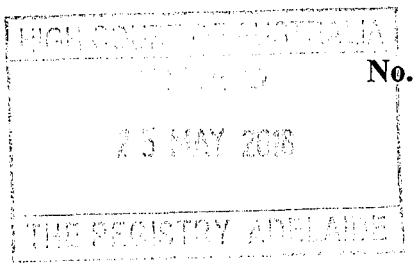
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M46 of 2018



BETWEEN:

KATHLEEN CLUBB
Appellant

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and

ALYCE EDWARDS
First Respondent

ATTORNEY-GENERAL FOR VICTORIA
Second Respondent

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ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

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

Part II: Basis for intervention

2. The Attorney-General for the State of South Australia ("South Australia") intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Attorney-General for Victoria ("Victoria").

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia accepts the statement by Victoria of the applicable legislative provisions.

Part V: Submissions

5. In summary, South Australia submits:

   5.1. Part 9A of the *Public Health and Wellbeing Act 2008* (Vic) ("Public Health Act") does not impermissibly infringe the implied freedom;

   5.2. The Public Health Act effectively burdens the implied freedom, in that its effect is to restrict slightly the range of locations in which a communication about abortion can be made. Some (but by no means all) communications about abortion will comprise a political communication, such that the Public Health Act incidentally burdens political communication in relation to abortions;

   5.3. The third stage of the analytical framework of three-stage proportionality testing (adequacy of balance) requires the court to make a series of value judgments, inherent in the weighing of the importance of the legislative purpose against the extent of the burden upon the implied freedom. The difficulties that attend on this value-oriented comparison of incommensurables can be ameliorated by a reasoned approach:

      5.3.1. The identification of the importance of the legislative purpose in the first instance can be undertaken in a manner that contributes significantly to a transparent resolution of the tension between, on the one hand, the traditional boundary between the judicial and the legislative function, and on the other hand, the need to enforce the boundaries of constitutional power and prevent Parliament from reciting itself into power.

5.3.2. The assessment of the extent of the burden upon the implied freedom can be undertaken by methodically identifying and stepping through the limits placed by the legislation upon the *"the real-world ability of a person or persons to make or to receive communications which are capable of bearing on electoral choice."*[1] Ascertaining the positive and negative dimensions of the burden in this manner and feeding these results into the overall balancing exercise reduces the incidence of hard cases in which incommensurables must be compared.

5.4. In its application to the present case, the analysis demonstrates that the importance of the underlying public purpose of the Public Health Act is undeniably strong. The burden upon the implied freedom is slight, being highly spatially confined and, in its practical operation, targeted against communications that are likely to be unsolicited and made to a captive audience.

The construction of Part 9A of the Public Health Act

6. Section 185D of the Public Health Act creates an offence of engaging in prohibited behaviour within a safe access zone, bearing a maximum penalty of 120 penalty units or imprisonment for a term not exceeding 12 months. The question as defined by the amended notice of appeal is whether the offence created by s 185D of the Public Health Act impermissibly burdens the implied freedom of political communication insofar as it prohibits conduct the subject of paragraph (b) of the definition of "*prohibited behaviour*" in s 185B. The essential elements of the s 185D offence, as it applied to the appellant, are as follows:

    1) The defendant is a person other than an employee or other person who provides services at premises at which abortion services are provided.[2]
    2) The defendant is within an area within a radius of 150 metres from a premises at which abortions are performed (a "safe access zone").
    3) While within the safe access zone, the defendant communicates by any means in relation to abortions.[3]
    4) The communication in relation to abortions is done in a manner that is both:

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[1] *Brown v Tasmania* (2017) 91 ALJR 1089 at [188] (Gageler J).
[2] By reason of s 185B(2) of the Public Health Act.
[3] That is, in relation to the intentional causing of the termination of a woman's pregnancy by any means: *Abortion Law Reform Act 2008* s 3.

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

b) reasonably likely to cause distress or anxiety.

The first question: whether the freedom is in fact burdened?

7. The questions propounded by *Lange v Australian Broadcasting Corporation*,[4] modified in *Coleman v Power*[5] and restated in *Brown v Tasmania*,[6] comprise the *"indispensable means"*[7] to determine whether a legislative measure impermissibly burdens the implied freedom of communication about government or political matters. The first question asks whether the freedom is effectively burdened; that is to say, whether the law, in its legal and practical effect, imposes a prohibition or limitation upon the making or the content of political communications.[8] This inquiry is qualitative, not quantitative.[9]

8. For the reasons given by Victoria, the first question should be answered "yes". A practical effect of the law is to restrict (slightly) the range of locations in which a communication about abortion can be made. Some communications about abortion may comprise a political communication; a limitation upon the making of such political communications within the vicinity of abortion clinics burdens the freedom to an extent that likely cannot be regarded as "*inconsequential*".[10]

9. It is helpful, nevertheless, to identify the burden with some precision. This requires distinguishing between communication generally and constitutionally-protected communication. The purposes underlying the implied freedom define the extent of the protection and inform the boundaries of what constitutes "*political communication*".

