

PRIVATE RIGHTS, PROTEST AND PLACE IN *BROWN v TASMANIA*

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I INTRODUCTION

Protest is an important means of political communication in a contemporary democracy. Indeed, a person's right to protest goes to the heart of the relationship between an individual and the state. In this regard, protest is about power. On one hand, there is the power of individuals to act individually or a collective to communicate their concerns about the operation of governmental policies or business activities. On the other, the often much stronger power wielded by a state to restrict that communication in the public interest. As part of this, state authorities may seek to limit certain protest activities on the basis that they are disruptive to public or commercial interests. The question is how the law should reconcile these competing interests.

In this paper, we recognise that place is often integral to protest, particularly environmental protest. In many cases, *place* will be inextricably linked to the capacity of protest to result in influence. This is important given that the central aim of protest is usually to be an agent of change. As a result, the purpose of any legislation which seeks to protect business activities from harm and disruption goes to the heart of contestations about protest and power.

In a recent analysis of First Amendment jurisprudence, Seidman suggests that

[t]here is an intrinsic relationship between the right to speak and the ownership of places and things. Speech must occur somewhere and, under modern conditions, must use some things for purposes of amplification. In any capitalist economy, most of these places and things are privately owned ... Because speech opportunities reflect current property distributions, free speech tends to favor people at the top of the power hierarchy.¹

This claim seems to rest on an important premise, namely, that free speech rights do not provide a licence to override claims of ownership. For were it otherwise, then speech opportunities would not necessarily 'reflect current property distributions'. There is an important category of political speech, however, which

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1 Louis Michael Seidman, 'Can Free Speech Be Progressive?' (2018) 118 *Columbia Law Review* 2219, 2232. The First Amendment to the *United States Constitution* provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment makes much of the Bill of Rights (including the First Amendment) applicable to the states.

depends for its efficacy precisely on interfering with rights of control over property — namely, political protest. Therefore, if the protection of free speech extends to the protection of protest, this might constitute at least one counterexample to Seidman’s argument.

Seidman is clear that he is making claims only in relation to the United States;² nevertheless, both the quoted argument and the possible counterexample of protest can be generalised beyond a single jurisdiction. This article approaches the issue in the Australian context, although drawing on illustrations from other jurisdictions, with particular reference to the *Workplaces (Protection from Protesters) Act 2014* (Tas) (*‘Protesters Act’*), and its (partial) striking down by the High Court in *Brown v Tasmania* (*‘Brown’*).³ The article argues that the decision in *Brown* leaves many relevant considerations unresolved, but concludes that it does not foreclose a jurisprudence of political protest that might protect such speech even where that requires subordinating some incidents of ownership.

II THE IMPORTANCE OF PLACE FOR PROTEST

In this article we take it as given that the ability of people to engage in political protest goes to the heart of the relationship between an individual and the contemporary state. Political protest is a preeminent means whereby people act individually or as a collective to communicate — to the government and to their fellows — their concerns about the operation of governmental policies or business activities. With this in mind, and before turning to the decision in *Brown*, it is important to bring out the distinctive connections that obtain between protest, as a mode of political speech, and *place*, which implicates rights of control over property as a potential obstacle to protest. This will enable an appreciation of

2 Seidman, above n 1, 2219. The United States has a well-established jurisprudence on the right to protest, particularly in response to the Civil Rights Movement. For instance, in *Edwards v South Carolina*, 372 US 229 (1963) the Supreme Court held that a federal decision to arrest protesters for marching peacefully on a sidewalk in protest against discrimination infringed the protesters’ rights to freedom of speech and assembly; and in *Cox v Louisiana*, 379 US 536 (1965) the Supreme Court found that the arrest and conviction of Reverend Cox under Louisiana laws that prohibited acts of ‘disturbing the peace’ and ‘obstructing public passages’ for leading a peaceful protest by African American students against the continued use of segregated lunch counters in local stores deprived him of his rights of free speech and free assembly in violation of the First and Fourteenth Amendments. The Supreme Court noted that the statute defined ‘breach of the peace’ as ‘to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet’: at 551. However, as the Court held (at 552, quoting *Terminiello v Chicago*, 337 US 1, 4–5 (1948)), one of the very functions of free speech is to invite dispute:

Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech ... is ... protected against censorship or punishment. ... There is no room under our *Constitution* for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

The Supreme Court also found that the statute on which the charges were based was ‘unconstitutionally vague in its overly broad scope’: *Cox v Louisiana*, 379 US 536, 551 (1965). This so-called ‘void for vagueness’ doctrine is discussed in Part IV(C) below.

3 (2017) 261 CLR 328 (*‘Brown’*).

what was at stake in *Brown*, and the extent to which the High Court's reasoning adequately responds to those stakes.

We suggest that there are at least three ways in which political protest may have an important relationship to place. One is purely *instrumental*, and is an echoing of Seidman's point in the particular context of protest: a protest cannot take place without access to some place to hold it. Mead, writing in the United Kingdom context, has noted this point:

An obvious and significant factor determining the success of any protest that seeks to persuade or to engage with voters is having somewhere to hold it. ... [T]he rules that govern the availability of land, generally of private law, have wider ramifications in the public sphere: it is those rules that may well determine whether — and where — a protest may be held and so may determine levels of public participation and political engagement.⁴

As Mead observes, questions of access can be governed by considerations of private law. They can also be governed by laws that regulate public lands. In the Australian context, issues of this latter sort arose in the *Street Preachers* case:⁵ a municipal by-law limited access to certain roads for the purposes (inter alia) of preaching, canvassing, and haranguing, and the validity of that law was challenged on the basis that it unduly interfered with political communication. A majority of the High Court upheld the by-law's validity, on the basis that the burden it placed on political communication — which *did not* include a discretion to withhold permission on the basis of controlling political or religious communication⁶ — was not disproportionate to its purpose of ensuring unobstructed access to and use of roads.⁷

In addition to this instrumental relationship of access, however, protest can also be related to place in an *intrinsic* fashion. An example of such protest, and its suppression, is provided by Crocker, writing on the role of 'place' in First Amendment jurisprudence:

when President George W Bush visited Columbia, South Carolina, in 2002, Brett Bursey sought to welcome him with a sign that read 'No War for Oil.' Standing among others who were waiting to greet the President without messages of dissent, Bursey was ordered by officials to remove himself to a designated protest zone three quarters of a mile away and out of sight of the President. When he refused, he was arrested, charged with violating 18 USC § 1752, and later convicted of

4 David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart Publishing, 2010) 118.

5 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1 ('*A-G (SA)*').

6 *Ibid* 33 [46], 44 [68] (French CJ), 64 [140]–[141] (Hayne J), 89 [219] (Crennan and Kiefel JJ, Bell J agreeing at 90 [224]).

7 *Ibid* 44–5 [68] (French CJ), 64 [141] (Hayne J), 88–9 [217], [219]–[220] (Crennan and Kiefel JJ, Bell J agreeing at 90 [224]). As Adrienne Stone has pointed out, 'the High Court has always accepted that the freedom of political communication is not absolute. Thus the acceptance that reasonable limits can be placed on the use of public roads for political purposes is both consistent with the established law and well within the international mainstream': Adrienne Stone, 'Freedom to Preach in Rundle Mall: *Attorney-General (SA) v Corporation of the City of Adelaide* ('*Corneloup's Case*') on *Opinions on High* (14 October 2013) <<https://blogs.unimelb.edu.au/opinionsonhigh/2013/10/14/stone-corneloup/>>.

violating Secret Service restrictions on a person's presence where the President is temporarily visiting. Bursey was not singled out simply because he wished to convey a message of dissent, but because he wished to convey a message of dissent in a particular place and in the presence of other persons standing along a roadway to greet the President as he passed. By the simple regulation of place, government officials succeeded in suppressing dissent.⁸

The relationship in this instance between place and protest is an intrinsic rather than merely instrumental one because an inherent element of Bursey's (attempted) protest was his confrontation of the President. And as Crocker points out, it was the severing of this connection between place and dissent — not the prohibition of dissent as such — that suppressed Bursey's protest.

The capacity for the place in which a protest takes place to be intrinsic to that protest, and not simply a matter of access to some place or other, was recognised in a recent English case:

In some cases it may not matter much whether a public protest is held in one location rather than another, while in other cases the location in which it takes place may constitute the essence of the protest itself. In such a case, to say that there is a right to assemble peacefully or to express views in one public place but not in another may be tantamount in practice to denying the right to freedom of peaceful assembly or freedom of expression altogether.⁹

It was recognised also by McHugh J in *Levy v Victoria*, a case which concerned regulations prohibiting entry by anyone without a game licence into areas where duck hunting was taking place:

It is beside the point that their arguments against the alleged cruelty of duck shooting could have been put by other means during the periods when the Regulations operated. What the Regulations did was to prevent them from putting their message *in a way that they believed would have the greatest impact on public opinion* and which they hoped would eventually bring about the end of the shooting of game birds.¹⁰

The italicised phrase indicates that what we identify as an intrinsic connection between protest and place might still serve an instrumental purpose, namely, of increasing the capacity of the protest to result in influence. (One might think that this also applied in Bursey's case discussed above — a protester among the welcoming crowds is more likely to be televised than one who is three-quarters of a mile away). This point may readily be granted, but does not undermine the distinction between episodes of speech where place is intrinsic to the communication that is taking place and episodes of speech where it is not so important (as in the *Attorney-General (SA) v Adelaide City Corporation* ('A-G

8 Thomas P Crocker, 'Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence' (2007) 75 *Fordham Law Review* 2587, 2589 (citations omitted). Crocker summarises this outcome thus: 'The simple regulation of place has made dissent effectively invisible, practically pointless, and criminally dangerous.'

9 *Sheffield City Council v Fairhall* [2018] Public and Third Sector Law Reports 719, 740–1 [79].

10 (1997) 189 CLR 579, 625 (emphasis added). McHugh J went on to say: 'That being so, and subject to one qualification, the Regulations effectively burdened their freedom to communicate with other members of the Australian community on a political matter'.

(SA)’ example). In episodes of the former sort, the place in which a protest takes place may inform or enrich both the content of what is being communicated (eg images of dead birds in the places where they were shot may more clearly communicate the occurrence of those events than alternative approaches) and the power with which it is communicated (ie place serves as a rhetorical device).¹¹ In this way, place helps *constitute* the communication; this is what makes the relationship an intrinsic one.

A third way in which protest may be related to place can be called *documentary*. Here we refer to Andrew Edgar’s description of the actions taken by Bob Brown which gave rise to the *Brown* case as ‘documentary activism’.¹² Edgar notes that in recent years this type of activity has been particularly prominent in Australia in relation to animal welfare: ‘Animal welfare activists have secretly filmed cruel practices relating to greyhound racing and live exports of cattle, which were then broadcasted in news programmes.’¹³ But a documentary connection to place can equally be established by way of onsite protest. A documentary connection to place can be seen to serve as an accountability mechanism: by bringing information into the political debate which might otherwise remain unknown, it helps to counter a significant power imbalance between commercial enterprises (such as forestry and mining enterprises) and the general citizenry, providing a source of evidence which can lead to community awareness, support and, ultimately, action.¹⁴

When protest is connected to place in these ways that are not purely instrumental, the exercise of power by the state to restrict or prohibit such protest raises issues that go beyond those addressed in the *A-G (SA)* case. Both intrinsic and documentary relationships between protest and place seems to be a particularly prominent feature of environmental protest. Environmental damage to the sea, rivers and forests is often not readily ascertainable by the general citizenry, who rely on journalists and environmental organisations to bring environmental concerns into the public domain via photography and sharing of those photos and material through both traditional and social media platforms (a documentary relationship); and environmental protesters often rely on images of footage from the site of the relevant activity (eg the logging of a forest) to communicate their political opinion about that activity (an intrinsic relationship). If protesters are unable to obtain these images or footage, this significantly impedes their capacity to engage politically in respect of the issue. Thus, television broadcasts

11 For discussion of the communicative function of place in the context of protest, see Danielle Endres and Samantha Senda-Cook, ‘Location Matters: The Rhetoric of Place in Protest’ (2011) 97 *Quarterly Journal of Speech* 257.

