IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S204 of 2018

BETWEEN:

UNIONS NSW
First Plaintiff

NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION
Second Plaintiff

ELECTRICAL TRADES UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH
Third Plaintiff

AUSTRALIAN EDUCATION UNION
Fourth Plaintiff

NEW SOUTH WALES LOCAL GOVERNMENT, CLERICAL, ADMINISTRATIVE, ENERGY, AIRLINES & UTILITIES UNION
Fifth Plaintiff

HEALTH SERVICES UNION NSW
Sixth Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

PART I: Internet publication

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

PART II: Outline of propositions

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Proportionality testing

2. Queensland's written submissions in this matter were made in response to a question raised by Kiefel CJ at the hearing of the matters of *Clubb* and *Preston*. The Chief Justice acknowledged that in *McCloy* it was not suggested that the three-stepped approach there adopted was the only criterion by which justification analysis might proceed. The Chief Justice noted that the Court had been waiting to hear what other criterion there might be, and invited submissions on that question.

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- *Clubb v Edwards; Preston v Avery* [2018] HCATrans 210, line 5425.

3. The written submissions made by Queensland were intended only as a response to that invitation. Queensland does not seek to reopen any law.

4. The answer Queensland gives is:

(a) because structured proportionality is not a constitutional rule, it is also consistent with constitutional principle to approach the question of justification in either of
20 the ways adopted by Gageler J and Gordon J in *Brown*;

- *Brown v Tasmania* (2017) 261 CLR 328, 378-379 [164]-[165] (Gageler J); [315]-[325] (Gordon J) **(Vol 2, tab 14)**.

- *McCloy v New South Wales* (2013) 257 CLR 178, 213 [68] (French CJ, Kiefel, Bell and Keane JJ) **(Vol 3, tab 18)**.

(b) for the same reason, even where proportionality testing is applied, some laws may be justified without engaging in each of the three *McCloy* steps (because different
30 principled balancing formulas are appropriate depending on the nature and extent of the burden);

- QS [40]-[41].

(c) if, however, all three steps of structured proportionality are to be applied in a given case, a law should be regarded as adequate in its balance unless it is 'grossly disproportionate'.

- QS [42]-[43].
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- In this respect, Queensland understands its written submissions to be consistent with those made by the plaintiff (at [54], [68]), the defendant (at [47]), and the Cth (at [48]-[49]).

That approach promotes transparency of reasoning, but does so in a way which is accommodated to the limits of the judicial function in the Australian constitutional system.

Burden of justifying a measure

5. A defendant jurisdiction does not bear the burden of justifying a restriction on the implied freedom.

   - *Brown* (2017) 261 CLR 328, 421 [288] (Nettle J) **(Vol 2, tab 14)**.

6. This is consistent, correctly analysed, with statements to the effect that it is 'incumbent' upon a defendant polity to justify a restriction, or that 'it is for those supporting the impugned legislation to justify any of its measures which burden the freedom'.

   - *McCloy* (2015) 257 CLR 178, 201 [24] (French CJ, Kiefel, Bell and Keane JJ) **(Vol 3, tab 18)**.

   - *Brown* (2017) 261 CLR 328, 370 [131] (Kiefel CJ, Bell and Keane JJ) **(Vol 2, tab 14)**.

7. Those statements are consistent with a tactical or provisional burden; that is, 'if the defendant fails to call any or any weighty evidence, it will run a risk of losing on the issue' though it will not necessarily lose on the issue.

   - *Strong v Woolworths Ltd* (2012) 246 CLR 182, 201-202 [53] (Heydon J).

8. *A fortiori* in a constitutional case where constitutional facts will arise, the proof of which exhibits a marked difference from ordinary fact finding. Hence, it is not a requirement of validity that a defendant jurisdiction adduce evidence of the mischief to which the measure is directed.

Dated: 5 December 2018.

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