IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S196 of 2019

BETWEEN:

ANNIKA SMETHURST

First Plaintiff

NATIONWIDE NEWS PTY LTD

Second Plaintiff

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and

COMMISSIONER OF POLICE

First Defendant

JAMES LAWTON

Second Defendant

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OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Crown Solicitor for the State of South Australia
Level 17, 10 Franklin Street
ADELAIDE SA 5000

Telephone: 08 8204 2324
Fax: 08 8207 1794
Email: samantha.graham@sa.gov.au
Ref: Sam Graham, LM 182557

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

2. There are good reasons why a later, narrower law may not be an obvious and compelling alternative to an earlier, broader law (WS [10]);
    a. The laws may pursue *different purposes* (WS [12]);
    b. The laws may seek to achieve the same purpose, but to *differing degrees* (WS [13]);
    c. a *change in circumstances* may have had the consequence that at the time the later law is enacted, narrower means can achieve the identified purpose to the same extent as the earlier, broader law (WS [16]).
3. Where a change in circumstances of the above kind is identified, the *fact of the enactment* of the narrower law does not make out the claim that the narrower law is, much less has always been, an obvious and compelling alternative to the earlier, broader law enacted under different circumstances (WS [16]). Nor can the *underlying change in circumstances* which led to its enactment be relied upon to make out that claim (WS [17]).
4. Where, despite the changed circumstances, the earlier, broader law operates in the same way, imposes the same burden and pursues the same object, the legislative provision does not cease to be valid because its purpose could now be achieved through narrower means.
5. In such a case, the changed circumstances have not affected the content of any constitutional concept underpinning the implied freedom (cf. *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (Volume 5, Tab 37) at 92 [196]). Nor have the changed circumstances affected the operation of the law so as to engage that constitutional limitation in a way not thereto engaged (be that by imposing a much greater burden in the changed circumstances, or by imposing that burden otherwise than in the pursuit of a legitimate object) (WS [17], [18]; *Armstrong v Victoria [No 2]* (1957) 99 CLR 28 (Volume 3, Tab 23) at 48-49, 73-74). All that has resulted from the changed circumstances is the possibility that narrower means may now be employed to achieve the law's purpose.

6. It is not for the Court to compel Parliament to redesign its legislative scheme to adopt those newly available means. To resist the conclusion that an otherwise valid law has become invalid on the basis that a change in constitutional facts and circumstances has led to the emergence of an obvious and compelling alternative is to respect the roles of the legislature and the judiciary in our constitutional system (WS [19], [20]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (Volume 5, Tab 37) at 93 [199], 73-74 [109]-[110]). In respecting those roles, the Court would not deny any essential element of proportionality testing, but rather recognise that the articulated tools are subject to constitutional limits (WS [21]).

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Dated: 12 November 2019

C D Bleby

Solicitor-General for South Australia