12 Andrew Edgar, ‘Environmental Protests and Constitutional Protection of Political Communication: *Brown v Tasmania*’ (2018) 30 *Journal of Environmental Law* 333, 334.

13 *Ibid* 335.

14 This mode of connection between activism and accountability has been recognised in Australia, in a different legal context, via the granting of standing to various environmental organisations to commence judicial review proceedings against governmental decisions impacting upon the environment: see, eg, *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492.

undoubtedly aided the campaign to save the Franklin River in the 1980s,¹⁵ and a majority of the High Court in *Brown* noted the role played by onsite protests in Australian environmental politics of onsite protests.¹⁶

III THE LITIGATION IN *BROWN v TASMANIA*

A *Legislative Context*

The *Protesters Act* was passed in response to concerns from business about interference in logging. The sponsoring Minister's second reading speech referred to 'disruptive and irresponsible extremist protest groups' whose activity 'obstructs and disrupts ... businesses, preventing the creation of wealth and employment through legal means'.¹⁷ It attempts to regulate protests that impede the ability of businesses to operate lawfully. The *Protesters Act* creates offences, punishable by a fine of up to \$50 000 and/or up to five years' imprisonment, relating to the causing of damage to business premises and equipment, and also an offence of threatening business premises or equipment where such threats are 'in furtherance of' or 'for the purposes of promoting awareness of or support for ... an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue'.¹⁸ However, the High Court did not consider the constitutionality of these offences in the *Brown* case, and this article will not consider them further.

The provisions of the *Protesters Act* that were considered by the Court are those which prohibit people who are engaging in protest activity from doing anything (including entering business premises) that 'prevents, hinders or obstructs' the carrying out of business activity or access to business premises.¹⁹ '[P]rotest activity' is defined as any activity, other than lawful industrial action, which 'is in furtherance of' or is 'for the purposes of promoting awareness of or support for an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue' that 'takes place on business premises or a business access area';²⁰ a 'business access area' is defined as the area outside business premises that permits entrance to and exit from those premises.²¹ Importantly, these

15 Bob Brown, reflecting on the protests against the Franklin Dam, has stated: 'Colour television had come in, and we knew that getting colour pictures of this wilderness to people's lounge rooms in Tasmania and around Australia was going to be pivotal, because nothing could speak stronger for the river than itself': Martin Clark, Interview with Bob Brown (Melbourne Law School, The University of Melbourne, 24 July 2013) <<http://blogs.unimelb.edu.au/opinionsonhigh/files/2013/07/Remembering-Tasmanian-Dams-Interview-Transcripts2.pdf>>.

16 (2017) 261 CLR 328, 346 [32] (Kiefel CJ, Bell and Keane JJ), 387 [191] (Gageler J), 399–400 [239]–[240], 402 [244] (Nettle J).

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

18 *Protesters Act* s 7. For a body corporate, the maximum penalty is a fine of up to \$250 000. A conviction can also trigger an obligation to compensate: at s 18.

19 *Ibid* ss 6(1)–(3).

20 *Ibid* ss 4(2), (7) (punctuation omitted).

21 *Ibid* s 3 (definition of 'business access area').

prohibitions do not take the form of criminal offences. Rather, the *Protesters Act* empowers a police officer to ‘direct a person ... to leave ... without delay’ business premises or a business access area, if the officer ‘reasonably believes that the person has committed, is committing, or is about to commit’ either prohibited conduct or an offence under the Act.²² Once such a direction is given, it is an offence, punishable by a fine of up to \$10 000, not to comply, or to return within the next four days without lawful excuse.²³ Such a direction may also include a requirement not to engage in prohibited conduct, nor commit an offence under the Act, without lawful excuse within the next three months.²⁴ The maximum penalty for violating such a direction is a \$10 000 fine or, for a subsequent offence, up to four years’ imprisonment, and conviction can also enliven an obligation to pay compensation for loss caused by the violating conduct.²⁵ An exception to such a requirement is that the person may ‘[form] part of a procession, march, or event, that passes business premises or passes along a business access area in relation to business premises at a reasonable speed, once on any day’.²⁶

An officer may also use reasonable force to remove a person from business premises or a business access area if the officer ‘reasonably believes’ that the person ‘is committing, or has committed’ either prohibited conduct or an offence under the *Protesters Act*, and if such removal is reasonably believed necessary ‘to preserve public order; to prevent the continuation or repetition of an offence’ under the Act, or ‘for the safety or welfare of members of the public or of the person’.²⁷

The provisions of the *Protesters Act* considered by the High Court, therefore, are a somewhat complex set of ‘move on’ powers granted to police in relation to protest activity that would ‘prevent, hinder or obstruct’ business. The phrase ‘prevents, hinders or obstructs’ is not defined in the legislation but on its face imposes significant restrictions on protest activities, although the Tasmanian Government conceded that these words would not extend to ‘[i]rivial or transient disruptions to business’ and would encompass only ‘substantive preventions, hindrances and obstructions of business activities’.²⁸ The definition of ‘protest activity’ encompasses a very broad range of opinions expressed through protest. The legislation thus establishes a legal regime which (i) delineates between ‘legitimate’ and non-legitimate protest, by restricting protest where it is viewed as impacting upon commercial interests, and (ii) gives police officers the job

22 Ibid ss 11(1)–(2).

23 Ibid s 8. For a body corporate, the maximum penalty is a fine of up to \$100 000.

24 Ibid ss 6(4), (6), 11(6).

25 Ibid ss 17–18. The maximum penalty for a body corporate for a first or subsequent offence is a fine of up to \$100 000.

26 Ibid s 6(5) (punctuation omitted).

27 Ibid ss 13(3)–(4), 14 (punctuation omitted). Certain additional grounds mentioned in s 13(4) have been omitted in the text as they are of relevance primarily to the exercise of powers of arrest conferred by s 13, rather than the power of removal.

28 *Brown* (2017) 261 CLR 328, 414 [274] (Nettle J). The concession was taken to follow from reading the statute in light of the *Acts Interpretation Act 1931* (Tas) s 3, which provides that ‘[e]very Act shall be read and construed subject to the limits of the legislative powers of the State and so as not to exceed such powers’.

of making the discretionary judgements that will establish and enforce that delineation. This importance given to commercial interests is perhaps occluded in the statement released by the Tasmanian Minister for Resources in relation to the legislation:

As a result, Tasmania will now have the strongest legislation in the country to protect the rights of workers to lawfully earn a living, while ensuring the right to free speech and legitimate protest have been protected. A clear message has been sent to the radical protesters, to the workers in the forest and mining industries whose livelihoods they have tried to destroy, and to the wider community. No longer will Tasmania tolerate the extremists; you may have your say but you may not stop workers from earning a living.²⁹

In fact the *Protesters Act*'s definition of business activity does not refer to employment at all, but rather to 'lawful activity carried out ... for the purposes of profit' and 'lawful activity carried out ... by a Government Business Enterprise'.³⁰ The statute, despite its formal title, is focused on protecting commercial interests against the impact of protests carried out on or about business premises.

Perhaps unsurprisingly, the Act has been the subject of criticism nationally and internationally.³¹ In particular, the UN Special Rapporteur on Freedom of Opinion and Expression, David Kaye stated that:

The law itself and the penalties imposed are disproportionate and unnecessary in balancing the rights to free expression and peaceful assembly and the government's interests in preserving economic or business interests ... The bill would have the chilling effect of silencing dissenters and outlawing speech protected by international human rights law.³²

B Factual Context

The plaintiffs — Bob Brown and Jessica Hoyt — were arrested and charged under the *Protesters Act* in early 2016 due to 'their onsite political protest against the proposed logging of the Lapoinya Forest'.³³ When they refused to move on as directed by police they were arrested, although charges were later dropped.³⁴ Importantly, Bob Brown filmed within the forest and this formed a part of his

29 Paul Harriss, 'Protecting Workers from Radical Protesters' (Media Release, 6 November 2014) <http://www.premier.tas.gov.au/releases/protecting_workers_from_radical_protesters2>.

30 *Protesters Act* s 3 (definition of 'business activity').

31 See, eg, Michael Safi, 'Tasmania's Anti-Protest Law Slammed by Former Supreme Court Justice', *The Guardian* (online), 29 October 2014 <<https://www.theguardian.com/australia-news/2014/oct/29/tasmanias-anti-protest-law-slammed-by-former-supreme-court-judge>>; Human Rights Law Centre, *Tasmania's Proposed Anti-Protest Laws Will Breach International Human Rights Law* (29 October 2014) <<https://www.hrlc.org.au/news/tasmanias-proposed-anti-protest-laws-will-breach-international-human-rights-law>>; Office of the High Commissioner for Human Rights, *UN Experts Urge Tasmania to Drop Its Anti-Protest Bill* (9 September 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>>.

32 Office of the High Commissioner for Human Rights, above n 31.

33 Robert James Brown and Jessica Anne Willis Hoyt, 'Plaintiffs' Submissions', Submission in *Brown v Tasmania*, H3/2016, 27 February 2017, 1 [7].

34 *Brown* (2017) 261 CLR 328, 342–3 [13]–[16].

campaign against the logging operation.³⁵ The footage shows Dr Brown pointing out the trees which were to be logged, his explanation of the ramifications of this for the environment and the exchange between Brown and a Tasmanian police officer leading up to his arrest and removal from the site. In their submissions to the High Court, the plaintiffs emphasised the importance of onsite political protest as integral to their aim of communicating concern about environmental issues to the general public:

Dr Brown's experience is that 'on-site protests, and broadcasting images of parts of the environment at risk of destruction, are the primary means of bringing environmental issues to the attention of the public and politicians', and 'the wider public is more likely to take an interest in an environmental issue when it can see the environment sought to be protected'. That is because '[o]n-site protests enable images of the protest and of the environment which the protestors believe to be under threat to reach a wide audience'.³⁶

The plaintiffs argued that protest serves a vital role as an agent for change and political participation and that this was linked to the Australian system of democratic government. They referred to the history of protest in Tasmania where protest has been a catalyst for change (particularly in relation to World Heritage listing).³⁷ This connection between protest activity and political democracy was then analysed by the High Court through the legal lens of the constitutional protection of political communication.

C Constitutional Context

The *Australian Constitution* is not a classic liberal constitution: it does not set out a list of rights or freedoms. Rather, it is more of a republican constitution: it establishes a variety of institutions, processes and capacities.³⁸ One of the most fundamental of these is set out in ss 7 and 24 of the *Constitution*, namely, that the members of Parliament are to be chosen 'directly by the people'.³⁹ It follows that any law or government action which would excessively burden the making of the direct choice, or which interferes with a necessary incident of it such as

35 Bob Brown Foundation, 'Bob's Journey into Lapoinya' (Youtube, 28 January 2016) <www.youtube.com/watch?v=xF23kq8Ti9U>.

36 Robert James Brown and Jessica Anne Willis Hoyt, 'Plaintiffs' Submissions', Submission in *Brown v Tasmania*, H3/2016, 27 February 2017, 15–16 [57] (citations omitted); *Brown* (2017) 261 CLR 328, 346 [32] (Kiefel CJ, Bell and Keane JJ), 387 [191] (Gageler J), 400 [240] (Nettle J).