10. The implied freedom of communication in relation to government and political matters arises by necessary implication from the text of ss 7, 24, 64 and 128 of the *Constitution,* and related provisions, and protects those communications concerning political or government matters that enable the people to exercise a "*free and informed choice as electors*".[11] The provisions from which the implication is drawn "*do not mention speech or*

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[4] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[5] *Coleman v Power* (2004) 220 CLR 1.
[6] *Brown v Tasmania* (2017) 91 ALJR 1089 at [104] (Kiefel CJ, Bell and Keane JJ).
[7] *Brown v Tasmania* (2017) 91 ALJR 1089 at [88] (Kiefel CJ, Bell and Keane JJ).
[8] *Monis v The Queen* (2013) 249 CLR 92 at [108] (Hayne J)
[9] *Brown v Tasmania* (2017) 91 ALJR 1089 at [180] (Gageler J), [237] (Nettle J), [316] (Gordon J).
[10] *Monis v The Queen* (2013) 249 CLR 92 at [344] (Crennan, Kiefel and Bell JJ).
[11] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *McCloy v New South Wales* (2015) 257 CLR 178 at [42] (French CJ, Kiefel, Bell and Keane JJ).

communication",[12] and the corresponding freedom does "*not arise from any general notion of representative government or the value of freedom of expression*".[13] The freedom "*is limited to the extent of the need*".[14]

11. A broad view of the nature of communication that might be necessary to enable people to exercise a "*free and informed choice*" is required. The protected communication extends to communications between electors and elected representatives, between electors and candidates, between electors themselves,[15] and between persons other than electors and electors.[16] The communications may occur at any time, rather than only during election periods, and due to the integration of social, economic and political matters across federal, State and local politics,[17] may concern matters arising in the State context.

12. Nevertheless, not all communications concerning matters that are of general public interest will necessarily comprise *"communications concerning political or government matters"* that fall within the implied freedom. For example, communications comprising "*commercial activity*"[18] and "*communications concerning the results of cases or the reasoning or conduct of the judges who decide them*" concern neither "*government*"[19] nor "*political*"[20] matters. The latter would only fall within the freedom in the exceptional case when the communications "*also concern the acts or omissions of the legislature or the Executive Government*".[21] The "*constitutionally protected freedom is to receive and to disseminate information which might ultimately bear on electoral choice*".[22]

13. A communication about abortion would comprise a protected communication regarding a political or government matter where it was capable of contributing to the raising of public and political awareness regarding the issue of abortion, including by disseminating information regarding legal, ethical or moral concerns in relation to abortion. This might be by a protest about abortions, but could equally include a private communication

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[12] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [56] (McHugh J), whose treatment was referred to with approval by Gummow, Hayne, Heydon, Crennan Kiefel and Bell JJ in *Hogan v Hinch* (2011) 243 CLR 506 at [92].
[13] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [56] (McHugh J).
[14] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [66] (McHugh J).
[15] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.
[16] *Unions NSW v New South Wales* (2013) 252 CLR 530 at [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[17] *Brown v Tasmania* (2017) 91 ALJR 1089 at [316] (Gordon J).
[18] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [28] (Gleeson CJ and Hayne J).
[19] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [66] (McHugh J).
[20] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [67] (McHugh J).
[21] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [67]-[68] (McHugh J).
[22] *Tajjour v New South Wales* (2014) 254 CLR 508 at [141] (Gageler J).

between two persons where the information exchanged was capable of ultimately bearing on electoral choice concerning abortions.

14. Conversely, the type of communication the subject of the offence committed by the appellant in this case - offering *"help"* to women who are considering abortion,[23] including by offering counselling, or information regarding alternatives to abortion[24] - does not comprise political communication. This form of communication simply involves the transmission of information to another person. It is not information *"which might ultimately bear on electoral choice"*. It is information directed towards influencing a private medical decision by asserting available alternatives, not throwing *"light on government or political matters"*.[25]

The second question: compatibility testing

15. The second *Lange* question as restated in *Brown* was described by the majority in *McCloy* as a *"rule derived from the Constitution itself"*.[26] It asks whether the purpose of the law is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This requires identification of the purpose of the law.

