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

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

PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland ('Queensland') intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondents.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

Intervener's submissions
Filed on behalf of the Attorney-General for the State of Queensland (intervening)
Form 27C

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Per James Potter
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PART IV: Submissions

Summary of argument

4. Noting the relation between this matter and *Clubb v Edwards*, Queensland makes the following submissions:

(a) First, 'the law's need to treat like cases alike'[1] is as central to constitutional law as to any other area of law. There is no relevant difference between s 9 of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) ('the Tasmanian law') and s 185D of the *Public Health and Wellbeing Act 2008* (Vic) ('the Victorian law'), which might justify their different treatment.

(a) Second, notwithstanding their differences, the written submissions of the second respondent, the Commonwealth and the State interveners in *Clubb* each proceed on the basis that:

(i) A statute will burden the freedom if, in its legal or practical operation, it has the effect of restricting or limiting the making or content of a political communication.[2]

(ii) The justification of any burden must account for the nature and extent of the burden. Accordingly, a burden must be not only identified, but its nature and extent described, before an answer can be given to the third *Lange* question.[3]

(iii) A burden of the nature and extent imposed by the law impugned in *Clubb* will be justified if it is rationally connected to the pursuit of a purpose which

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[1] *Tame v New South Wales* (2002) 211 CLR 317, 417 [295] (Hayne J).
[2] See, in *Clubb v Edwards,* written submissions of the second respondent, [28]; Cth A-G, [17], [45]-[46], NSW A-G, [4]; Qld A-G, [15]-[33]; SA A-G, [5.2], [7]-[8]; WA A-G, [13]-[38].
[3] See, in *Clubb v Edwards*, written submissions of the second respondent, [30], [49]; Cth A-G, [19]ff; NSW A-G, [23]; Qld AG, [34]; SA A-G, [30]-[40]; WA A-G, [39].

is 'compatible'.[4] In such cases, it is unnecessary (and therefore unhelpful) to resort to the other analytical tools described in *McCloy*.

(b) Third, the different submissions made by the second respondent, Queensland, and South Australia[5] (on the one hand), and New South Wales and Western Australia[6] (on the other) as to the existence of a burden in *Clubb*, make good Queensland's point[7] that the question of whether a restriction or limitation is more than 'inconsequential' is necessarily, ultimately one of degree.[8] In both *Clubb*, and the present matter, the burden – if it exists – is marginal. Where a test of degree produces binary results, it is unsurprising that its application in borderline cases may produce either a negative or a slight positive. Any test of degree will necessarily call for a line to be drawn, and minds will inevitably differ about precisely where to draw it. The consequence in marginal cases is that different outcomes may be produced. That, and not any difference in approach to principle, explains the different submissions.

5. It is necessary to elaborate only on the first of those submissions.

Statement of argument

Like cases

6. The law must treat like cases alike: only relevant differences may yield different results.[9] That is a requirement of the rule of law,[10] as central in constitutional cases as in any other.[11]

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[4] See, in *Clubb v Edwards*, submissions of the second respondent, [51]; Cth A-G, [5], [40]; Qld A-G [6]; SA A-G [23], [41]; WA A-G, [39]. The respondents make the same submission in *Preston*: see respondents' submissions at 15 [76].
[5] See, in *Clubb v Edwards*, submissions of the second respondent, [28]; Qld A-G [41]; SA A-G, [8].
[6] See, in *Clubb v Edwards*, submissions of the NSW A-G, [8]; WA A-G, [38].
[7] Submissions for the Qld A-G, [22].
[8] See submissions of the Qld A-G, [16]-[25], [40] and for the WA A-G, [17]-[19], [38].
[9] *Green v The Queen* (2011) 244 CLR 462, 472-473 [28] (French CJ, Crennan and Kiefel JJ).
[10] Ibid.
[11] This is so even if it is accepted that '[j]udicial exposition of the Constitution does not replace the Constitution or its meaning' (*McGinty v Western Australia* (1996) 186 CLR 140, 235 (McHugh J)), and that 'the doctrine of stare decisis should not be so rigidly applied to constitutional as to other laws' (*Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J)). In

7. There are two interrelated, overarching reasons why this Court would not apply the *Lange* test at a level of granularity which enabled the identification of a relevant difference between the Tasmanian law and the Victorian law:

(a) *First*, to do so would be to review impermissibly the relative merits of competing legislative models,[12] and to exceed the limits of the judicial function.[13]

(b) *Second*, the Court should avoid an approach to the *Lange* test, and in particular to justification analysis, which is case-specific and therefore incapable of giving rise to a general rule to guide future behaviour.[14] As discussed below, principle points against an approach which – to adopt the simile of Roberts J in *Smith v Allwright* – would render the precedential value of decisions on the implied freedom like 'a restricted railroad ticket, good for this day and train only'.[15] Legislatures 'should know, and are entitled to know, the limits of their legislative powers'.[16]

8. With those considerations in view, and in the context of a simultaneous challenge to two analogous laws, Queensland makes the following submissions.