37 Transcript of Proceedings, *Brown v Tasmania* [2017] HCATrans 93 (2 May 2017) 1750–72; Clark, above n 15.

38 For a discussion, see Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143.

39 *Australian Constitution* ss 7 and 24.

free political communication, is unconstitutional.⁴⁰ This implied freedom of political communication was first expounded by the High Court in 1992 in two cases: *Australian Capital Television Pty Ltd v Commonwealth* ('ACTV')⁴¹ and *Nationwide News Pty Ltd v Wills*.⁴² In those cases, the Court held that a guarantee of freedom of communication in relation to political matters must necessarily be implied from the provision which the *Constitution* makes (via ss 7 and 24) for a system of representative government. The Court held that such a freedom is an essential element of representative government, and thus is necessarily implied by the *Constitution's* prescription of that system.

A key challenge in subsequent judicial exposition of this doctrine has been to articulate the freedom in a manner that is consistent with broader aspects of Australian constitutional method. For instance, it might seem possible to argue that ss 7 and 24 operate as a conferral of power, effectively declaring the sovereignty of the state to be vested in the people. The basis of the implied freedom, then, would be that interference with this power of the people is unconstitutional.⁴³ However, such an approach appears inconsistent with the interpretative doctrine laid down in the *Engineers' Case*, which precludes interpreting the *Constitution* by first identifying abstract principles that inhere within it (in this case, *popular sovereignty*) and then reading those principles back in by way of implication.⁴⁴ This challenge appeared to be answered in the case of *Lange v Australian Broadcasting Corporation* ('*Lange*'),⁴⁵ which held that 'the *Constitution* gives effect to the institution of "representative government" only to the extent that the text and structure of the *Constitution* establish it',⁴⁶ and hence that 'the relevant question ... is, "What do the terms and structure of the *Constitution* prohibit, authorise or require?"',⁴⁷ which is to say that 'the implication can validly extend only so far as is necessary to give effect to' the relevant sections of the *Constitution*.⁴⁸

40 For the High Court's clearest statement of this point, with particular reference to freedom of political communication, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'), especially at 559–60. Other provisions of the *Constitution*, such as s 128 (establishing that the *Constitution* can be amended only by referendum) and s 64 (requiring that Ministers sit in Parliament, and thereby establishing responsible government) reinforce the implication derived from ss 7 and 24, but as these two are the most important provisions underpinning the implication, and also for ease of exposition, in the text we refer only to them.

41 (1992) 177 CLR 106 ('ACTV').

42 (1992) 177 CLR 1.

43 See, eg, the remarks of Mason CJ in *ACTV* (1992) 177 CLR 106, 138. The language of 'popular' and 'political' 'sovereignty' has also been used in subsequent decisions: see, eg, *McCloy v New South Wales* (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ), 257 [215]–[217], 274 [271] (Nettle J), 284 [318] (Gordon J) ('*McCloy*'); *Brown* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ).

44 *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*'). For a fuller discussion of the interpretative method established by the *Engineers' Case* — which 'probably remains the most important case in Australian constitutional law' — see James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 8–10.

45 (1997) 189 CLR 520.

46 *Ibid* 566–7.

47 *Ibid* 567.

48 *Ibid*.

This approach in *Lange* settles one aspect of the implied freedom: as the *Constitution*, in its text, establishes an institution and a process (namely, the direct choice by the people of the members of Parliament), but does not confer any political rights, so the implied freedom of political communication takes the form of a limitation upon the reach of the law and of exercises of government power, rather than an individual right to free speech.⁴⁹ However, the approach in *Lange* does not, of itself, settle the question of precisely what it is that the constitutional text requires in providing for *direct choice*, and thereby the necessary incidents of direct choice such as free political communication.⁵⁰ The *Lange* case itself concerned the law of defamation, and the Court's reasoning about the requirements of direct choice and political communication was confined to a consideration of changes in the nature of communication and the media that have taken place with the growth of mass democracy since the time of Australian federation.⁵¹ While the Court's analysis of these matters is compelling as far as it goes, it provides relatively little guidance for considering other modes and contexts of political communication, such as protest.

The legal test that is generally used to determine the validity of legislation by reference to the implied freedom was set out in the *Lange* case, although subsequently refined in *Coleman v Power*,⁵² *McCloy v New South Wales* ('*McCloy*')⁵³ and *Brown*.⁵⁴ In *Lange*, the High Court set out a two-step test: the first step is to examine whether the law 'burden[s] freedom of communication about government or political matters either in its terms, operation or effect'; if it does so, the second step is to determine whether the law is 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.⁵⁵ The second step itself involves two stages: first, determining whether 'the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible

49 Ibid 560, 567.

50 This point is made particularly powerfully in the work of Adrienne Stone: see, eg, Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842. Stone goes on to argue that the constitutional requirement identified in *Lange* cannot be developed and applied without departing from the 'interpretive conservatism seen in the High Court's approach in *Lange*' and adopting '[m]ore value-laden reasoning': Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication', above n 50, 707–8. In this article we leave open the question of whether adequate development of the *Lange* doctrine would require more value-laden reasoning.

51 (1997) 189 CLR 520, 565–6.

52 (2004) 220 CLR 1. The refinement consisted in a confirmation that not just the end of a valid law which burdens the freedom, but the means used to pursue it, must be compatible with the maintenance of the constitutionally prescribed system of government: at 51 (McHugh J), 78 (Gummow and Hayne JJ), 82 [211] (Kirby J).

53 (2015) 257 CLR 178. In that case, a majority of the Court restated the *Lange* test as a three-stage test, breaking the second *Lange* step into two stages ('compatibility testing' and 'proportionality testing'): at 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

54 (2017) 261 CLR 328.

55 (1997) 189 CLR 520, 567.

government’ and second, determining whether ‘the law is reasonably appropriate and adapted to achieving that legitimate object or end’.⁵⁶ Thus, not all laws which ‘burden’ the freedom (as that term is understood) will be unconstitutional because the law may *itself* serve a constitutionally permitted purpose.

In *Brown*, Gageler J stated the test in the following way:

1. Does the law effectively burden freedom of political communication?
2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?

If the first question is answered ‘yes’, and if either the second question or the third question is answered ‘no’, the law is invalid.⁵⁷

The second *Lange* step can involve difficult matters of judgement, in identifying the purpose of an impugned law, in assessing the legitimacy of that purpose by reference to its compatibility with the constitutionally prescribed system of government, and in determining whether the means that the law adopts are appropriate and adapted. And in respect of the second and third of these inquiries, it can sometimes be uncertain whether and how the *Constitution’s* text and structure might provide answers to the questions that the *Lange* test poses.

IV THE DECISION IN *BROWN*

The Court in *Brown* confined its consideration of the validity of the *Protesters Act* to the Act’s operation in respect of ‘forestry land’, that is, land on which ‘forest operations’, such as planting, managing and harvesting trees, are being carried out.⁵⁸ So confined, a majority of the High Court — Kiefel CJ, Bell and Keane JJ in a joint judgment, Gageler J and Nettle J — held that the provisions discussed above impermissibly burdened the implied freedom of political communication and as a result were invalid in their operation. However, the reasons that led the majority judges to that conclusion differed in ways that reflect some of the uncertainties

⁵⁶ Ibid 561–2.

⁵⁷ (2017) 261 CLR 328, 376 [156]. The joint judgment of Kiefel CJ, Bell and Keane JJ adopted a similar formulation at 364–5 [104]. Gordon J stuck to the *Lange* formulation: at 431 [316]–[317]. This article does not directly address the place and role of ‘structured proportionality’ reasoning as an element of the application of the second *Lange* step: for discussion of this matter in a comparative context see Anne Carter, ‘Proportionality in Australian Constitutional Law: Towards Transnationalism?’ (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [Heidelberg Journal of International Law]* 951; Mark Watts, ‘Reasonably Appropriate and Adapted? Assessing Proportionality and the “Spectrum” of Scrutiny in *McCloy v New South Wales*’ (2016) 35 *University of Queensland Law Journal* 349; Shipra Chordia, ‘Proportionality and *McCloy v New South Wales*: Close but Not Quite?’ on *AUSPUBLAW* (1 March 2016) <<https://auspublaw.org/2016/3/proportionality-and-mccloy/>>.

⁵⁸ *Protesters Act* s 3 (definition of ‘forestry land’); (2017) 261 CLR 328, 341 [6], 379 [168], 397 [234], 427–8 [303].

just noted in respect of the *Lange* test, and which therefore leave the constitutional understanding of the significance of place to protest underdeveloped. Gordon J's dissent (except in respect of s 8(1)(b), the provision forbidding a person, once directed to leave, to return within four days without lawful excuse)⁵⁹ is also instructive in these respects, as to some extent is that of Edelman J.⁶⁰

A The Identification of Purpose

As was noted above, legitimacy or constitutional compatibility of statutory purpose is an important stage in assessing the validity of legislation that burdens the freedom of political communication. This requires first identifying the impugned law's purpose.

Gageler J emphasised that identifying a law's purpose is not 'confined to attributing meaning to the statutory text'.⁶¹ Rather,

[t]he correct understanding is that '[t]he level of characterisation required by the constitutional criterion of object or purpose is closer to that employed when seeking to identify the mischief to redress of which a law is directed'.

The purpose of a law is the 'public interest sought to be protected and enhanced' by the law. The purpose is not what the law does in its terms but what the law is designed to achieve in fact.⁶²

The joint judgment similarly identified a statute's purpose as being 'the mischief to which the statute is directed'.⁶³

That the identification of purpose is not *confined* to the identification of statutory meaning does not mean that the identification of the meaning and operation of a law is not an important step in the identification of purpose. Thus, in *Unions NSW v New South Wales* ('*Unions NSW*') the joint judgment stated that

the identification of the statutory purpose in connection with the application of [the *Lange*] test is arrived at by the ordinary processes of statutory construction. Where ... the general purposes of [a statute] are relied upon to justify the restrictive measures of [a particular section of that statute], that section must be understood, by a process of construction, to be connected to those purposes and to further them in some way.⁶⁴

In some cases, it has been held that the purpose of a law does not extend beyond its legal operation. In the same judgment in *Unions NSW* this conclusion was reached in respect of two provisions. That is, although the broader statutory scheme *did* have a legitimate purpose, the provisions in question could not be connected, in

59 *Brown* (2017) 261 CLR 328, 427 [303], 429 [310], 479 [483].

60 Edelman J decided the case primarily on the basis of statutory construction rather than the constitutional protection of political communication: *ibid* 479 [484], 482–3 [491]–[492].

61 *Ibid* 392 [208].

62 *Ibid* 392 [208]–[209]. The quotations are from *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 394 [178]; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 300.

63 *Brown* (2017) 261 CLR 328, 363 [101]. Gordon J agreed: at 432 [321].

64 (2013) 252 CLR 530, 557 [50].

their legal operation, *to that purpose*, and did not in their operation serve any other ascertainable legitimate purpose. Hence they were unconstitutional.⁶⁵

French CJ reached a similar conclusion in respect of the law at issue in *Monis v The Queen* (*'Monis'*),⁶⁶ describing it as being a case in which the two stages of the second *Lange* step 'collapse into one', there being no distinction between the purpose of the law and its legal operation, that is, the means whereby it pursues that purpose.⁶⁷ Hayne J agreed with French CJ on this aspect of *Monis*, but appeared to reason in a slightly different fashion. He first identified the purpose of the law with its legal operation, and then went on to treat broader purposes as reasons for regarding the law's purpose as compatible with the requirements of the *Constitution*.⁶⁸ It is clear that Hayne J did not, in general, regard this approach as collapsing the two stages into one, as he placed great emphasis on (i) the identification of a purpose that is legitimate in virtue of its connection to the constitutional requirements as a necessary condition of (ii) then asking whether the means whereby a law pursues that purpose unduly burden the freedom in legal operation or practical effect.⁶⁹ Stellios suggests that there may be no practical difference between the results of the approach to purpose apparently adopted by Hayne J and those from the approach of the sort adopted by the majority in *Brown*. However, he favours the latter as better suited to ensuring that questions about means (the second stage of the second *Lange* step) are not subsumed into questions about legislative ends (the first stage of the second *Lange* step).⁷⁰ The Court's analysis of purpose in *Brown* shows the importance of avoiding this sort of collapse.