16. The express purpose of the Public Health Act, as considered further below, is underpinned by a legislative judgment that citizens have an entitlement to freely access health services, including abortion services. The Act's purpose is to protect that entitlement by ensuring that persons accessing or providing abortion services can do so without interference and without compromise to their safety, wellbeing, privacy and dignity. The Act is not directed to the freedom, but affects it indirectly. The maintenance of the safety, wellbeing, privacy and dignity of citizens, by ensuring that they are not exposed to communications reasonably likely to cause anxiety and distress at the entrance to a premises that is either where they work, or are required to attend to receive a lawful medical treatment,[27] cannot *"impinge upon the functionality of the system of*

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[23] The appellant told arresting police that "I believe I have the right to offer my help to women": Magistrate's reasons for decision on the charge, AB 295.
[24] Conduct referred to as "sidewalk counselling"; see the Findings of Constitutional Fact sought by the Attorney-General of Victoria, AB 497 [9].
[25] *Coleman v Power* (2004) 220 CLR 1 at [332] (Callinan J).
[26] *McCloy v New South Wales* (2015) 257 CLR 178 at [68] (French CJ, Kiefel, Bell and Keane JJ).
[27] The protecting of persons within the privacy of the home and the workplace was recognised as a compatible end by Crennan, Kiefel and Bell JJ in *Monis v The Queen* (2013) 249 CLR 92 at [323]. That principle can be readily extended to encompass the protection of persons within the similar circumstances of attending at premises to receive lawful medical treatment.

representative government"[28] and is *"not incompatible"* with the maintenance of that system or the implied freedom that supports it.[29] For these reasons and the reasons given by Victoria,[30] the second *Lange* question should be answered "yes".

The third question: proportionality testing

17. The third question propounded by *Lange v Australian Broadcasting Corporation*,[31] as modified in *Coleman v Power*[32] and restated in *Brown v Tasmania*,[33] assuming positive answers to Questions 1 and 2, asks, *"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 government?"* In *McCloy v New South Wales*, the plurality identified that this question (as previously formulated) was to be answered by consideration of three identified stages of proportionality testing.[34]

18. The plurality articulated that *"proportionality"* provided a uniform analytical framework for evaluating legislation which effects a restriction on a right or freedom, but eschewed any idea that this was the only criterion by which legislation that restricts a freedom can be tested.[35]

19. In *Brown v Tasmania*,[36] a submission by the Attorney-General for Queensland in support of an alternative approach to the three-stage proportionality test articulated in *McCloy*, to the effect of determining that the law went *"too far"*, was rejected as lacking the necessary transparency.[37] That requirement of transparency was identified in *McCloy* as carrying the advantage of assisting the legislature in understanding how the sufficiency of the justification for the imposition on the implied freedom will be tested.[38] Similarly, it was held to facilitate the proper provision of reasons by a court charged with determining validity.[39]

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[28] *McCloy v New South Wales* (2015) 257 CLR 178 at [67] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 91 ALJR 1089 at [321], [378] (Gordon J).
[29] *Monis v The Queen* (2013) 249 CLR 92 at [349] (Crennan, Kiefel and Bell JJ).
[30] *Victoria WS*, [36]-[46].
[31] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[32] *Coleman v Power* (2004) 220 CLR 1.
[33] *Brown v Tasmania* (2017) 91 ALJR 1089 at [104] (Kiefel CJ, Bell and Keane JJ).
[34] *McCloy v New South Wales* (2015) 257 CLR 178 at [2] (French CJ, Kiefel, Bell and Keane JJ).
[35] *McCloy v New South Wales* (2015) 257 CLR 178 at [74] (French CJ, Kiefel, Bell and Keane JJ).
[36] (2017) 91 ALJR 1089.
[37] *Brown v Tasmania* (2017) 91 ALJR 1089 at [125] (Kiefel CJ, Bell and Keane JJ).
[38] *McCloy v New South Wales* (2015) 257 CLR 178 at [74] (French CJ, Kiefel, Bell and Keane JJ).
[39] *McCloy v New South Wales* (2015) 257 CLR 178 at [75] (French CJ, Kiefel, Bell and Keane JJ).

20. The plurality also rejected a submission by the Attorney-General for the Commonwealth that the third stage of the three-stage proportionality test (adequacy of balance) need not be engaged in where the burden is other than *"direct and substantial"*, on the basis that *Lange "requires that* any *effective burden on the freedom must be justified".*[40]

21. Those answers to the challenges to the three-stage proportionality test of justification must be juxtaposed against the equally clear statements of the plurality that this test is a tool of analysis, rather than a rule derived from the Constitution itself.[41] A majority of this Court has confirmed its usefulness as a tool in considering the third question in the *Lange* test. Justice Gageler, by contrast, has disputed its usefulness on the basis that it establishes a
10 structure more relevant to a rights analysis.[42] To this end, his Honour has criticised the third stage (adequacy of balance) as *"convey*[ing] *no more than that the judgment the court is required to make can turn on difficult questions of fact and degree."*[43] His Honour's concern, with respect to the third stage of the test, also articulated by Gordon J,[44] is that such a test provides no guidance as to how the incommensurables of importance of purpose and extent of restriction are to be weighted or as to how the adequacy of balance is to be gauged.[45]

22. Fundamental to this criticism is the concern voiced by Gordon J,[46] to the effect that the balancing exercise engaged in during the third stage carries a heightened danger of the courts substituting their own assessment for that of the legislative decision-maker as to the
20 importance of the purpose. This is in circumstances where it has been explicitly recognised by the plurality that the balancing exercise involves the making of value judgments.[47] At least where the object of the law is not itself the promotion, protection or enhancement of the constitutionally prescribed system of government,[48] a value judgment of *"importance"* of purpose will be required.