The nature and extent of the burden in each case is alike

9. On the assumption that each law does restrict the freedom to an extent that is 'real' or 'meaningful', Queensland submits that the extent of the burden imposed by s 9 of the Tasmanian law is materially indistinguishable from the extent of the burden imposed by

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circumstances where the correctness of a constitutional principle is not in issue, the rule of law must require that principle's consistent application.

[12] *Brown v Tasmania* (2017) 91 ALJR 1089, 1143 [282], 1144 [286] (Nettle J).

[13] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

[14] Adrienne Stone, 'The limits of constitutional text and structure: Standards of review and the freedom of political communication' (1999) 23 *Melbourne University Law Review* 668, 691.

[15] *Smith v Allwright*, 321 US 649, 669 (1944), quoted by *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 130 (Brennan J).

[16] *McCloy v New South Wales* (2015) 257 CLR 178, 216 [74] (French CJ, Kiefel, Bell and Keane JJ), citing Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012), 379. See also 238 [151] (Gageler J, noting the desirability of 'consistency and predictability in the application of the implied freedom').

s 185D of the Victorian law. So much is revealed by an enquiry into the legal operation and practical effect of the law.[17]

10. The legal operation of the Tasmanian law on the implied freedom is largely co-extensive with the legal operation of the Victorian law on the implied freedom. To the extent the restrictions imposed by the laws are not co-extensive in their legal operation, each is narrower than the other in different respects: the Victorian law is slightly narrower in that it is limited to communications that would be 'reasonably likely to cause distress or anxiety'; the Tasmanian law is slightly narrower in that it is limited to communications which constitute a 'protest'. For that reason, it is not possible to conclude that, as a matter of legal operation, one law's effect on the implied freedom is more extensive than the other's.

11. Contrary to the appellant's submissions, the fact that the Tasmanian law is directed to 'protests' does not mean that its legal operation effects a 'viewpoint discrimination'.[18] The appellant submits that the word 'protest' when used in the phrase 'a protest in relation to terminations…' in s 9(1) means 'protest *in opposition* to terminations'.[19] While it may be accepted that 'protest' connotes opposition to something,[20] the definition in s 9(1) does not use the preposition 'against' and does not identify anything that the protest must oppose to qualify as 'a protest' for the purposes of the definition. Instead, the definition employs the connecting phrase 'in relation to', which is an expression 'of broad import'[21] and 'requires no more than a relationship, whether direct or indirect, between two subject matters'.[22] The appellant acknowledges as much at [45(a)] of his submissions.[23] Were a protest to be organised outside a clinic in

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[17] *Monis v The Queen* (2013) 249 CLR 92, 142 [108] (Hayne J); *Tajjour* (2014) 254 CLR 508, 560 [71] (Hayne J); *Brown v Tasmania* (2017) 91 ALJR 1089, 1118 [150] (Kiefel CJ, Bell and Keane JJ), 1123 [180] (Gageler J), 1132 [237] (Nettle J), 1149 [307], 1165 [395] (Gordon J).

[18] Appellant's submissions in *Preston* at 10 [48], referring to 7 [42].

[19] Appellant's submissions in *Preston* at 7 [42].

[20] Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6th ed, 2013) 1179; JA Simpson and ESC Weiner, *The Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989) vol 12, 684.

[21] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, 374 (Toohey and Gaudron JJ).

[22] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, 376 (McHugh J). See also *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513, 533 (Toohey J); *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 328 (Toohey and Gummow JJ).

[23] In the very least, there is a logical inconsistency in saying on the one hand (at [42]), that 'protest in relation to terminations' must mean 'protest *against* terminations' and, on the other hand (at [45(a)]), that 'protest in

opposition to terminations as well as a counter-protest with an opposing position, both would qualify as prohibited behaviour on the ordinary meaning of 'protest' and the ordinary meaning of 'in relation to'. Any discriminatory effect of the Tasmanian law cannot be attributed to its legal effect.