The plaintiffs in *Brown* argued that purpose of the *Protesters Act* is to stop onsite protests.⁷¹ A majority of the Court disagreed, however. The joint judgment held that its purpose is not to stop protests as such, but rather to protect against

the harm that the conduct of particular kinds of protest activities may cause. ... [The Act is] directed towards protesters because protesters are seen as the potential source of such harm. ... [T]he legislation was enacted against a background where protesters, or at least some of them, were perceived to be those persons, or

65 Ibid 557–61 [51]–[65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

66 (2013) 249 CLR 92, 133–4 [72]–[74] (*'Monis'*).

67 Ibid 134 [74].

68 Ibid 161–74 [175]–[220].

69 Ibid 147–54 [125]–[146]. Hayne J uses the word 'connection' in this context: at 149 [130], while making it clear (at 148 [128]) that articulating the connection of a law to the constitutional requirements does not require that the law be shown to pursue 'the maintenance or enhancement' of those requirements. In *Brown*, Gordon J pointed to criminal laws as 'illustrat[ing] that some regulation is often necessary and beneficial for an end that is not the maintenance or enhancement of the constitutionally prescribed system of representative and responsible government but, at the same time, is not incompatible with the maintenance of that system': (2017) 261 CLR 328, 451 [378]. For discussion of the High Court's approach to these two different classes of legislative purposes — ie those which are, and are not, directed at maintaining or enhancing the constitutional requirements — see Samuel J Murray, 'The Public Interest, Representative Government and the "Legitimate Ends" of Restricting Political Speech' (2017) 43 *Monash University Law Review* 1, 6–12, 15–20.

70 Stellios, above n 44, 592–3.

71 (2017) 261 CLR 328, 362 [97], 392 [211].

groups, who would cause damage or disrupt economic activities during protests of particular kinds.⁷²

Nettle J agreed with this.⁷³ Of the majority judges, only Gageler J fastened directly on the fact that the *Protesters Act* taking *protesters* as its target might raise constitutional concerns:⁷⁴

To constrain the conduct of protesters *as protesters* is to limit freedom of political communication. To limit freedom of political communication is simply not a purpose that is compatible with the maintenance of the constitutionally prescribed system of government. To constrain the conduct of protesters as protesters may be a means to a legitimate end, but it cannot be a legitimate end in itself.⁷⁵

The closest that the joint judgment comes to addressing this issue is in the following curious passage:

neither the terms of the *Protesters Act* nor its purpose seeks to affect the content of the opinion which a protester may seek to voice with respect to forest operations. ‘Protesters’ are defined by reference to those opinions, perhaps unnecessarily, but the Act takes it no further. Its terms, in their operation and effect, are directed to the conduct of protesters.⁷⁶

The phrase ‘perhaps unnecessarily’ glosses over precisely what is at issue, however: namely, that by making the voicing of political opinions a necessary trigger for liability, the *Protesters Act* directly targets that political communication which is a necessary incident of the people making their direct choice of the members of Parliament.

Furthermore, as Gageler J observed,

[t]he nature and intensity of the burden imposed on political communication by the impugned provisions of the *Protesters Act* fall therefore to be considered against

72 Ibid 362 [99], 363 [101]; see also at 362–3 [100], 363[102]. The joint judgment did hold that s 8(1)(b) of the *Protesters Act* ‘is not based upon any foresight on the part of a police officer that the person’s presence might have an adverse effect on forest operations ... [and thus] cannot be said to share the purpose of the *Protesters Act* ... [and] is directed solely to the purpose of deterring protesters’ and hence is invalid due to a lack of a rational connection to the Act’s legitimate purpose: ibid 358 [81], 371 [135]. Gordon J agreed on this point, emphasising that the provision does not condition the prohibition on returning on any sort of intended disruptive conduct, is not ‘directed to regulating effects of conduct beyond the communication of ideas or information’ and therefore ‘does not have an object compatible with the maintenance of the constitutionally prescribed system of government’: at 468 [440]–[442]; see also at 429 [310]. Anne Twomey has suggested that ‘the point of the proportionality test is to expose those cases where a “legitimate end” is a mere ruse to achieve quite a different end and to burden the implied freedom’, and this appears to be true at least of the way in which the joint judgment and Gordon J dealt with s 8(1)(b): Anne Twomey, ‘*McCloy v New South Wales*: Developer Donations and Banning the Buying of Influence’ (2015) 37 *Sydney Law Review* 275, 280.

73 *Brown* (2017) 261 CLR 328, 413–4 [272], 414–5 [275]–[276].

74 For an academic anticipation of the significance of this feature of the legislation, see William Bartlett, ‘The Raised Spectre of Silencing “Political” and “Environmental” Protest: Will the High Court Find the *Workplaces (Protection from Protesters) Act 2014* (Tas) Impermissibly Infringes the Constitutionally Implied Freedom of Political Communication in *Brown v The State of Tasmania?*’ (2017) 36(1) *University of Tasmania Law Review* 1, especially at 15–18, 32.

75 *Brown* (2017) 261 CLR 328, 392 [210] (emphasis added).

76 Ibid 368 [122].

a background of historical and continuing public access to permanent timber production zone land, of limited statutory regulation of that public access, and of historical and likely continuing on-site political protests directed to bringing about legislative or regulatory change on environmental issues on Crown land in Tasmania. ...

[T]he burden imposed on political communication by the impugned provisions ... can be expected to fall in practice almost exclusively on on-site political protests of that description. ... [G]iven the history of on-site protests in Tasmania, it would be fanciful to think that the impugned provisions are not likely to impact on the chosen method of political communication of those whose advocacy is directed to bringing about legislative or regulatory change on environmental issues and would have little or no impact on political communication by those whose advocacy is directed to other political ends. ...

The burden on political communication imposed by the impugned provisions is ... direct, substantial and discriminatory — facially against political communication and in its practical operation more particularly against political communication expressive of a particular political view.⁷⁷

Thus, while it is true to say that the law, in its legal operation, targets conduct and not viewpoint, once its *purpose* is understood as being to protect against protesters as such, and once it is acknowledged that that means, in practice, protesters expressing a particular set of political opinions *because of* the connection between the protected places and particular sorts of protest, it is hard to avoid Gageler J's conclusion that the purpose is an illegitimate one: any constitutional protection of the freedom of political communication surely must be sensitive to a law which directly fastens on the making of political communication as a basis for liability, particularly when — in virtue of the place that it regulates, in this case forestry land — it burdens some views but not others.⁷⁸

Gageler J went on to accept, as a plausible explanation of the law's purpose, that it was “to protect businesses in Tasmania from conduct that seriously interferes with the carrying out of business activity, or access to business premises on

77 Ibid 387–8 [192]–[193], 389 [199]; see also at 390 [203]. Nettle J similarly noted ‘the apparent importance to protesters of the ability to protest in close proximity to forest operations in order effectively to convey to the public and parliamentarians their opposition to those activities’ but went on to state that ‘the *Protesters Act* does not target communication on the basis of its content’: ibid 413 [270], 423 [291].

78 The approach of the joint judgment, Nettle J and Gordon J can be contrasted with that of the US Supreme Court in *Grayned v City of Rockford*, 408 US 104 (1972) (*‘Grayned’*). A majority of the Court upheld the validity of a law which prohibited wilfully making noise, adjacent to a school, that would tend to disturb classes, on the grounds that the law was ‘narrowly tailored’ to regulate the ‘time, place and manner’ of speech appropriately to the ‘nature of [the] place’ without fastening upon content: at 115–17. (The Court also found that the law was not impermissibly vague: at 109–14. For the significance of this in First Amendment jurisprudence, see text to nn 130–33 below.) The law in *Grayned* did not target only protesters, nor did it target a place of distinctive significance for a particular sort of protest.

which that business activity is conducted”⁷⁹. Gordon J upheld a similar account of the purpose of the *Protesters Act*.⁸⁰ Framing the purpose in this way, rather than as the others did, has the methodological significance identified by Stellios:⁸¹ it establishes a different context for assessing the proportionality of the legislative means. The majority framing of purpose already presupposes that targeting protesters is legitimate, and hence all that need be shown to defend the law is that the law is appropriate and adapted to protecting against protesters’ conduct; whereas Gageler J’s framing requires showing that the law is appropriate and adapted to protecting businesses in the way described *despite the fact* that it targets protesters at a particular site of protest.

B Compatibility of Purpose and Proportionality of Means

If we put to one side the infelicities in the way the majority of the High Court identified the purpose of the *Protesters Act*, we can then turn to the question of why, in constitutional terms, the protection of businesses from disruption constitutes a legitimate statutory purpose.

There has been a substantial amount written on the notion of ‘legitimate purpose’ in the context of the *Lange* test.⁸² In this article we proceed by comparing the approaches of Hayne J and the joint judgment in *Monis*, and explaining why Hayne J’s approach is to be preferred. This explanation draws in part on considerations of the role of place in protest.

The joint judgment in *Monis* held that the purpose of the legislation at issue in that case ‘is not incompatible with the maintenance of the constitutionally prescribed system of government or the implied freedom which supports it’, apparently because it ‘is not directed to the freedom.’⁸³ Hayne J, on the other hand, rejected the suggestion that ‘a legislative object or end is “legitimate” if it is an end within a legislative head of power’.⁸⁴ He gave two main reasons for this.

79 *Brown* (2017) 261 CLR 328, 392 [212], quoting Attorney-General (Vic), ‘Annotated Submissions of the Attorney-General for the State of Victoria (Intervening)’, Submission in *Brown v Tasmania*, H3/2016, 28 March 2017, 8 [35]; see also *Brown* (2017) 261 CLR 328, 392–4 [213]–[217]. Because Gageler J found that the *Protesters Act* is not reasonably appropriate and adapted to serve any legitimate end (such as protecting forestry operations from serious interference), he did not need to reach a final conclusion as to whether or not the legislation does have such a legitimate purpose: *Brown* (2017) 261 CLR 328, 392–4 [212]–[217].

80 *Brown* (2017) 261 CLR 328, 427–8 [303], 461 [413].

81 See above n 70 and accompanying text. Gordon J, citing Stellios on this point, likewise stated that the purpose of the *Protesters Act* should not be construed narrowly in a way that would collapse the two stages of the second *Lange* step: *Brown* (2017) 261 CLR 328, 432–3 [322], 461 [413]–[414], citing Stellios, above n 44, 592–3.

82 See, eg, Bartlett, above n 74, 11–14; Watts, above n 57, 358–63; Murray, above n 69, 1–26; Kristen Walker, ‘Justice Hayne and the Implied Freedom of Political Communication’ (2015) 26 *Public Law Review* 292, 296.

83 *Monis* (2013) 249 CLR 92, 215 [349]; see also the observation in the joint judgment that the law in question ‘is not directed to political communication’: at 212 [342]. Stellios, above n 44, describes this judgment as evincing the view that a law will have a legitimate purpose provided that it is not directed to nothing more than burdening political communication: at 593.

84 *Monis* (2013) 249 CLR 92, 150 [132].