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[40] *Brown v Tasmania* (2017) 91 ALJR 1089 at [127] (Kiefel CJ, Bell and Keane JJ).
[41] *McCloy v New South Wales* (2015) 257 CLR 178 at [4], [68], [73], [78] (French CJ, Kiefel, Bell and Keane JJ). See also *Brown v Tasmania* (2017) 91 ALJR 1089 at [159] (Gageler J).
[42] *Brown v Tasmania* (2017) 91 ALJR 1089 at [160] (Gageler J).
[43] *Brown v Tasmania* (2017) 91 ALJR 1089 at [160] (Gageler J).
[44] *Brown v Tasmania* (2017) 91 ALJR 1089 at [432] (Gordon J).
[45] *Brown v Tasmania* (2017) 91 ALJR 1089 at [160] (Gageler J).
[46] *Brown v Tasmania* (2017) 91 ALJR 1089 at [435] (Gordon J).
[47] *McCloy v New South Wales* (2015) 257 CLR 178 at [2] (French CJ, Kiefel, Bell and Keane JJ).
[48] *Brown v Tasmania* (2017) 91 ALJR 1089 at [438] (Gordon J).

23. Insofar as the first and second stages of the proportionality test are concerned, South Australia adopts the submissions of Victoria.[49]

The third stage of the third question - adequacy of balance - assessing the importance of purpose

24. Having regard to the criticisms made by Gageler J and Gordon J in relation to the third stage of the proportionality test, the challenge that then arises is how the Court is to execute the balancing test, transparently identifying the value judgments deployed to inform the importance of the purpose being served and minimising the risk of the Court sitting in judgment on a legislative decision as to the importance of the purpose *"without having access to all of the political considerations that played a part in the making of that decision, thereby giving a new and unacceptable dimension to the relationship between the Court and the legislature."*[50]

25. So expressed, this challenge advises care on the part of the Court in ascribing importance of purpose in circumstances where Parliament's own ascription of the importance of an apparent purpose may be discerned from ordinary indicators of legislative intention. As Brennan CJ observed in *Levy v Victoria*,[51] *"The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose."* Two imperatives are in tension.

    25.1. The first is the need for the Court to deploy value judgments that as best as possible identify and assess those that informed the legislative act and which avoid merely subjective impressions of the particular judge as to the importance of the purpose served.

    25.2. The second is the need to avoid deference in the exercise and, at the extreme, to ensure that Parliament does not recite itself into power.[52]

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[49] *Victoria WS*, [47]-[61].
[50] *Brown v Tasmania* (2017) 91 ALJR 1089 at [436] (Gordon J), citing *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473; *Leask v Commonwealth* (1996) 187 CLR 579 at 615-616.
[51] (1997) 189 CLR 579 at 598 (Brennan CJ).
[52] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J), 205-206 (McTiernan J), 222 (Williams J); *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 at 149 [53]-[54] (Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). See also *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11, [23] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ), [49] (Gageler J).

26. There can be no absolute prescription as to how this may be achieved. A comprehensive exercise in making the necessary value judgments raises the following considerations:

26.1. It is necessary to identify the purpose. This must be undertaken at the stage of compatibility testing. It is the province of the legislature to determine which policy objectives it pursues and to what extent[53] (subject at all times to any limitations imposed by the Constitution). The purpose is discerned objectively by ordinary methods of statutory construction.[54] It may emerge that the law pursues multiple objects. Further, an object disclosed by orthodox methods of construction cannot be denied even though the law's practical operation suggests it is deficient or not exhaustively comprehensive in achieving that object.[55]

26.2. The level of abstraction at which the object of a law is to be identified for the purposes of the question of justification lies at the level of identifying the mischief or mischiefs to which the law is directed:[56]

> *"The 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 or when speaking of 'the objects of the legislation'."*

26.3. Focusing on the mischief is to focus on the objects at a high level of abstraction.

26.4. To then assess the importance of the identified purpose or purposes first requires discerning the importance that Parliament has expressly or implicitly ascribed to that purpose. This may present expressly or implicitly in the indicators used to identify the purpose itself.[57] It may be apparent in terms, for example, from an expression of the objects of the Act or by some Parliamentary Declaration.

