrict definitions in provisions to conform to the Constitution where required, or declare a provision invalid where this is not possible.

In *Coleman v Power* the issue was the validity of a law prohibiting the use of “insulting” words in a public place. The law was not targeted at political communication *per se* but clearly this could be captured by it. The role of invective in robust political debate in the Australian context was noted.

For Gleeson CJ the maintenance of public order was sufficient to override freedom of political communication in this instance. Gummow, Hayne and Kirby JJ noted the criminal sanctions attached to the offence, and read down the provision to apply only to insulting language that was reasonably likely to provoke physical retaliation (hence restricting it to conform with the requirements of *Lange*). McHugh J noted the potential broad application of “insulting words”, “in or near a public place”, and “to any person”, and the lack of specific defences to the charge. He concluded:

Insofar as insulting words are used in the course of political discussion, an unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom.⁵⁰

Similar issues arose in *Monis*, where the Court was asked to consider the validity of laws relating to “offensive” material sent via the post. French CJ noted:

⁵⁰ *Coleman v Power* at [102]

[regarding offensive conduct] It accorded with the need to construe a criterion of serious criminal liability relatively narrowly and clearly where the narrow construction was reasonably open.⁵¹

And later:

Its purpose is properly described as the prevention of the conduct which it prohibits ... That should not be regarded as a legitimate end not least because, as explained below, its very breadth is incompatible with its implementation in a way that is consistent with the maintenance of that freedom of communication which is a necessary incident of the system of representative government prescribed by the Constitution.⁵²

Similarly, Hayne J notes that attempting to regulate the civility of discourse is not compatible with the constitutionally prescribed system of government, concluding:

The elimination of communications giving offence, even serious offence, *without more* is not a legitimate object or end.⁵³

Crennan, Keifel and Bell JJ take a different approach, focussing on the issues of proportionality and reasonable necessity. They did consider the section in question had a legitimate protective purpose, provided it was confined to "seriously offensive" communications. They conclude that so read down the section did not impose too great a burden by the means it employs:

Having regard to the elements of the offence ... considerable ingenuity would be required to conceive the field of operation of a defence that the accused's use of the postal service was a reasonable communication for the discussion of political matters.⁵⁴

The divisions in the decision in *Monis* means it has limited value as precedent, which makes the task of predicting how the Court would respond to the proposed legislation more difficult. However, it is very likely that it could be challenged as to its Constitutional validity for the reasons that follow.

Whilst the protection of physical safety can readily be seen as an overriding public interest compared to the freedom of political communication (as in *Levy*), the protection of business activity is not of this character. It is a competing public interest, and further the means of protecting business involves a direct restriction of political communication. In order to pass the *Lange* test, the proposed legislation must be able to achieve its purpose in a manner that does not place an undue burden on the implied freedom of communication.

The proposed legislation contains very broad definitions of "protest activity". There are few restrictions on the kinds of business activities it covers. It is not geographically limited to business premises and business access areas, as there are provisions regarding protest activity in public spaces (s.6(4) interfering with movement of vehicles/vessels/aircraft relating to a particular business).

The terms "prevent, hinder or obstruct" business activity are not further specified and contain no qualifiers, other than the protester knows or ought reasonably to be expected to know that this was the likely effect of their conduct. There is no qualification in terms of seriousness, reasonableness, malicious intent, or

⁵¹ *Monis* at [59]

⁵² *Monis* at [73]

⁵³ *Monis* at [220]

⁵⁴ *Monis* at [351]

seniority in an organisational sense. The only specific defence available is 'lawful excuse'.

The penalties are severe when compared to similar conduct in the "non-protest" context. As noted above, where there is serious criminal liability attached to the offences, there is further reason to construe the provisions narrowly. This is because the threat of severe criminal sanctions is likely to have a chilling effect on freedom of political communication unless it is confined to particularly egregious circumstances.

Taken together, the broad scope of the proposed legislation, combined with the limited constraining and qualifying terms, creates a problem analogous to that identified by French CJ in *Monis*:

[the prohibition applies] in a range of circumstances the limits of which are not able to be defined with any precision and which cannot be limited to the outer fringes of political discussion.⁵⁵

Further, in a similar vein to the recognition of "invective" as part of Australian political heritage, it must be acknowledged that protest activity has its place in our political life. It is unrealistic to insist that all protest activity should be verbal and polite – the purpose of protest is to disrupt, to draw attention to an issue in a powerful way. Protestors choose this course of action precisely because they feel the official channels have failed them.

This factor is particularly relevant when it comes to the activities of "big" business, who are in a relatively more powerful position to influence the decisions of government to their advantage. This may in itself undermine the system of representative and responsible government, by distorting the information made available to electors. If this is accepted, the disruption of business activity in a limited fashion (within the boundaries of public order) for the purposes of political protest may be Constitutionally protected.

CONCLUDING REMARKS

The stated objectives of the proposed legislation were to "rebalance the scales" between the right to protest and freedom of speech, as opposed to the rights of businesses to create wealth and employment without disruption. There is a particular concern to "send a strong message to disruptive and irresponsible extremist protest groups".

The proposed legislation is broad in its definitions of protest activity and contains what would appear to be low thresholds for disruption of business activity. The penalties are severe compared to the existing legislation that could be utilized for comparable public order offences. Further, there is mandatory conviction if found guilty; mandatory minimum penalties and mandatory imprisonment for some offences if there have been previous convictions. This sentencing regime diminishes the separation of powers and is likely to lead to unjust outcomes as the Court will be restricted in its ability to tailor sentences to the particular facts.

There is a high risk of capturing individuals who would not in any sense be characterized as "extremist". Even if the legislation is successful in curbing disruption to business activity by protesters, it is likely to be disproportionate in

⁵⁵ *Monis* at [74]

its effects. As noted above, if the legislation is enacted its Constitutional validity is open to challenge.

A handwritten signature in black ink, appearing to read 'AG Melick SC', written in a cursive style.

AG Melick SC
Michael Kirby Chambers
08 Aug 2014