First, accepting the suggestion would tend to make the first stage of the second *Lange* step redundant, reducing the question of compatibility to a question about the appropriateness of the means adopted by the law (*ex hypothesi* within power) given that they (again, *ex hypothesi*) burden the freedom.⁸⁵ Second, only if the connection of the impugned law to the constitutional requirements is examined, as part of a process of demonstrating compatibility, is one then in a position to undertake the second stage of the second *Lange* step, by comparing ‘the means of pursuing a legislative object or end that has been determined to be compatible with the implied freedom and ... the burden on the freedom’ imposed by those same legislative means.⁸⁶ As his Honour goes on to say,

the comparison that is to be made between the effect of the impugned law upon the freedom to communicate on government and political matters and the law’s connection with an identified end proceeds from a common point of reference: the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident.⁸⁷

Making sense of the second reason articulated by Hayne J, which draws a link between the two stages in the second *Lange* step, is not straightforward, but we take it to reflect the point made above, that the *Constitution* is not protecting rights but rather is establishing a particular institutional framework. ‘Balancing’ burdens on political communication against independently-conceived legitimate ends does not frame the question as one about the maintenance of that mandated system, and (as Hayne J puts it) would ‘require a court to balance incommensurables ... [namely] the law’s effect on freedom of political communication and the law’s effect on some public interest or purpose wholly unconnected with’ the constitutional requirements.⁸⁸

Presumably the law fails this test if its detrimental impact on political communication is somehow judged to be greater than the benefit following from pursuit of the end that has been held to fall within a head of legislative power. How that comparison is to be made was not explained.⁸⁹

In contrast, considering the legal operation and practical effect of means that burden political communication but nevertheless pursue an end whose compatibility has itself been demonstrated by reference to the constitutional requirements both (i) enables the constitutionally mandated system to remain the object of inquiry, and (ii) enables an appreciation of how legislative means

85 Ibid 150–1 [134]–[137], 152 [139].

86 Ibid 151 [138]; see also at 149 [130], 150 [134], 152 [140], 153 [143], 153–4 [145]–[146].

87 Ibid 154 [146].

88 Ibid 151 [138], 154 [146].

89 Ibid 150 [134].

that pursue the (*ex hypothesi*) legitimate end might be justified even though they burden the freedom of political communication.⁹⁰

To make this point about methodology is not to deny that free speech protections in other constitutional contexts may also have an institutional dimension.⁹¹ However, to the extent that free speech protection is framed *as a right*, then questions about its scope and operation are most naturally framed as inquiries into who is the duty-bearer, and what are the limits of that right;⁹² whereas in the Australian context, given that the constitutional mandate is *that a certain political system shall obtain* rather than *that a certain right shall be enjoyed*, it is the operation of that system, and the effect on that operation of the impugned law, that must be the focus of inquiry.

90 The contrast between the approach of the joint judgment and of Hayne J can be appreciated by considering how each dealt with the compatibility that *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104 (*Theophanous*) and *Lange* (1997) 189 CLR 520 have held obtains between the law of defamation (at least in its basic outline) and the constitutional requirements: the joint judgment noted simply that ‘it will be recalled that in *Lange* the protection of reputation was not considered to be incompatible’, whereas Hayne J cited Dawson J explaining *why* it is not incompatible (because, at the least, it provides a degree of assurance to participants and would-be participants in politics): *Monis* (2013) 249 CLR 92, 149–50 [130] (Hayne J), quoting *Theophanous* (1994) 182 CLR 104, 192 (Dawson J); *Monis* (2013) 249 CLR 92, 215 [349] (Crennan, Kiefel and Bell JJ). For further criticism of the need for ‘balancing’ in the *Lange* test see Patrick Emerton, ‘Political Freedoms and Entitlements in the *Australian Constitution* — An Example of Referential Intentions Yielding Unintended Legal Consequences’ (2010) 38 *Federal Law Review* 169; Emerton, ‘Ideas’, above n 38; Nicholas Aroney, ‘Justice McHugh, Representative Government and the Elimination of Balancing’ (2006) 28 *Sydney Law Review* 505, especially at 519–28, 531–34; Nicholas Aroney, ‘The Implied Rights Revolution — Balancing Means and Ends?’ in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 173, 187. In an early case on the implied freedom of political communication, Dawson J similarly stated that ‘[i]f a law interferes with the essential elements of representative government, it is beyond power, regardless of any justification. No balancing process occurs’: *Theophanous* (1994) 182 CLR 104, 191. Murray, above n 69, appears to set out a third view with regard to compatibility, arguing that when legislation that burdens the implied freedom is not directed at the constitutional requirements then adjudication of its constitutional validity should have no regard to the ‘importance’ or ‘public interest’ of its legislative purpose; rather, a test of the ‘reasonable necessity’ of the impugned law in serving its end should be applied: at 10–12, 17, 20–23. However, such a contention is implausible, as it would permit any degree of burden on the implied freedom provided only that the burden-imposing law is reasonably necessary to serve its end. Murray appears to avoid this conclusion only by including, as part of the notion of legitimate end, that it not ‘adversely impinge’ on the implied freedom: at 16–17. But this is clearly not an analysis of the end or purpose of legislation (the ‘mischief at which it is directed’) but rather of the justifiability of its burden. Murray is led into this confusion by an error in the way in which the plurality judgment stated its test in *McCloy*: (2015) 257 CLR 178, 194 [2]. The Commonwealth pointed out this error in argument in *Brown*, and the joint judgment, Gageler J and Nettle J all accepted the Commonwealth’s correction: (2017) 261 CLR 328, 364 [104], 375 [155], 416 [277]. The problem with the statement of the test in *McCloy* had also been pointed out by Anne Carter: Anne Carter, ‘Case Note: *McCloy v New South Wales*: Political Donations, Political Communication and the Place of Proportionality Analysis’ (2015) 26 *Public Law Review* 245, 252–3.

91 For instance (as an anonymous referee has reminded us) the First Amendment clearly has institutional elements to it. That is, one thing towards which the First Amendment is oriented is the maintenance of a democratic system of government (see, eg, the discussion in James Weinstein, ‘Climate Change Disinformation, Citizen Competence, and the First Amendment’ (2018) 89 *University of Colorado Law Review* 341, especially at 348–9, 361–2).

92 For a recent discussion of this issue, in the context of an inquiry into how courts in the United States, Canada and Germany engage in the process of determining the extent to which constitutional rights provide protection against private actors exercising their private rights, which emphasises jurisdictional differences of methodology grounded in constitutional context and tradition, see Jud Mathews, *Extending Rights’ Reach: Constitutions, Private Law, and Judicial Power* (Oxford University Press, 2018).

Another virtue of Hayne J's approach to ascertaining the compatibility of a law's purpose with the constitutional requirements is that it does not focus simply on whether those requirements fall within the scope of that purpose (and if so, whether the purpose is at odds with them). This is significant when we consider a purpose such as that of the *Protesters Act*. A purpose of protecting businesses from harm, or disruption of their economic activities, is not itself *directed* at the implied freedom or the constitutionally mandated system of government. But that does not mean that it does not bear upon those things. If we accept – as this article does — that protest is an important means of political communication in a contemporary democracy, and if we recognise that place is often integral to protest, particularly environmental protest, then we can easily see that the purpose of protecting business activities from harm and disruption may bear directly upon the constitutional requirements because of its implications for the access of protesters to protected business premises.

This way of approaching the issue of compatibility does not necessarily make the inquiry an easy one. For, as Hayne J says,

[t]he *Constitution* provides only limited guidance on the requirements of the system of government which it establishes. Legitimate ends are not expressly listed in the *Constitution* as they sometimes are in other jurisdictions. ...

The decided cases ... are no more than examples of legitimate objects or ends that have so far been identified in the cases. The list is not closed.⁹³

In some cases, however, identifying the compatibility of a law's purpose with the constitutional requirements, and then the proportionality of the freedom-burdening means whereby it pursues that purpose, may be relatively straightforward. An illustration is the case of *McCloy*,⁹⁴ which held a restriction on political donations by property developers under the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) to be a permissible burden on the implied freedom. The Court unanimously held that the purpose of the legislation was legitimate, being to address corruption and allow other (potentially less powerful) people to participate in the political process, thereby serving the purpose of political equality;⁹⁵ the joint judgment spent just a single sentence dealing with this issue.⁹⁶ A majority of the Court also held that the legislation was reasonably appropriate and

93 *Monis* (2013) 249 CLR 92, 148–9 [128]–[129].

94 (2015) 257 CLR 178.

95 In their joint judgment, French CJ, Kiefel, Bell and Keane JJ stated that '[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution*' and that '[t]he purpose of [the legislation] and the means employed to achieve that purpose are not only compatible with the system of representative government; they preserve and enhance it': *ibid* 207[45], 208 [47]; see also at 248 [184] (Gageler J), 260 [227], 261 [232] (Nettle J), 284–5 [322]–[325], 292 [355], 296 [376] (Gordon J). Although the *Constitution* does not itself expressly set out any requirement of political equality, this can be inferred from the reference to 'the people' as those who choose the members of Parliament: for discussion, see Emerton, 'Political Freedoms and Entitlements in the *Australian Constitution*', above n 90; Emerton, 'Ideas', above n 38; Justice Patrick Keane, 'The People and the *Constitution*' (2016) 42 *Monash University Law Review* 529.

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

adapted in its pursuit of its end.⁹⁷ The fact that reports from the Independent Commission Against Corruption ('ICAC') revealed that property developer funds were having a pernicious effect on politics in NSW was an important consideration in this conclusion, as it made the legislative focus on one class of donors permissible.⁹⁸

But *Brown* is not a case like this. It is true that, when restrictions upon political protest are considered in the abstract, questions arise seemingly of a similar nature to those dealt with in *McCloy*. For instance, the power differential between business and environmental protesters may resonate with the legitimate purpose of facilitating and protecting the capacity of all persons to participate in the political process (not merely those who could make large donations). However, the constitutional question is quite different, for in *Brown* – unlike *McCloy* – the law under consideration does not have a purpose that directly conduces to the furtherance of the constitutionally prescribed system of government, and the considerations of power and political equality come into play as reasons that speak *against* the constitutionality of the law. Similarly, whereas the law in *McCloy* imposed burdens on private rights (namely, the right of property developers to dispose of their money as they wish) in order to further the constitutionally prescribed system of government, the law in *Brown* aims at the *protection* of commercial interests.

How is it to be ascertained whether or not the protection of commercial interests is compatible with the constitutionally prescribed system of government? Unfortunately the Court in *Brown* did not go into this in any detail. The joint judgment stated simply that 'the purpose of the *Protesters Act*, understood in the way described above, could not be said to be incompatible with the freedom'.⁹⁹ Gageler J similarly stated that

[t]here could be no question that such a purpose [ie of protecting business activities from serious disruption] is compatible with the maintenance of the constitutionally prescribed system of government. ... [T]he plaintiffs do not argue that [this purpose] would not be sufficiently protective of an important public interest.¹⁰⁰

Nettle J said that

[t]here should ... be no doubt that the purpose of ensuring that protesters do not substantively prevent, impede or obstruct the carrying out of business activities

97 Ibid 220–1 [93] (French CJ, Kiefel, Bell and Keane JJ), 249 [185] (Gageler J), 287 [335], 290 [345], 293–5 [362]–[369], 297 [379]–[381] (Gordon J). Nettle J, however, would have invalidated the provisions prohibiting donations by property developers on the grounds that they discriminated against one particular category of donor: at 264 [241], 267–8 [250]–[252], 270 [257], 272 [266], 273 [269]. In *Brown*, Gordon J hesitantly described this reasoning in *McCloy* as involving a 'balancing' of 'positive and negative effects on the system' of government prescribed by the *Constitution: Brown* (2017) 261 CLR 328, 467–8 [438].

98 *McCloy* (2015) 257 CLR 178, 208–9 [49]–[53] (French CJ, Kiefel, Bell and Keane JJ), 250 [191]–[194] (Gageler J), 292 [354], 292–3 [359] (Gordon J). Nettle J did not accept that the ICAC reports provided a sufficient ground for distinguishing property developers as a prohibited category of political donors: at 261–2 [233], 273 [268].

99 *Brown* (2017) 261 CLR 328, 363 [102].