26.5. Care need be taken, however, to avoid circular reasoning. It is difficult, for example, to see that it would be permissible to rely on the actual burden on the freedom imposed as being demonstrative of the importance of the manifest purpose. To do so may tend to allow Parliament to recite itself into power by

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[53] *McCloy v New South Wales* (2015) 257 CLR 178 at [90] (French CJ, Kiefel, Bell and Keane JJ); *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [65] (Kiefel J).
[54] *Unions NSW v New South Wales* (2013) 252 CLR 530 at [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178 at [67] (French CJ, Kiefel, Bell and Keane JJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [178] (Gummow J).
[55] *McCloy v New South Wales* (2015) 257 CLR 178 at [55], [80] (French CJ, Kiefel, Bell and Keane JJ);
[56] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [178] (Gummow J); see also *McCloy* (2015) 257 CLR 178 at [132], [186] (Gageler J), [227], [232] (Nettle J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 301 (Mason CJ). As to the origin of the concept of "mischief" see *Heydon's Case* (1584) 3 Co Rep 7a at 7b.
[57] *Brown v Tasmania* (2017) 91 ALJR 1089 at [209] (Gageler J).

foreclosing the result of the balancing process of the third stage. Identifying the purpose with the requisite degree of abstraction will assist in this regard, as it will ensure that *"the means adopted by a law"* are separated *"from the end that it is designed to pursue"*.[58]

26.6. It would be permissible to have regard to the Second Reading Speech or Explanatory Memorandum insofar as such is capable of contributing to an understanding of Parliament's assessment of the importance of the purpose. To do so would not be to go beyond the bounds of common law[59] or statutory prescriptions[60] as to the use that may be made of extrinsic materials, as what is in question is not the interpretation of a provision of an Act, but an assessment of the value judgments made as to the importance of the purpose served.

26.7. None of this is a matter of deference to Parliament's assessment.[61] The exercise is evidential. But where Parliament has identified its view of the importance of an articulated purpose, that view, being by definition a representative opinion, becomes a critical integer of the Court's assessment.

26.8. The observation that the Court is, in the assessment of importance of purpose, *"without ... access to all of the political considerations"*[62] that contributed to the enactment illustrates the potential usefulness of receipt by the Court of evidence that is capable of ameliorating, if not filling completely, that gap in knowledge. As Mason CJ noted in his dissenting judgment in *Cunliffe v The Commonwealth,* which turned upon a consideration of proportionality, evidence of *"the scope and extent of the alleged mischief"* might be *"agreed"*, *"proved"*, the subject of *"judicial notice"* or established *"by legislative findings"*.[63] Ordinarily, proof would be via evidence procured by the executive relevant to the social or economic scale, scope and impact or potential impact of the particular, targeted mischief.

26.9. This is not to say that such evidence is necessary in every case; the scale of the mischief might in some circumstances be notorious and be a proper subject for judicial notice. Equally, it might be evidenced by an explicit legislative finding (for

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[58] *Brown v Tasmania* (2017) 91 ALJR 1089 at [322] (Gordon J); *Tajjour v New South Wales* (2014) 254 CLR 508 at [163] (Gageler J).
[59] *Owen v South Australia* (1996) 66 SASR 251 at 255-256 (Cox J).
[60] *Interpretation of Legislation Act 1984* (Vic), s 35 (b); *Acts Interpretation Act 1901* (Cth), s 15AB.
[61] *McCloy v New South Wales* (2015) 257 CLR 178 at [90]-[91] (French CJ, Kiefel, Bell and Keane JJ).
[62] *Brown v Tasmania* (2017) 91 ALJR 1089 at [436] (Gordon J).
[63] *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 304 (Mason CJ).

example by a report of a Parliamentary committee), or implicitly by consideration of a long history of legislative regulation or changes in societal norms represented by, for example, abolition of certain offences or enactment of human rights legislation. In some cases the significance of the purpose served, that is, of the public interest, will be self-evident.

27. In the present matter, the legislative purpose of the creation of safe access zones and the prohibitions attached thereto is expressly stated in ss 185A and 185C of Public Health Act. The Attorney-General for Victoria has summarised the purposes accurately.[64] Expressed at the appropriate level of abstraction, the purposes are to protect the safety and wellbeing of people accessing, providing and otherwise associated with lawful medical services and to support their privacy and dignity.

28. Parliament's opinion as to the importance of these purposes is implicit in the legislative expression. It requires no further extrapolation. The identified purposes are of compelling importance. In this instance, the value judgment to be engaged in by the Court requires nothing more than recognition of the self-evident. The protection of human safety, wellbeing, dignity and privacy in the pursuit of lawful activity has long been recognised as being an objective of high importance to the Australian public. There is a sense in which the Court may regard this as self-evident; otherwise it is evidenced by the long history of these matters being at the heart of comprehensive legislative and common law regulation, most obviously through protection by the criminal law (statutory and common law),[65] industrial[66] and employment legislative protections[67] and privacy[68] legislation, both generally and in the specific area of health.

