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ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY **No. H2 of 2018**

B E T W E E N:

JOHN GRAHAM PRESTON
Appellant

AND

ELIZABETH AVERY
First Respondent

AND

SCOTT WILKIE
Second Respondent

ANNOTATED WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia (**Western Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the First and Second Respondents (**Tasmania**).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

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PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. Western Australia accepts and adopts the outline of relevant constitutional provisions and legislation as contained in the submissions for Tasmania.

PART V: SUBMISSIONS

5. The question in the present case is whether s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (**the Act**) impermissibly burdens the freedom of political communication implied in the *Constitution*.

6. The test to be applied, as to whether s 9(2) (together with paragraph (b) of the definition of "prohibited behaviour" contained in s 9(1)) impermissibly burdens the implied freedom (the *Lange*[1] test), as most recently refined in *Brown v Tasmania* (2017) 91 ALJR 1089[2], is as follows:

    1. Does the law effectively burden the freedom either in its terms, operation or effect?

    2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

    3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[3]

7. In relation to Question 1 of the *Lange* test, Tasmania, while accepting that a protest in relation to terminations may "in some cases" contain political

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1 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

2 *Brown v Tasmania* (2017) 91 ALJR 1089 per Kiefel CJ, Bell & Keane JJ at 1112 [104] (incorporating Question 1 from *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2] and restating Questions 2 and 3), per Gageler J at 1119 [156], per Nettle at 1131-1132 [236], per Gordon J at 1151 [315]-[318].

3 See also Western Australia's submissions at paragraph [8] in matter No. M46 of 2018 (Clubb v Edwards & Anor) (**the Victorian proceedings**).

communication[4] (although not this case[5]), submits that any effect of the law on political communication is "indirect and only slight"[6]. Western Australia adopts this submission and submits further that, for that reason and the reasons that follow, the law does not ***effectively*** burden the freedom.

Identification of an Effective Burden

8. Question 1 of the *Lange* test requires that the law "effectively" burden the implied freedom of political communication. That is a question to be asked by reference to the legal operation and practical effect of the law, which in turn necessarily involves construing the relevant law[7].

10 9. Importantly, the burden must be on ***the*** freedom implied in the *Constitution*, an implication which arises because:

> "...ss 7, 24 and 128 of the Constitution (with Ch II, including ss 62 and 64) create a system of representative and responsible government. It is an indispensable incident of that system because that system requires that electors be able to exercise a free and informed choice when choosing their representatives, and, for them to be able to do so, there must be a free flow of political communication within the federation. For that choice to be exercised effectively, the free flow of political communication must be between electors and representatives and "between all persons, groups and
20 other bodies in the community."[8]

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4 Tasmania's Submissions at paragraph [48].

5 Tasmania's Submissions at paragraphs [48]-[51].

6 Tasmania's Submissions at paragraph [47](1) and [52].

7 *Brown v Tasmania* (2017) 91 ALJR 1089 per Gordon J at 1151 [316]; *Monis v The Queen* (2013) 249 CLR 92 per Hayne J at 154 [147]; *Coleman v Power* (2004) 220 CLR 1 per Gleeson CJ at 21-22 [3], per Gummow & Hayne JJ at 68 [158], per Kirby J at 80-81 [207]. Western Australia's submissions in the Victorian proceedings at paragraph [13].

8 *Brown v Tasmania* (2017) 91 ALJR 1089 per Gordon J at 1150 [312] (footnotes omitted). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-559; *Brown v Tasmania* (2017) 91 ALJR 1089 per Kiefel CJ, Bell and Keane JJ at 1110 [88]; *Unions NSW v New South Wales* (2013) 252 CLR 530 per French CJ, Hayne, Crennan, Kiefel and Bell JJ at 548 [17]; *McCloy v NSW* (2015) 257 CLR 178 per Gordon J at 279-280 [301]-[303]; *Levy v Victoria* (1997) 189 CLR 579 per Gaudron J at 622. Western Australia's submissions in the Victorian proceedings at paragraph [14].

10. At its heart, the freedom is concerned with ensuring persons are able to exercise a free and informed choice as electors[9].

11. A law can be said to effectively burden the implied freedom if it prohibits, or puts some limitation on, the making or content of political communications[10], unless perhaps that prohibition is so slight as to have no real effect[11].