100 Ibid 392–3 [213].

on business premises and do not damage business premises or business-related objects is a purpose compatible with the system of representative and responsible government.¹⁰¹

Gordon J did describe the reason for holding the *Protesters Act* to pursue a legitimate end in more detail:

The object of the *Protesters Act*, in relation to forestry land, is to protect the productivity, property and personnel of forest operations; in particular, to protect forest operations from activity that prevents, hinders or obstructs business activity or causes damage on business premises or in areas necessary to access business premises. That object is no more incompatible with the constitutionally prescribed system of representative and responsible government than the pre-existing wider legal framework alongside which the *Protesters Act*, in its operation in relation to forestry land, sits, and within which it operates.¹⁰²

Her Honour also pointed out that the constitutionality of that ‘wider legal framework’ had not been challenged, and stated that ‘[t]hat framework was and remains a constitutionally valid baseline’.¹⁰³ This unchallenged framework included the *Forest Management Act 2013* (Tas) (*Management Act*), which already regulated access to areas of forest where forestry work was taking place, including by the giving of directions.¹⁰⁴ But this still does not tell us *why* the object of the *Protesters Act* is compatible with the constitutional requirements, by reference to constitutional text and structure and what follows therefrom.

In *Monis*, Hayne J stated that, when compatibility is to be determined,

[i]n many cases it will be profitable to examine how the general law operates and has developed over time, not because the general law in any way limits or restrains the exercise of legislative power but because the implied freedom of political communication must be understood and applied having regard to what may be learned from consideration of the general law.¹⁰⁵

However, and as will be discussed further below, this statement does not seem to give sufficient weight to the fact that the general law must conform to the *Constitution*.¹⁰⁶ That the common law as received into Australia contemplates the operation of private enterprises for profit does not therefore seem sufficient to answer the question. After all, as Seidman,¹⁰⁷ *McCloy*, and the circumstances of the *Brown* case all make clear,¹⁰⁸ the carrying on of commercial activities is

101 Ibid 414–15 [275].

102 Ibid 461 [413]. Both Nettle J and Gordon J also made the point that the Tasmanian Parliament was entitled to legislate in respect of the perceived problem of protesters, whose activities ‘particularly and uniquely’ posed a threat to business activities: at 415–16 [276] (Nettle J), 462 [418], 462–3 [422] (Gordon J); the quotation is from 415 [276]. Gordon J was careful to identify this as a matter of means, not ends.

103 Ibid 443 [357].

104 Ibid 365–6 [110]–[114]. Edelman J also emphasised this point: at 505–6 [561].

105 (2013) 249 CLR 92, 148–9 [128] (citations omitted).

106 As was authoritatively stated in *Lange* (1997) 189 CLR 520, 556, 566.

107 See above nn 1–2 and accompanying text.

108 See above nn 94–8 and accompanying text.

hardly neutral as far as a system of representative government predicated on the direct choice by the people of their members of Parliament is concerned.

Nettle J offered the following argument in favour of the compatibility of the *Protesters Act*, which seemed to rely on considerations drawn from the general law:

The implied freedom of political communication is a freedom to communicate ideas to those who are willing to listen, not a right to force an unwanted message on those who do not wish to hear it ... Persons lawfully carrying on their businesses are entitled to be left alone to get on with their businesses and a legislative purpose of securing them that entitlement is, for that reason, a legitimate governmental purpose.¹⁰⁹

But such a conception of the operation of the freedom, and its role in the constitutionally prescribed system of government, seems to be at odds with some important remarks in earlier cases.

While the High Court has frequently noted that the *Constitution* does not confer political rights, and hence that argument cannot proceed on any such premise as that legislation interferes with a personal right to engage in political speech,¹¹⁰ it has less often identified potential affirmative implications of the distinctive foundation of the constitutional protection of political speech in Australia, that is, modes of argument that may be enlivened by the fact that the *Constitution* mandates a certain political process and institutional arrangement rather than guaranteeing individual rights. There are some examples of it doing so, however. One of these is the majority judgment in *Aid/Watch Inc v Federal Commissioner of Taxation*.¹¹¹ The majority first cited Dixon J's remarks about the relationship between political advocacy and the public welfare (occurring as part of a discussion of the law of charitable trusts):

A coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare. Thus, when the main purpose of a trust is agitation for legislative or political changes, it is difficult for the law to find the necessary tendency to the public welfare ...¹¹²

109 *Brown* (2017) 261 CLR 328, 415 [275]. In the *A-G (SA)* case, French CJ similarly seemed to treat the unsolicited nature of the communications that might be burdened as speaking in favour of constitutional validity: (2013) 249 CLR 1, 44 [68].

110 In *Brown* this point was made in nearly every judgment: (2017) 261 CLR 328, 360 [90], 374 [150] (Kiefel CJ, Bell and Keane JJ), 398 [237], 407 [258], 410 [262] (Nettle J), 430 [313], 466 [433], 475 [465] (Gordon J), 503 [559] (Edelman J). The cases cited as authority for and illustrations of this point included *ACTV* (1992) 177 CLR 106, 150; *Theophanous* (1994) 182 CLR 104, 149; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 327; *Lange* (1997) 189 CLR 520, 560–1, 567; *Levy v Victoria* (1997) 189 CLR 579, 622; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 451 [381]; *Wotton v Queensland* (2012) 246 CLR 1, 23–4 [54], 30 [78], 31 [80]; *A-G (SA)* (2013) 249 CLR 1, 73–4 [166], 89 [220]; *Monis* (2013) 249 CLR 92, 189 [266], 192 [273], 206–7 [324]; *Unions NSW* (2013) 252 CLR 530, 548–9 [19], 551 [30], 553–4 [35]–[36], 572 [112], 574 [119], 578 [135], 586 [166]; *Tajjour v New South Wales* (2014) 254 CLR 508, 569 [104], 593–4 [198]; *McCloy* (2015) 257 CLR 178, 202–3 [29]–[30], 228–9 [119]–[120], 258 [219], 280 [303], 283 [317].

111 (2010) 241 CLR 539 (*Aid/Watch*).

112 *The Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396, 426, quoted in *ibid* 555 [42].

The majority then went on to explain why Dixon J was wrong:

In Australia, the foundation of the ‘coherent system of law’ of which Dixon J spoke ... is supplied by the *Constitution*. The provisions of the *Constitution* mandate a system of representative and responsible government with a universal adult franchise, and s 128 establishes a system for amendment of the *Constitution* in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is ‘an indispensable incident’ of that constitutional system. While personal rights of action are not by these means bestowed upon individuals in the manner of the *Bivens* action known in the United States, the *Constitution* informs the development of the common law. Any burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of that system of government.

The system of law which applies in Australia thus postulates for its operation the very ‘agitation’ for legislative and political changes of which Dixon J spoke ... it is the operation of these constitutional processes which contributes to the public welfare.¹¹³

This is consistent with the unanimous judgment in *Lange*, which in considering the doctrine of qualified privilege as an element of the law of defamation held that

[b]ecause the *Constitution* requires ‘the people’ to be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of Ministers of State and the conduct of the executive branch of government, ... this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.¹¹⁴

It is also consistent with Mason CJ’s statement of the importance of the implied freedom of political communication in *ACTV*: ‘Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none is taken and in this way influence the elected representatives.’¹¹⁵

The emphasis on the centrality of political communication in a representative democracy, on the interest that all members of the Australian community have in receiving political communications, and on ‘agitation’ as a component of those constitutional processes whose operation contributes to the public welfare, shows that the implied freedom of political communication is far more than a mere

113 *Aid/Watch* (2010) 241 CLR 539, 555–6 [44]–[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (citations omitted). The quotation ‘an indispensable incident’ is from *Lange* (1997) 189 CLR 520, 559–60. In her judgment in *Brown*, Gordon J asserted that ‘[b]ecause the implied freedom operates solely as a restriction on power and only to the extent necessary to maintain the constitutionally prescribed system of government, the notion of speech as an affirmative value has no role to play’: (2017) 261 CLR 328, 473 [459] (citations omitted). This statement appears to be at odds with the reasoning of the majority in *Aid/Watch*.

114 *Lange* (1997) 189 CLR 520, 571.

115 *ACTV* (1992) 177 CLR 106, 138.

liberty to address those who are willing to listen. Hence, the fact that a law aims at protecting from disturbance the private activity of an individual or a group does not in itself show that the law's purpose is compatible with the constitutional requirements in the manner that the *Lange* test requires.

Rather than focusing on some more general purpose of protecting privacy or 'be[ing] left alone',¹¹⁶ then, it seems that the focus must be on the purpose of protecting businesses from disruption. Ought we to conclude that there is a right under the *Constitution* to operate a business? The *Constitution* contains some provisions that clearly seem to bear upon this question: for instance, s 92 provides for free trade between states, and thus appears to presuppose a system of free markets and free enterprise;¹¹⁷ s 51(xxxv) provides for industrial conciliation and arbitration, and thus appears to presuppose a system of free, waged labour; and s 51(xxxi) provides that Commonwealth law may provide for the acquisition of property only on just terms, presupposing a system of private property rights. This may be a circumstance in which the *Constitution's* text and structure does yield a straightforward answer to the question of compatibility, but it would help to have the reasoning spelled out.

The absence of any challenge to the constitutionality of the 'wider legal framework', which informed Gordon J's conclusion that the *Protesters Act* was compatible, also played a role in determining whether the burden on the freedom of political communication imposed by the *Protesters Act* was nevertheless reasonably appropriate and adapted to serve its legitimate purpose. Thus, the joint judgment stated that '[t]he extent of the burden effected by the *Protesters Act* must be determined having regard to the restrictions already imposed on the freedom by the [*Management Act*].'¹¹⁸ Nettle J similarly stated that

where the legislature has seen fit to prohibit certain forms of communication, and there is no challenge to that existing prohibition, the implied freedom is not to be regarded as restraining legislative power to do again what has already been done, by doubly prohibiting certain acts of communication or by imposing greater penalties than already apply.¹¹⁹

His Honour also referred to the common law:

the implied freedom of political communication is a freedom to communicate by lawful means, not a licence to do what is otherwise unlawful. Hence, in this context, it does not authorise or justify trespass to land or chattels, nuisance or the besetting of business premises, or negligent conduct causing loss.¹²⁰

116 *Brown* (2017) 261 CLR 328, 415 [275] (Nettle J).

117 But does not confer an individual right on traders: see *Cole v Whitfield* (1988) 165 CLR 360.

118 *Brown* (2017) 261 CLR 328, 366 [111]; see also 365 [109].

119 *Ibid* 410 [262]. Nettle J also went on to find that the *Protesters Act* was rationally connected to its purpose, and had not been shown to not be reasonably necessary to serve that purpose: *Brown* (2017) 261 CLR 328, 418 [281], 422 [289]. Edelman J, by way of contrast, held that the *Protesters Act* imposed no burden on the implied freedom because the conduct it dealt with was already unlawful pursuant to un-impugned laws: *Brown* (2017) 261 CLR 328, 482 [491], 502–3 [556]–[557].

120 *Brown* (2017) 261 CLR 328, 408 [259] (citations omitted).

However, as we noted above, the common law may need to change if, as currently understood, it is not consistent with the implied freedom. Gageler J, Gordon J and Edelman J all recognised this point.¹²¹ However, as Gordon J put it, ‘no party or intervener submitted that an injunction could not or should not be granted to prevent trespass or nuisance simply because the trespasser or person committing a nuisance sought to make a political point by acting in breach of the rights of another’.¹²²

Thus, the question that the judgments addressed was whether the *Protesters Act* imposed an impermissible burden on political communication when compared to this unchallenged background law. The Court offered no account of how the validity of this background of rights conferred upon business by statute and common law might be analysed if it were to be challenged. This article does not seek to argue that the constitutional importance of political communication requires a wholesale rewriting of the laws of trespass or nuisance. But private rights are not always serving the same interest: there is a qualitative difference, for instance, between individuals’ interests in residential privacy¹²³ and the commercial interests in respect of publicly-owned forests that were at issue in *Brown*. The fact that protection of the operation of a business without serious disruption is a legitimate end under the *Constitution* does not mean that the law of torts as it is currently understood, without express regard to the significance

121 Ibid 385–6 [188], 463 [424], 506 [563]. Gageler J described this as the law ‘be[ing] adjusted to accommodate to the implied freedom’: at 386 [188]. Gordon J described this as ‘the demands of the implied freedom ... modify[ing] the civil law’: at 463 [424]. Edelman J described this as ‘development of the common law, consistently with the *Constitution*, [which] must occur by the common law analogical method’: at 506 [563]. This article does not consider the proper analysis of the methodology whereby the common law ‘must conform to the requirements of the *Constitution*’: *Lange* (1997) 189 CLR 520, 556; see also at 566.