29. It is not strictly necessary to go further. However, Victoria has, by reference to extrinsic materials and the filing of affidavit evidence, placed before the Court historical and contemporary material which demonstrates the acuteness of the mischief in the particular

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[64] *Victoria WS*, [34].
[65] In South Australia, it is an offence pursuant to the by-laws of hospitals established under s 42 of the *Health Care Act 2008* to act on hospital grounds in a manner that constitutes disorderly or offensive behaviour, or to be a threat to another person at the hospital, and such a person may be removed using reasonable force under s 43.
[66] For example, the prohibition on discrimination against an employee by reason that they have taken lawful steps to bring to light a work, health and safety issues: the offence created by s 104 of the *Work Health and Safety Act 2012* (SA) of engaging in discriminatory conduct for a prohibited reason.
[67] Such as the provisions of Part 6-4B of the *Fair Work Act 2009* (Cth) permitting a worker who has been bullied at work to apply to the Fair Work Commission for an order to stop the bullying.
[68] *Health Records Act 2011* (Vic), Part 3 of which creates the Health Privacy Principles and proscribes the doing of an act that is "an interference with the privacy of an individual", and section 82 of which criminalises the requesting of health information by false representation.

space around abortion clinics.[69] This material is capable, to some significant extent, of filling the lacuna left by the Court not otherwise having *"access to all of the political considerations"*[70] that motivated the enactment of the legislation.

The third stage of the third question - adequacy of balance - assessing the extent of the burden

30. A careful assessment of the extent of the burden, for the purpose of placing it in contradistinction to the accepted importance of the purpose served, has the capacity to reduce the incidence of truly hard cases where incommensurables must be compared and difficult (and potentially opaque) value judgments made.

10 31. To this end, analysis of the extent of any burden is assisted by stepping out methodically its qualities. This has been recognised as a matter of general observation, such that *"laws imposing restrictions on the time, place and manner of political communication have been understood as forming a category that requires a lesser justification."*[71] The plurality in *Brown v Tasmania* observed that *'[i]t is possible that a slight burden on the freedom might require a commensurate justification. Certainly, a heavy burden would ordinarily require a significant justification."*[72] But this is ultimately a question of *"the incremental effect of that law on the real-world ability of a person or persons to make or to receive communications which are capable of bearing on electoral choice."*[73]

32. The limits imposed on that real-world ability may be delineated, if not perfectly. They
20 may be:

32.1. spatial. In *Attorney-General (SA) v Adelaide City Corporation*,[74] the prohibition made by the relevant by-law was limited to the prescribed forms of activity occurring *"on any road"*.[75] In *Brown v Tasmania*, the spatial burden was imposed by the descriptions *"business premises"* and *"business access areas"*, the vagueness of which terms proved important to the plurality in assessing the nature and extent of the burden in its real-world operation;[76]

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[69] See *Victoria WS* [12]-[26].
[70] *Brown v Tasmania* (2017) 91 ALJR 1089 at [436] (Gordon J).
[71] *Brown v Tasmania* (2017) 91 ALJR 1089 at [478] (Gordon J), referring to *Coleman v Power* (2004) 220 CLR 1 at [91].
[72] *Brown v Tasmania* (2017) 91 ALJR 1089 at [128] (Kiefel CJ, Bell and Keane JJ).
[73] *Brown v Tasmania* (2017) 91 ALJR 1089 at [188] (Gageler J).
[74] (2013) 249 CLR 1; *Brown v Tasmania* (2017) 91 ALJR 1089.
[75] *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [26] (French CJ).
[76] *Brown v Tasmania* (2017) 91 ALJR 1089 at [40], [73], [77]-[79], [84], [95], [149] (Kiefel CJ, Bell and Keane JJ).

32.2. temporal. In *Attorney-General (SA) v Adelaide City Corporation*,[77] the prohibition imposed primarily by spatial criteria was modified in respect of periods of time during the course of a federal, state or local government election, or during the course of a referendum.[78] In *ACTV v The Commonwealth*,[79] the burden was imposed for the duration of election periods;

32.3. conditional or absolute. *Attorney-General (SA) v Adelaide City Corporation*,[80] the prohibition was subject to a requirement of *"permission"*;

32.4. drawn by reference to the character of the communication. In *Attorney-General (SA) v Adelaide City Corporation*,[81] the prohibited conduct was worded in terms, *"preach, canvass, harangue, tout for business or conduct any survey or opinion poll"* and *"give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter"* Exceptions to these prohibitions related to particular types of communication during elections and referenda.[82] In *Monis v The Queen*,[83] the prohibition was on communications that would be reasonably regarded as *"menacing, harassing or offensive"*;

32.5. drawn by reference to the content of the communication. In *ACTV v The Commonwealth*,[84] the prohibition was on communication in relation to *"political matter"*.

