

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No H2 of 2018

BETWEEN:



JOHN GRAHAM PRESTON

Appellant

AND:

ELIZABETH AVERY

First Respondent

AND:

SCOTT WILKIE

Second Respondent

APPELLANT'S SYNOPSIS OF ARGUMENT

Filed on behalf of the Appellant by
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Part I: Certification

1. This document is suitable for publication on the internet.

Part II: Argument

2. The initial issue is the construction of various expressions in s.9.
3. The first question is whether the impugned law effectively burdens the freedom in its terms, operation or effect: *McCloy* [2] *Brown* [61]. That question relates to the manner in which the impugned provision affects the freedom generally rather than to the operation of the provision in this particular case: *Brown* [90].
- 10 4. A law effectively burdens the freedom if it prohibits or puts some limitation on the making or content of political communication: *Brown* [180] (citing various cases). This is a qualitative question to be answered by reference to the legal operation and practical effect of the law: *ibid*. The impugned law easily satisfies this initial test.
5. The burden on the freedom imposed by the impugned provision is substantial: it strikes at peaceful protest and demonstration; it applies to protests “on-site”; it is content based; it is discriminatory ie aimed at and biased against a particular viewpoint (*viz* anti-abortion protest); it relates to abortion (a topic of high political controversy); it is direct and substantial; there is no qualification or defence; there are likely to be a substantial number of relevant premises; it is a strict liability offence.
20 And it is apt to chill communications not strictly caught by its terms.
6. The second question is: is the purpose of the *impugned provision* legitimate in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? See *McCloy* [2]; *Brown* [104], [277].
7. RS [67] asserts that the *Reproductive Health Act* has four purposes each of which relates to certain persons (“the relevant persons”): people accessing services provided at premises where abortions are provided; those who are employed at such premises; those who need to access such premises in the course of their duties.

8. Those four purposes are: (i) to respect the privacy of the relevant persons; (ii) to respect the dignity of the relevant persons; (iii) to protect the [physical] safety of the relevant persons; (iv) to protect the [psychological] wellbeing of the relevant persons.
9. None of these purposes is the purpose of the impugned provision (para (b)). Nor is (ii) a purpose which is compatible: AS at [72]-[75]. Nor is (iv) compatible if it relates to hurt feelings, upset (or similar).
10. The purpose of (b) is to prevent protests in relation to abortions within 150 metres of premises where abortions are provided. That is not a compatible purpose.
- 10 11. Alternatively, the purpose of (b) is to eliminate the possibility of upset to the feelings of the relevant persons caused by peaceful anti-abortion protests near premises where abortions are provided. That is not a compatible purpose.
12. The third question is the issue of reasonable proportionality. The test in *Lange* (as modified by *Coleman v Power*) is whether the impugned provision is reasonably appropriate and adapted to advance the relevant purpose in a manner compatible with the constitutionally prescribed system of government.
13. Some elaboration of that test is to be found in *McCloy* (especially at [2]) and *Brown* (especially at [104], [277]).
14. Any effective burden on the freedom must be justified: *Brown* at [127] – see also [152], [131], [130], [123], [164], [165], [291], [324], [325], [397]. And “it is for those supporting the impugned legislation to justify any of its measures which burden the freedom”: *Brown* at [131].
- 20 15. The greater the burden on the freedom, the greater the justification required from those supporting the impugned legislation: *Brown* at [118], [128], [164], [165], [291]. Because the burden imposed by (b) is substantial a substantial justification is required: paragraph (b) warrants strict scrutiny and requires a compelling justification: *Brown* [205], [206], [203].
16. Even if the purpose of the impugned provision is one of the four purposes identified at [8] above, the substantial burden on the freedom occasioned by paragraph (b) has not been justified (and is not justifiable) particularly bearing in mind:
 - 30 (i) the nature and extent of the burden on the freedom: *Brown* [165];

- (ii) the extent to which the mischief (and its scope) have been established by evidence: *Cunliffe* (1994) 182 CLR 272, at 303-304; *Castlemaine* (1990) 169 CLR 436, at 476, 449-451, 373, 475; *Rowe* (2010) 243 CLR 1 at [384]; *ACTV* (1992) 177 CLR 106, at 145, 239-240; *South Australia v Tanner* (1989) 166 CLR 161 at 167;
- (iii) whether and how the law advances the purpose: *McCloy* [80], [2]; *Unions NSW* [55]-[56];
- (iv) the extent to which the law is tailored to the achievement of the purpose: *Brown* [204];
- 10 (v) whether the law goes further than is reasonably necessary to advance the purpose: *Brown* [109], [205], [206], [165], [218];
- (vi) the extent to which the purpose is advanced by other statutory provisions (including provisions in the Act containing the impugned provision) and the common law: *Brown* [295];
- (vii) the importance of the precise mischief the alleviation of which is the law's purpose: *Brown* [295], *McCloy* [2], [83]-[87];
- (viii) whether there are other reasonably practicable means of achieving the law's precise purpose which are less restrictive of the freedom: *Brown* [130];
- (ix) the extent to which the law derogates from relevant common law rights and freedoms: *Nationwide* at 30-31.
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