122 *Brown* (2017) 261 CLR 328, 454 [391]; see also at 463 [424]. Her Honour also included the common law in her account of the ‘constitutionally valid baseline’, drawing particular attention to the relevance, in this context, of the common law of trespass and of nuisance: at 443 [357], 451 [379], 453 [387]. Edelman J went further in this respect than Gordon J, saying: ‘*Nor is there a need*, and no party contended, for the law concerning property rights to develop so that an individual has a liberty to trespass on the property of another for the purposes of political communication’: at 506 [563] (emphasis added). As the joint judgment was concerned with the comparison of the *Protesters Act* to the *Management Act*, it did not address ‘questions of right of entry or trespass’: *Brown* (2017) 261 CLR 328, 365 [109].

123 In *Frisby v Schultz*, 487 US 474 (1988), the US Supreme Court upheld the validity of a Brookfield, Wisconsin ordinance making it ‘unlawful for any person to engage in picketing before or about the residence or dwelling of any individual’ (at 477). The plaintiffs, who wanted to picket the residence of a doctor who was alleged to perform abortions at two clinics in neighbouring towns, filed a suit arguing that the ordinance violated the First Amendment. The primary purpose of the ban was said to be to ‘protect[t] and preserv[e] the home’ through assurance ‘that members of the community enjoy in their homes ... a feeling of well-being, tranquility, and privacy’. The Supreme Court rejected the argument that the streets of Brookfield should be considered a non-public forum, in part because they were physically narrow and of a residential character. The Court held that the residential streets in question were traditional public fora and that ‘a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood’ (at 480). Thus, the ordinance had to be judged against the ‘stringent standards’ established by the Court in relation to restrictions on speech in such places (at 481). In upholding its validity, the Court construed it as ‘prohibit[ing] only picketing focused on, and taking place in front of, a particular residence’ (at 482; see also at 483), and so construed the ordinance served the ‘significant government interest’ of protecting residential privacy and was ‘narrowly tailored’ to serve that governmental interest (at 484–9).

of place to political protest, perfectly maps the boundaries of what is permissible in this respect.

C The Significance of Vagueness and Police Discretion

The joint judgment in *Brown* ultimately relied upon an issue of uncertainty in the operation of the *Protesters Act* in respect of forestry land in order to reach its conclusion of invalidity:

The principal problem, practically speaking, for both police officers exercising powers under the *Protesters Act* and protesters is that it will often not be possible to determine the boundaries of ‘business premises’ or a ‘business access area’. That problem arises because the term ‘business premises’ is inapt for use with respect to forestry land. ... Forest operations are not conducted in premises or even enclosures ...¹²⁴

The joint judgment held that this uncertainty resulted in the Act deterring lawful protest, as police would not be able to tell who might be the target of a lawful direction to move on – and the giving of such directions is ‘the mechanism by which [the *Protesters Act*] operates’.¹²⁵ The joint judgment went on to hold that these ‘substantial deterrent effects ... achieved by the uncertainty which surrounds the areas within which the Act applies’ were not reasonably necessary to achieve the Act’s purpose, and led to it ‘operat[ing] more widely than its purpose requires. ... It is likely to deter protest of all kinds and that is too high a cost to the freedom given the limited purpose of the *Protesters Act*’.¹²⁶

Gordon J, however, strongly criticised this line of reasoning on the grounds that the validity of a law

is not to be tested against the possibility that the law will be applied unlawfully ... For that reason, it is not relevant to observe that the geographical bounds of the area within which the provisions operate may be difficult to determine or that there may be cases where a power is said to be exercised unlawfully.¹²⁷

The solution to unlawful attempts at exercising ‘move on’ powers, in her Honour’s view, is an application for judicial review.¹²⁸ The joint judgment rejected this

124 *Brown* (2017) 261 CLR 328, 354 [67]–[68]. At 366–7 [115]–[116] the judgment noted that the *Protesters Act* was intended to apply to areas of forest not subject to powers exercised under the *Management Act*. Edelman J adopted a different approach to the construction, drawing upon the interaction of the *Protesters Act* with the *Management Act* to conclude that forestry business premises must in fact be clearly marked by signs, barriers and official directions: *Brown* (2017) 261 CLR 328, 494–6 [535]–[541], 498–500 [548]–[549]. He reinforced this conclusion by reference to the principle that penal statutes should be construed in the direction of certainty rather than uncertainty, and by reference to the principle of legality, in this case suggesting a narrow rather than broad construal of a statute that on a broad construction would limit freedom of speech: at 496–8 [542]–[547].

125 *Brown* (2017) 261 CLR 328, 357 [79]; see also at 356–7 [76]–[78], 357 [80], 358–9 [84]–[87], 367 [118].

126 *Ibid* 372 [140], 373 [144]–[145]. Nettle J appeared to share these concerns about the effect of the *Protesters Act* on lawful protest: at 425 [294].

127 *Ibid* 458–9 [408]; see also at 428–9 [307].

128 *Ibid* 442–3 [356], 469 [445].

suggestion, on the basis that by the time relief is obtained by such means the (*ex hypothesi* lawful) protest will have been brought to an end.¹²⁹

The reasoning of the joint judgment seems very similar to the United States ‘void-for-vagueness’ doctrine. This doctrine was explained in *Kolender v Lawson*: ‘the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement’.¹³⁰

The doctrine is connected both to questions of free speech and questions of discretion. In *Grayned v City of Rockford* (*‘Grayned’*), the US Supreme Court stated that one of the particular problems with vagueness in the context of burdens upon speech is that ‘[u]ncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone” ... than if the boundaries of the forbidden areas were clearly marked.’¹³¹ And in *City of Lakewood v Plain Dealer Publishing Co*¹³² the Supreme Court emphasised that it ‘has long been sensitive to the special dangers inherent in a law placing unbridled discretion directly to license speech, or conduct commonly associated with speech, in the hands of a government official’.¹³³

The joint judgment denied that the ‘void-for-vagueness’ doctrine forms part of Australian constitutional law.¹³⁴ However, it is hard to see how their Honours’ reasoning can be reconciled with rejection of the doctrine,¹³⁵ as it seems to be precisely the same sort of reasoning, grounded in concerns about deterrence, as was articulated by the Supreme Court in *Grayned*.

Gageler J, on the other hand, stated that uncertainty about the geographical application of the *Protesters Act* in relation to forestry land ‘does not play any part in my reasoning’.¹³⁶ Rather, he focused directly on the fact that the Act operates by way of the police exercising discretionary powers against protesters, and ‘the

129 Ibid 357 [78]–[79].

130 461 US 352, 357 (1983), citing *Village of Hoffman Estates v Flipside, Hoffman Estates Inc*, 455 US 489 (1982); *Smith v Goguen*, 415 US 566 (1974); *Grayned*, 408 US 104 (1972); *Papachristou v City of Jacksonville*, 405 US 156 (1972); *Connally v General Construction Co*, 269 US 385 (1926).

131 408 US 104, 109 (1972), quoting *Baggett v Bullitt*, 377 US 360, 372 (1964), quoting *Speiser v Randall*, 357 US 513, 526 (1958). This was cited in *Brown* by Gordon J at (2017) 261 CLR 328, 474 [463]. A majority of the Supreme Court nevertheless upheld the validity of the law at issue in *Grayned*.

132 486 US 750 (1988).

133 Ibid 767–8. The relevant provision (Lakewood, Ohio, Codified Ordinances § 901.181(c) (1984)) provided that ‘[t]he Mayor shall either deny the application [for a permit], stating the reasons for such denial or grant said permit subject to the following terms’. § 901.181(c) set out some of those terms, including: ‘(7) such other terms and conditions deemed necessary and reasonable by the Mayor’. The Court stated that ‘[i]t is apparent that the face of the ordinance itself contains no explicit limits on the mayor’s discretion’ (ibid 769). The Court held those portions of the Lakewood ordinance giving the Mayor ‘unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems “necessary and reasonable” to be unconstitutional’ (at 772).

134 *Brown* (2017) 261 CLR 328, 373 [147]–[149]. Gordon J likewise rejected the doctrine: at 469–70 [447]–[448].

135 As is demonstrated by the reasons of Gordon J: ibid 469–70 [445]–[448], 471–2 [454], 472–5 [457]–[467].

136 Ibid 379 [168].

breadth and severity of the consequences' flowing therefrom.¹³⁷ Police might lawfully remove a protester from an area based on a reasonable *but mistaken* belief; or might similarly direct a protester to leave an area, which would then trigger penal consequences both for noncompliance and for return, and may be accompanied by a further direction requiring the person not to engage in prohibited conduct, triggering further possible penal consequences.¹³⁸ This burden on political communication was 'more extensive or more severe than might be expected had a more comprehensive solution been sought',¹³⁹ that is, protective legislation that did not operate only in respect of protesters; and, at least partly for that reason, the burden was 'greater than reasonably necessary' to serve any legitimate protective purpose.¹⁴⁰ Nettle J similarly noted the burden upon lawful protest activity that might arise from the exercises of police discretion permitted by the Act,¹⁴¹ and held that this burden was 'grossly disproportionate to the achievement of the stated purpose of the legislation',¹⁴² particularly given other existing laws that protect forest operations and hence tend to render such discretions unnecessary.¹⁴³ Gordon J disagreed, holding that the police powers conferred by the *Protesters Act* and the consequences that might flow therefrom constitute only a 'marginal extension of existing prohibitions' on 'protest that is disruptive or causes damage' and hence is apt already to be unlawful.¹⁴⁴

We favour the conclusion reached by Gageler J and Nettle J, which reflects a more realistic assessment of the potential impact of expansive 'move on' powers than that of Gordon J, particularly when the importance of place to protest is recognised. But all three judgments focus directly on the burden the law imposes on protest. This approach is amenable to application in other contexts where a law gives police the power to direct protesters to move on. The joint judgment, in contrast, confines its reasoning to a somewhat idiosyncratic aspect of the *Protesters Act's*

137 Ibid 395 [224].

138 Ibid 395–7 [225]–[231]. Gageler J also referred to the 'Pythonesque absurdity' of the statutory permission 'to march along a forest road once a day, provided they do so at a reasonable speed and irrespective of whether or not in doing so they would prevent, hinder or obstruct access to the area on which forest operations are being carried out': at 397 [231]. Gordon J did not consider it significant that the discretionary imposition of a requirement not to engage in prohibited conduct would generate penal consequences, as it 'is no more than a discretion to direct that, in the next three months, the person must not do what the *Protesters Act* already says the person must not do': *Brown* (2017) 261 CLR 328, 458 [405]. This approach gives *Protesters Act* ss 6(1)–(3) a self-standing significance that seems at odds with the legal operation of the *Protesters Act*.

139 *Brown* (2017) 261 CLR 328, 395 [223]. Gageler J drew a contrast with *McCloy* (2015) 257 CLR 128, where the burden — a prohibition on political donations by property developers — was not different from what might be expected by a less targeted approach to the threat of political influence and corruption. In this respect it can be noted the *Protesters Act* expressly limits its application to owners and operators who otherwise might fall within its scope: at ss 4(6), 11(3).

140 *Brown* (2017) 261 CLR 328, 397 [232]; see also at 396 [228] ('visiting those consequences could not even be described as using a blunt instrument to achieve that purpose'), 396 [230] ('The criminal consequences ... travel so far beyond protecting the operations of Forestry Tasmania ... as to lack even the most tenuous connection').