32.6. media-specific. In *ACTV v The Commonwealth*,[85] the prohibition was on broadcasting. In *Monis v The Queen*,[86] the prohibition related to the use of a postal service;

32.7. monetary. In *Unions NSW v State of New South Wales*, the prohibition effected a restriction upon funds available to political parties and candidates to meet the costs

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[77] (2013) 249 CLR 1; *Brown v Tasmania* (2017) 91 ALJR 1089.
[78] *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [68] (Hayne J).
[79] (1992) 177 CLR 106.
[80] (2013) 249 CLR 1; *Brown v Tasmania* (2017) 91 ALJR 1089.
[81] (2013) 249 CLR 1; *Brown v Tasmania* (2017) 91 ALJR 1089.
[82] *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [74] (Hayne J).
[83] *Monis v The Queen* (2013) 249 CLR 92.
[84] *ACTV v The Commonwealth* (1992) 177 CLR 106.
[85] *ACTV v The Commonwealth* (1992) 177 CLR 106.
[86] *Monis v The Queen* (2013) 249 CLR 92.

of political communication by restricting the source of funds.[87] In *McCloy v New South Wales*, the burden was of a similar monetary character.[88]

33. More than one of those types of real-world limits may operate together,[89] or they might be imposed in a discriminatory manner (which has been observed as generally requiring a strong justification, reflecting the risk that minority opinions might be selectively impeded).[90] They may be deployed at the point of the person making the communication or, by the selection of media limits, at the point of what would be its receipt.

34. Undertaking the analysis methodically as to the limits on the real-world ability to engage in political communication assists in identifying what is *not* prohibited as much as what is prohibited, which is an equally important integer of the assessment of the *"extent"* of the burden.

35. The positive and negative integers of the burden identified by reference to the real-world limits facilitate characterisation of the features of the political communication that is burdened by the legal and practical effect of the legislation. The factual circumstances of the communication in issue in a particular case may provide *"useful examples"* of the effect of the legislation on political communication more broadly.[91] The characteristics of the affected communication would include a consideration of its incidence (is it widespread, or rare) and the likely audience of the communication (does the affected communication advertise to a receptive public on issues of political importance as in *ACTV,* or is it an "*unsolicited*" and offensive communication as in *Monis*). Such devices will inform whether what is being limited is an essentially private communication or a broadly public communication. All of this will in turn inform the *"extent"* of the burden.

36. Careful identification of the nature and extent of the burden imposed by s 185D of the Public Health Act, as given content by subparagraph (b) of s 185B of that Act, identifies that the burden on the freedom is:

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[87] *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[88] *McCloy v New South Wales* (2015) 257 CLR 178 at [24] (French CJ, Kiefel, Bell and Keane JJ).
[89] See, e.g., *Levy v Victoria* (1997) 189 CLR 579, where the prohibition was on entering specified hunting areas within specified dates.
[90] *McCloy v New South Wales* (2015) 257 CLR 178 at [222] (Nettle J); *Brown v Tasmania* (2017) 91 ALJR 1089 at [202] (Gageler J); See *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at [136] (Keane J); *ACTV v The Commonwealth* (1992) 177 CLR 106 at 131-132, 145-146, 171-173, 218, 236.
[91] *Brown v Tasmania* (2017) 91 ALJR 1089 at [90] (Kiefel CJ, Bell and Keane JJ).

36.1. spatially limited in the extreme, being a prohibition of communication within 150m of premises at which abortions are provided, with the further spatial limitation that the communication must be done in a *"manner that is able to be seen or heard by a person accessing, attempting to access or leaving premises at which abortions are provided"*;

36.2. circumscribed as to the content of the communication, namely communication in relation to abortion. As discussed above, many communications about abortion are not political communication - the legislation not being directed to political communication, its impact is "incidental"; and

36.3. further circumscribed by reference to the character of the communication by the requirement that the communication be *"reasonably likely to cause distress and anxiety"*.

37. As to the negative integer, the Public Health Act:

37.1. places no prohibition on communications outside of the 150m distance, or communications within the safe access zone that are not *"able to be seen or heard"* by a person attempting to access the premises (for example, a protest meeting within a town hall that falls within the safe access zone);

37.2. places no limits on communications via any other medium, including the print media (other than through its distribution within the safe access zone) or the electro-magnetic spectrum (including, potentially, a broadcasted interview 151m from an abortion premises, with the premises visible in the background);

37.3. does not discriminate in terms between communications regarding abortions that are anti-abortion and communications regarding abortions that are pro-abortion, save insofar as one type of communication might be more likely to cause distress or anxiety;[92]

37.4. is not directed to restricting an individual to a *"less ... effective"* method of communication, or depriving an individual of the opportunity to communication *"in a manner which would have achieved maximum effect"*.[93] The communications most effectively made within the spatial and manner prohibitions are the

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[92] *Victoria WS* [43].