12. This first step in the test is critical and not perfunctory[12]. If a law does not operate so as to impose a meaningful restriction on political communication, the supervisory role of the courts is not engaged[13]. The determination as to whether there is a meaningful restriction on political communication, in that regard, is not volumetric or quantitative, but qualitative[14].

13. In that regard the fact that a law prohibits or proscribes certain conduct, and that ***any*** conduct might be carried out for political purposes, cannot be enough, it is submitted, to satisfy the need for an effective or meaningful burden. Many, if not most, laws may be so characterised and such a test would indeed be perfunctory. A law which prohibits the lighting of a fire does not burden political communication merely because a person may wish to light fires as an act of political protest.

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9 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Unions NSW v New South Wales* (2013) 252 CLR 530 per French CJ, Hayne, Crennan, Kiefel and Bell JJ at 551 [27]-[28], per Keane J at 570 [103]; *Brown v Tasmania* (2017) 91 ALJR 1089 per Gageler J at 1120 [162] and 1124 [188], per Gordon J at 1129 [312]; *McCloy v NSW* (2015) 257 CLR 178 per French CJ, Kiefel, Bell and Keane JJ at 193 [2], per Gageler J at 226 [111]-[112], per Gordon J at 280 [303]; *Levy v Victoria* (1997) 189 CLR 579 per Dawson J at 606-7, per Gaudron J at 622. Western Australia's submissions in the Victorian proceedings at paragraph [15].

10 *Brown v Tasmania* (2017) 91 ALJR 1089 per Gageler J at 1123 [180]; *McCloy v NSW* (2015) 257 CLR 178 per Gageler J at 230-231 [126]; *Monis v The Queen* (2013) 249 CLR 92 per Hayne J at 142 [108]; *Unions NSW v New South Wales* (2013) 252 CLR 530 per Keane J at 574 [119]. Western Australia's submissions in the Victorian proceedings at paragraph [16].

11 *Brown v Tasmania* (2017) 91 ALJR 1089 per Nettle J at 1132 [237]. Western Australia's submissions in the Victorian proceedings at paragraph [17].

12 *McCloy v NSW* (2015) 257 CLR 178 per Gageler J at 231 [127]. *Brown v Tasmania* (2017) 91 ALJR 1089 per Nettle J at 1132 [237]. Western Australia's submissions in the Victorian proceedings at paragraph [18].

13 *McCloy v NSW* (2015) 257 CLR 178 per Gageler J at 231 [127].

14 *Tajjour v New South Wales* (2014) 254 CLR 508 per Gageler J at [145]; *Brown v Tasmania* (2017) 91 ALJR 1089 per Gageler J at [180], per Nettle J at [237], per Gordon J at [316].

14. Rather, the qualitative analysis requires that it be identified how the impugned law meaningful restricts political communication. That is, it must be asked: how is it said that the behaviour prohibited by the law, limits the making of political communication necessary for the maintenance of the system of representative and responsible government?[15]

15. In order to identify an effective burden on freedom of "political communication" it is necessary to ask: what kind of political communication is alleged to be affected? In *Brown v Tasmania*[16], for example, the history of political protests, including protests concerning environmental issues, were properly identified as a "means of bringing about political and legislative change on environmental issues"[17]. The effects of the law in that case were assessed by reference to the effect on such protests[18].

16. The only political communication that could, relevantly, be said to be engaged by the law in the present case is communication directed toward "political or legislative change" in relation to abortion law and health policy[19].

17. An analysis of the qualitative aspects of s 9(2) (when read with s 9(1)) demonstrates that the behaviour prohibited does not limit communication directed toward "political or legislative change" in relation to abortion law and health policy. Therefore, the law imposes no effective burden on the political communication necessary for the maintenance of the system of representative and responsible government.

18. The proper construction of s 9(2) (when read with s 9(1)) requires consideration of the text of the law, its statutory context, the wider context of the Act, the mischief the Act (and the provision) is seeking to remedy and the historical background. Western Australia respectfully adopts the detailed submissions of the Tasmania on these matters at [10]-[46]. Western Australia also adopts

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15 Western Australia's submissions in the Victorian proceedings at paragraph [19].

16 *Brown v Tasmania* (2017) 91 ALJR 1089.

17 *Brown v Tasmania* (2017) 91 ALJR 1089 per Kiefel CJ, Bell & Keane JJ at [33].