141 Ibid 406–7 [257], 410–13 [264]–[269].

142 Ibid 425 [295]; see also at 423–4 [291]–[293].

143 Those other laws include the *Management Act* and such common law actions as nuisance, trespass, negligence and besetting: *ibid* 408 [259], 425 [295].

144 *Brown* (2017) 261 CLR 328, 462 [420]; see also at 428 [304], 442 [355], 459–460 [409]–[411], 464 [426].

application to forest protests, and would leave broadly discretionary laws which allow protesters to be moved on but do not have comparable over-enforcement implications less likely to be found to infringe the implied freedom of political communication.

V SAFE ACCESS ZONES

The *Brown* case concerned environmental protest. Another sort of protest that is highly connected to place is that which takes place outside clinics providing reproductive health services, including terminations of pregnancies. Here jurisprudence from the United States is of significant interest. It is noteworthy that public streets and sidewalks have been recognised in US jurisprudence as enjoying a ‘special position in terms of First Amendment protection’¹⁴⁵ as they are considered traditional forums for speech on matters of public concern.¹⁴⁶ However, in a number of cases, including *Madsen v Women’s Health Centre Inc*¹⁴⁷ and *Schenck v Pro-Choice Network of Western New York* (*‘Schenck’*),¹⁴⁸ the US Supreme Court has confirmed that safe access zones of a precise nature around abortion clinics are justifiable restrictions on the right to free speech.¹⁴⁹ In *Schenck*, the Court was called upon to consider two types of safe access zones: ‘fixed buffer zones’ (where it was unlawful to come within a certain distance of the clinic) and ‘floating buffer zones’ (where it was unlawful to come within a certain distance of *people* attempting to access the clinic, rather than the *clinic itself*). In that case, the US Supreme Court held that ‘fixed buffer zones’ were constitutional, whereas ‘floating buffer zones’ were not. Here the underlying rationale appears to be that that fixed zones were necessary to allow patients and staff to enter and exit the clinic and to protect public safety, whilst also achieving a balance between the relevant interests, as it was still possible for protesters to be heard. In comparison, the Court held that ‘floating’ access zones imposed a greater burden than was necessary to protect public safety interests and access.¹⁵⁰

Interestingly, in another case — *Hill v Colorado* — the Supreme Court upheld a statute which prohibited any person from ‘knowingly approach[ing]’ within eight feet of another person near a health care facility without that person’s consent.¹⁵¹ In doing so, the Court emphasised that it was important to ‘recognize the significant difference between state restrictions on a speaker’s right to

145 *United States v Grace*, 461 US 171, 180 (1983).

146 The importance of streets as public places ‘used for purposes of assembly, communicating thoughts between citizens, and discussing public questions’ was stated by Roberts J, delivering the opinion of the Court, in *Hague v Committee for Industrial Organization*, 307 US 496, 515 (1939).

147 512 US 753 (1994) (*‘Madsen’*).

148 519 US 357 (1997) (*‘Schenck’*).

149 *Madsen*, 512 US 753 (1994); *ibid.* In *Madsen*, the zone was 36 feet from entrances to abortion clinics; in *Schenck*, the access zone was 15 feet.

150 *Schenck*, 519 US 357, 361, 376–9 (1997); *Madsen*, 512 US 753, 773–4 (1994).

151 *Hill v Colorado*, 530 US 703 (2000). *Colo Rev Stat* § 18-9-122(3) (1999) made it unlawful for any person within 100 feet of a health care facility’s entrance to ‘knowingly approach’ within eight feet of another person, without that person’s consent, in order to pass ‘a leaflet or handbill to, displa[y] a sign to, or engag[e] in oral protest, education, or counseling with [that] person’.

address a *willing audience* and those that protect listeners from *unwanted communication*.¹⁵² It was also influenced by the finding that the statute was ‘narrowly tailored’ to serve those interests and that it ‘left open ample alternative channels for communication’.¹⁵³ It also distinguished the eight feet limitation at issue in that case with the legislation which was struck down in *Schenck*. The Court noted that in *Schenck* the ‘floating bubble was larger (15 feet) and was associated with near-absolute prohibitions on speech’.¹⁵⁴ In *McCullen v Coakley*, on the other hand, the Supreme Court held that a statute that made it a crime to stand on a public footpath within 35 feet of an abortion clinic was *not* sufficiently narrow and violated the First Amendment.¹⁵⁵ In this case, the plaintiffs were individuals who attempted to engage women approaching Massachusetts abortion clinics in ‘sidewalk counselling’. They claimed that the 35-foot buffer zones had ‘displaced them from their previous positions outside the clinics’ and therefore considerably hampered their counselling efforts.¹⁵⁶ The Court recognised that the buffer zones served the government’s ‘legitimate interests in maintaining public safety on streets and sidewalks and in preserving access to adjacent reproductive healthcare facilities’.¹⁵⁷ However, at the same time, they imposed ‘serious burdens on petitioners’ speech, depriving them of their two primary methods of communicating with arriving patients: close, personal conversations and distribution of literature’.¹⁵⁸ This case demonstrates the close connection made by the Court between the purpose of protest, the chosen method of communication and the importance of the place of protest within that context.

The constitutional validity of safe access zones in Australia is a matter currently before the High Court of Australia.¹⁵⁹ As Ronli Sifris and Tania Penovic argue in their piece on safe access zones in this Special Issue:

While it is not clear that the safe access zone legislation constitutes a burden on political communication (the Magistrate in *Edwards v Clubb* held that it does not) High Court precedents suggest that the threshold for this limb is low and that

152 *Hill v Colorado*, 530 US 703, 715–16 (2000) (emphasis added). The Court also held (at 723) that the statute

places no restrictions on — and clearly does not prohibit — either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners. Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so.

153 *Ibid* 710.

154 *Ibid* 740.

155 *McCullen v Coakley*, 134 S Ct 2518 (2014).

156 *Ibid* 2522.

157 *Ibid* 2523.

158 *Ibid*. The Court noted:

While the Act may allow petitioners to ‘protest’ outside the buffer zones, petitioners are not protestors; they seek not merely to express their opposition to abortion, but to engage in personal, caring, consensual conversations with women about various alternatives. It is thus no answer to say that petitioners can still be seen and heard by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners’ message.

159 *Clubb v Edwards* (High Court of Australia, M46/2018, commenced 23 March 2018) (*‘Clubb’*).

the High Court is likely to find that such a burden is imposed by the legislation. However, the legislation in *Brown v Tasmania* had very different aims to the safe access zone legislation and the means used to achieve those aims, while both limiting protest, are quite different. The aim of the safe access zone legislation is to protect the privacy, dignity, health and wellbeing of women seeking to access a medical service whereas the aim of the legislation in *Brown v Tasmania* was to prevent interference with business activities.¹⁶⁰

This difference in aims, which goes in turn to the difference between individual and commercial interests, takes us back to the point that private law rights do not serve a uniform end.¹⁶¹ We note, furthermore, that the legislation at issue in that case does not operate by way of police ‘move on’ powers; defines the area it governs as ‘150 metres from premises at which terminations are provided’;¹⁶² and, in the case of the Victorian law, does not expressly target protest but rather those who seek to ‘communicat[e] ... in relation to abortions’ or to interfere with those coming or going from clinics.¹⁶³ It is therefore not vulnerable to attack in the same way as the *Protesters Act* was in relation to forestry land. That said, the fact that the Court in *Brown* did not address in any detail the fundamental issues of compatibility and private rights nevertheless means that the outcome in *Clubb* cannot be predicted with any certainty.¹⁶⁴

VI CONCLUSION

It may be that the environment should be recognised as a special situation for protest and permissible political communication. Although there is increasing recognition of environmental objects (rivers and forests) as legal entities in a

160 Ronli Sifris and Tania Penovic, ‘Anti-Abortion Protest and the Effectiveness of Victoria’s Safe Access Zones: An Analysis’ (2018) 44 *Monash University Law Review* 317, 331 (citations omitted).

161 The *Public Health and Wellbeing Act 2008* (Vic) states as its purpose ‘to protect ... safety and wellbeing and respect ... privacy and dignity’: s 185A. During argument in *Clubb*, Keane J remarked that

It would be unusual, would it not, the notion — or it would be counterintuitive, perhaps — the notion that legislation that is intended to protect the privacy and the dignity of individuals against shaming behaviour — it would be counterintuitive to think that that was inconsistent with the implied freedom because the very basis of the implied freedom is the dignity of the Australian people. Insofar as the people who are being shamed are members of the sovereign people, legislation that protects their dignity is surely compatible with it.

Transcript of Proceedings, *Clubb v Edwards* [2018] HCATrans 206 (9 October 2018) 1391–9.

162 *Reproductive Health (Access to Termination) Act 2013* (Tas) ss 9(1)–(2); *Public Health and Wellbeing Act 2008* (Vic) ss 185B, 185D (but using the word ‘abortions’ rather than ‘terminations’).

163 *Public Health and Wellbeing Act 2008* (Vic) ss 185B, 185D, which contrasts with *Reproductive Health (Access to Terminations) Act 2013* (Tas) ss 9(1)–(2).

164 For more detailed discussion of *Clubb*, see Shireen Morris and Adrienne Stone, ‘Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards*; *Preston v Avery*’ (2018) 40 *Sydney Law Review* 395.

number of jurisdictions,¹⁶⁵ the ‘environment’ as such is generally not an entity which is ‘owned’ by any one person.¹⁶⁶ Indeed, it is par excellence a collective entity or interest — all people are affected by environmental decisions and so it can be argued that all people have an interest in the environment. The environment itself obviously cannot protest on its own behalf and so the protection of the environment is reliant on individuals or organisations to represent its interests (or the interests of the public in the protection of the environment perhaps more accurately). However, it is not at all clear that the existing Australian constitutional framework has the scope to accommodate such a development. Environmental protest will therefore continue to be analysed through the lens of the freedom of political communication, as was the case in *Brown*. As we have seen, a majority of judges in *Brown* noted the importance to environmental politics of onsite protests, but only Gageler J fully incorporated this recognition of the importance of place into his reasoning, by identifying its importance to understanding the purpose and hence true burden imposed by the *Protesters Act*.

Thomas Crocker, writing on US First Amendment jurisprudence, argues that

within the free speech tradition, we need to reconsider the ways that public policy, legal doctrine, and constitutional theory treat the role and value of ‘place’ in public discursive practices. A refocused consideration of the essential role of ‘place’ is necessary to both understand and achieve the values of free speech.¹⁶⁷

In the Australian context, such a ‘refocused consideration of the essential role of “place”’ means considering how threats to place as a site of protest, arising from private rights of exclusion and statutory reinforcements of such rights, fit within the constitutionally prescribed framework. However, and in part because of the way that the case was argued, the decision in *Brown* leaves our understanding of the public sphere ramifications of private law rights concerning access to place still quite uncertain. However, this very uncertainty also means that *Brown* does not foreclose a jurisprudence of political protest that might protect such speech even where that requires subordinating certain incidents of certain sorts of ownership.

165 For instance, in New Zealand, the government passed legislation in 2017 that recognised the Whanganui River catchment as a legal person. Additionally, the High Court in India has ruled that the Ganges and Yamuna Rivers will be treated as minors under the law, and will be represented by three officials to act as guardians for the river. See discussion in Erin O’Donnell and Julia Talbot-Jones, ‘Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India’ (2018) 23(1) *Ecology and Society* <<https://www.ecologyandsociety.org/vol23/iss1/art7/>>; Erin O’Donnell, Michelle Maloney and Christine Parker, ‘New Developments in the Legal Status of Rivers’ (Workshop Report, Australian Earth Laws Alliance and Centre for Resources, Energy and Environment Law, Melbourne Law School, 11 August 2017) <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/2516479/Legal-rights-for-rivers-Workshop-Report.pdf>.

166 Obviously putting aside the fact that certain areas can be owned by individuals or collectives (eg under native title).

167 Crocker, above n 8, 2590.