12. In terms of 'practical effect', each law affects the 'real world ability of a person or persons to make or to receive communications which are capable of bearing on electoral choice'[24] in the same way.[25] In particular, the words 'able to be seen or heard by' in the definition of 'prohibited behaviour' in s 9(1) of the Tasmanian law reveal a close connection between the 'protest' and its capacity to detrimentally impact on 'a person accessing, or attempting to access, premises at which terminations are provided'. As the respondents submit, and the evidence upon which they rely demonstrates, 'protests' by their nature are reasonably likely to cause distress or anxiety to women and others accessing or attempting to access a clinic.[26] For that reason, the practical effect of each law is to prohibit effectively the same category of political communications. Moreover, even if it were possible to hypothesise some isolated examples of political communication to which one law would apply but not the other, it would not follow that the general effect of one law on the implied freedom was, in any appreciable sense, more extensive.

13. Given the substantial similarity in the laws' legal operation, it is unsurprising that their practical effects on the implied freedom are indistinguishable. The practical effect of a law is necessarily assessed by reference to the relevant aspects of the legal and factual context in which that law operates. In some contexts, inquiries as to 'practical effect' will frequently (perhaps invariably) mandate close attention to facts which are peculiar to the time and place (that is, jurisdiction) in which the law applies. Section 92 is an

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relation to terminations' may mean a protest which is not even on the topic of terminations, let alone against them.

[24] *Brown v Tasmania* (2017) 91 ALJR 1089,1125 [188] (Gageler J).

[25] Consistently with that submission, the appellant in *Preston* has, with one exception, simply adopted the submissions of the appellant in *Clubb* as to practical effect: see appellant's submissions at 10 [48]. The appellant's one exception (which is addressed to the idea that the Tasmanian law is discriminatory in its legal rather than practical operation) is misconceived for the reasons set out above at paragraph [11].

[26] Respondents' submissions in *Preston*, 7-8 [38]-[40].

example.[27] The relevance in constitutional cases of practical effects of that kind presents difficulties, not the least of which is the 'unattractive' consequence that a law might 'surreptitiously' become invalid, because 'changes in the milieu in which the Act operates produce[] a change in the practical operation of the law'.[28] A further difficulty is presented if the relevant constitutional facts must be proved or agreed (in circumstances in which agreement may prove difficult).[29]

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14. In the context of the implied freedom, the relevant practical effect of a law will rarely be affected by factual matters peculiar to the Australian jurisdiction in which the law applies. That is because the necessarily abstract inquiry as to the general effect of a law on the freedom focuses upon matters which do not relevantly vary between those jurisdictions. As this Court has noted, Australian jurisdictions are increasingly integrated in terms of social, economic and political matters.[30] Moreover, the
20 jurisdictions' legal systems are substantially the same, and operate within the single, unifying structure of the Constitution. Political communication therefore flows in the same way throughout the country. That is why usually (although not invariably), the question of the extent to which a law restricts or limits political communications will yield the same answer as between Australian jurisdictions. That position is not invariable because the peculiar legal context in which a law operates may make a

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[27] *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1062 [198] (Keane J, noting that the operation of s 92 'may depend upon the exigencies of trade, commerce and intercourse'). For example, the law found invalid in *Castlemaine Tooheys Ltd* v *South Australia* (1990) 169 CLR 436, which disadvantaged brewing companies that did not use refillable bottles, would not have had a practical protectionist effect if the brewing companies in South Australia had not used refillable bottles but their interstate competitors had: cf *Castlemaine Tooheys* (1990) 169 CLR 436, 464 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[28] *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1061 [193]-[194] (Keane J). See also *Armstrong v Victoria [No 2]* (1957) 99 CLR 28, 73-74 (Williams J, suggesting amongst other things that s 92 of the
40 Constitution might render invalid an impost valid at its inception as a reasonable regulation of inter-State trade which ceased to be reasonable because of changes in the circumstances of inter-State trade). That s 92 might render invalid a once valid law must remain true following *Cole v Whitfield* (1988) 165 CLR 360.

[29] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 273-274 [65]-[66] (Heydon J). See also Amelia Simpson, 'Grounding the High Court's modern s 92 jurisprudence: The case for proper purpose as the touchstone article on s 92' (2005) 33 *Federal Law Review* 445, 479-481.

[30] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 572 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 264 (McHugh J); *Wotton v Queensland* (2012) 246 CLR 1, 31 [79] (Kiefel J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 549 [22] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Brown v Tasmania* (2017) 91 ALJR 1089, 1151 [316] (Gordon J).

difference to an assessment of the extent to which the practical effect of the law restricts or limits political communications.[31]

15. Given that the legal effects of the Victorian and Tasmanian laws are materially indistinguishable and there is nothing in the legal or factual context to suggest the practical effect will be any different, the extent of the burden of each law is the same.