18 Western Australia's submissions in the Victorian proceedings at paragraph [30].

19 Western Australia's submissions in the Victorian proceedings at paragraph [31].

Tasmania's submissions as to what it identifies as the purpose of the law, being, *"to enable persons to access premises where terminations are provided unobstructed, uninjured and un-harried"*[20] and, *"protecting the safety, wellbeing, privacy and dignity of persons accessing premises where terminations are provided"*[21]. The following relevant propositions can be drawn from this analysis.

19. *First,* the law does not contain unrestricted prohibition on protests in relation to terminations. Nor is the prohibition as broad as the Appellant submits.

20. Not all protests regarding terminations will be captured by the prohibition in s 9(2). It will only be those protests that are:

(a) able to be seen or heard by a person accessing or attempting to access, premises at which terminations are provided; and

(b) within a radius of 150 metres from premises at which terminations are provided.

21. *Second*, the nature of the behaviour that is proscribed, when considered in its context, is confined by reference to circumstances that, on their face, do not involve protests directed toward "political or legislative change" in relation to abortion law and health policy. The proscribed behaviour is, namely, protests in the close vicinity of persons accessing (or attempting to access) premises at which terminations are provided, as opposed to (for example) a public rally or a protest directed at politicians.

22. *Thirdly,* and by contrast, the law leaves unaffected the capacity of any person to communicate regarding "political or legislative change" in relation to abortion law and health policy, even near the site of abortion clinics themselves.

23. Significantly, unlike the laws considered in *Levy v Victoria*[22] and *Brown v Tasmania*[23], the law does not impede the capacity for protest associated with, or

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20 Tasmania's Submissions at [23].

21 Tasmania's Submissions at [47(2)].

22 *Levy v Victoria* (1997) 189 CLR 579.

in the vicinity of, premises at which terminations are provided. In that regard, there is no restriction imposed by the law that could make a political communication or political protest less effective, than it might otherwise be 150 metres closer[24].

24. In *Levy v Victoria*[25], for example, the Plaintiff was able to identify, and plead, to the effect that the law would have on political communication, including that "televised images of the bloodied bodies of dead and wounded ducks"[26] were more likely to attract public attention to their cause. In concluding that there was a burden on the implied freedom (*albeit* that the validity of the regulations was ultimately upheld), McHugh J observed, at 625:

> "For the reasons that I have given, the constitutional implication extends to protecting political messages of the kind involved here and also the opportunity to send those messages. By prohibiting protesters like the plaintiff and any accompanying media representatives from entering the permitted hunting area ... the Regulations effectively prevented the protesters from putting the kind of political message to the people and government of Victoria that they wished to put to them. 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. 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."[27]

25. There is no analogous burden in the present case.

26. The effect of the law on the Appellant's[28] activities goes to the effectiveness of his attempts to convince individual women not to proceed with a termination,

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23 *Brown v Tasmania* (2017) 91 ALJR 1089.

24 Western Australia's submissions in the Victorian proceedings at paragraph [35].

25 *Levy v Victoria* (1997) 189 CLR 579.

26 *Levy v Victoria* (1997) 189 CLR 579 per Brennan CJ at 592, per McHugh J at 625.

27 Western Australia's submissions in the Victorian proceedings at paragraph [36].

28 And persons who engage in similar protests as the Appellant.

and not the effectiveness of any "political or legislative change" in relation to abortion law and health policy[29].

27. The inability to engage in the specified behaviour, within a 150 metre radius of a premises at which terminations are provided and that is able to be seen or heard by a person accessing (or attempting to access) such a premises, does not prevent any person from delivering a message that they best consider will have the greatest impact on public opinion or "political or legislative change" in relation to abortion law and health policy.

28. For these reasons, it is submitted that the law does not effectively burden the freedom and that Question 1 of the *Lange* test may be answered "No".

29. If, contrary to the above submission, the Court concludes that the law does impose an effective burden, it is submitted that any such burden is slight and, for the reasons submitted at [67]-[68] of Tasmania's submissions, the purpose of the law[30] is legitimate in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

30. Further, for the reasons submitted at [69]-[99] of Tasmania's submissions, the law is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and that the answers to Questions 2 & 3 of the *Lange* test are "Yes".

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29 Transcript [Respondent's Book of Further Materials 197 and 201-202]. See also the evidence of the Appellant's co-accused [Respondent's Book of Further Materials 151-152, 167-169]

30 See paragraph [18] above.

PART VI: LENGTH OF ORAL ARGUMENT

31. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

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