[93] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 145-146 (Mason J), 173 (Deane and Toohey JJ). *Levy v Victoria* (1997) 189 CLR 579 at 623-625 (McHugh J).

"targeted" discussions with women with a view to changing their mind about having an abortion, but these are *not political communication* for the reasons outlined above at [12] to [14]; and

37.5. does not affect the resourcing of those who wish to make political communications on the subject of abortion.

38. In other words, the Public Health Act *"impose*[s] *no general prohibition or regulation of communication or discussion."*[94] Like the legislation in *Monis,* consideration of these real-world limits reveals that the Act is *"not concerned with mutual discourse".*[95] The spatial limitation impedes communication that is likely to be *"unsolicited"*[96] and made predominantly to an audience who are considering a difficult, personal choice regarding receiving medical care. This is not a situation in which they are likely to be receptive to receiving information regarding their voting choices on the issue of abortion.

39. Both *Levy v Victoria*[97] and *Attorney-General (SA) v Adelaide City Corporation*[98] concerned prohibitions that were primarily spatial in nature, but with further temporal qualifications. While in each of those cases the testing for whether the laws were reasonably appropriate and adapted was not done through the three-stage proportionality test, each illustrates that a limited, spatial prohibition may carry little significance for the freedom when held up against purposes of safety (*Levy*) or free movement on roads (*Attorney-General (SA)*). By comparison, *Monis v The Queen,*[99] involved a spatially unlimited media-specific prohibition with a character-based qualification that was applicable to a *"broad range of circumstances"*, the limits of which could not be defined with precision.[100] The division of this Court reflected a difference in the purposes discerned[101] and their capacity to justify a significant burden, albeit one that was regarded by Crennan, Kiefel and Bell JJ as not *"extensive"* when weighed against the strength of the identified purpose.[102]

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[94] *Levy v Victoria* (1997) 189 CLR 579 at 614 (Toohey and Gummow JJ).
[95] *Monis v The Queen* (2013) 249 CLR 92 at [318] (Crennan, Kiefel and Bell JJ).
[96] *Monis v The Queen* (2013) 249 CLR 92 at [320] (Crennan, Kiefel and Bell JJ); See also *Brown v Tasmania* (2017) 91 ALJR 1089 at [275] (Nettle J).
[97] (1997) 189 CLR 579.
[98] (2013) 249 CLR 1.
[99] *Monis v The Queen* (2013) 249 CLR 92.
[100] *Monis v The Queen* (2013) 249 CLR 92, [74] (French CJ).
[101] These purposes were variously identified as preventing communications that a reasonable person would regard as offensive: [73] (French CJ); promoting civility of discourse: [178], [214] (Hayne J), as compared to the intrusion of seriously offensive material into a person's home or workplace: [348] (Crennan, Kiefel and Bell JJ)
[102] *Monis v The Queen* (2013) 249 CLR 92, [352].

40. Context will always matter, however: the limited spatial nature of the burden in *Brown v Tasmania* assumed a different significance on account of the vagueness of the spatial prohibition when combined with the significant freestanding temporal prohibitions[103] that could be imposed consequent on a reasonable, but mistaken identification of the space delineated by a police officer,[104] in circumstances where political communication was very much targeted by the prohibition.

Balancing in this case

41. In the present matter, an examination of the integers of the prohibition leads to the conclusion that the extent of the burden on the freedom is slight. By contrast, the purposes of the prohibition are of undeniably high public importance. This examination recommends the position, urged by Victoria,[105] that it is simply not necessary to utilise the analytical *"tool"*[106] of three-stage proportionality testing in its entirety in order to answer the more fundamental question whether the legislation is reasonably appropriate and adapted. However, having regard to the comments of the plurality in *Brown v Tasmania*,[107] to the effect that *any* effective burden on the freedom must be justified, a methodical identification of the integers of the burden on the freedom in the present matter demonstrates that the potential difficulty that may attend on the need to compare incommensurables is simply not reached: the justification for the potential burden on the freedom is incontrovertible.

Part VI: Estimate of time for oral argument

42. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

Dated: 25 May 2018

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[103] *Brown v Tasmania* (2017) 91 ALJR 1089, [81] (Kiefel CJ, Bell and Keane JJ), [228] (Gageler J).
[104] *Brown v Tasmania* (2017) 91 ALJR 1089, [73], [79], [144] (Kiefel CJ, Bell and Keane JJ).
[105] *Victoria WS* at [47]-[48]
[106] *McCloy* (2015) 257 CLR 178, [4] (French CJ, Kiefel, Bell and Keane JJ).
[107] *Brown v Tasmania* (2017) 91 ALJR 1089 at [127] (Kiefel CJ, Bell and Keane JJ).