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Indistinguishable purposes must be equally compatible

16. The purpose of the Victorian law is, as the second respondent in *Clubb* submits, to protect the safety and well-being, privacy and dignity of persons accessing premises at which terminations are provided.[32] As the respondents in *Preston* submit, the purpose of the Tasmanian law is the same.[33] At the very least, it is materially indistinguishable.

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17. Given that the purposes of the two laws are at least materially indistinguishable, it is submitted that both purposes must be equally legitimate or illegitimate. That follows as a matter of logic, because legitimacy turns on a criterion which applies equally to all Australian jurisdictions: compatibility with the maintenance of the constitutionally prescribed system of representative and responsible government.[34] The same purpose cannot be legitimate in one Australian jurisdiction and illegitimate in another: if a purpose 'does not impede the functioning of that [constitutionally prescribed] system and all that it entails'[35] in one jurisdiction, it cannot be said to do so in another. That must be so irrespective of whether evidence of the mischief at which the law is directed exists at all, or relates only to one jurisdiction.

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[31] *Brown v Tasmania* (2017) 91 ALJR 1089, 1113 [111] (Kiefel CJ, Bell and Keane JJ). See also at 1137-1138 [259] (Nettle J) and 1158 [357] (Gordon J). In particular, the legal context might demonstrate that the burden effected by the impugned law is only incremental: see *Brown* at 1125 [188] (Gageler J), 1165 [397] (Gordon J). The present cases do not call for consideration of whether there might be rare cases where the peculiar factual context may have a like result.

[32] Second Respondent's submissions in *Clubb* at 10 [34]; Respondents' submissions in *Preston* at 14 [68].

[33] See also Second Respondent's submissions in *Clubb* at 10 [34]-[35].

[34] *McCloy v New South Wales* (2015) 257 CLR 178, 203 [31] (French CJ, Kiefel, Bell and Keane JJ).

[35] Ibid.

18. For the reasons given by the second respondent in *Clubb* and adopted by the respondents in this proceeding, the indistinguishable purposes are legitimate.[36]

The justification analysis in each case is alike

19. Some observations can be made about the consequences that flow from the justification analysis in respect of s 185D of the Victorian law for the justification analysis in respect of s 9 of the Tasmanian law.

20. 'Suitability' is relevant irrespective of the mode of analysis employed.[37] It involves asking whether the means further, or are 'rationally connected' to the end in some way.[38] Although the Victorian and Tasmanian laws have the same end, they have adopted slightly different means to achieve that same end. However, where the end is constant and the means have an indistinguishable legal operation and practical effect, a conclusion of suitability in respect of one law must lead to a conclusion of suitability in respect of the other. In those circumstances, it will be impossible to conclude that one law is capable of furthering the end,[39] but the other is not.

21. For the reasons given by the second respondent[40] and the intervening Attorneys[41] in *Clubb*, because the burden imposed by the Victorian law in pursuit of a compelling purpose is insubstantial, the law is justified if it is suitable. The analogical reasoning outlined above means that the Tasmanian law is likewise justified if it is suitable.

22. Nonetheless, it is useful to note the following about other matters which may be relevant to determining whether similar laws are justified.

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[36] Second respondent's submissions in *Clubb* at 11-13 [36]-[45]; Respondents' submissions in *Preston* at 14 [67];
[37] *Brown v Tasmania* (2017) 91 ALJR 1087, 1116 [133] (Kiefel CJ, Bell and Keane JJ), 1143 [279] (Nettle J), 1170 [425] (Gordon J); *McCloy v New South Wales* (2015) 257 CLR 178, 232 [132] (Gageler J).
[38] *Unions NSW v New South Wales* (2013) 252 CLR 530, 557 [50], 560 [60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[39] *McCloy v New South Wales* (2015) 257 CLR 178, 217 [80] (French CJ, Kiefel, Bell and Keane JJ); *Unions NW v New South Wales* (2013) 252 CLR 530, 557-558 [50]-[55] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 579 [141] (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508, [82] (Hayne J). See also Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 310.
[40] Second respondent's submission in *Clubb* at 16 [51].
[41] See references above in footnote 4.

23. As these concurrent proceedings involve a challenge to two laws with the same purpose but which adopt slightly different means, the inquiry as to 'reasonable necessity' may appear to be 'available [and] appropriate',[42] because a comparator is readily available. It is submitted that is not the case: the Victorian law is not an 'alternative', let alone an 'obvious and compelling' alternative, of the Tasmanian law (nor vice versa).

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24. The first point may be shortly made. Where, as here, the laws have an indistinguishable legal operation and practical effect, they cannot be said to adopt 'alternative' means.

25. The second point is that, even if the laws could be said to be 'alternatives', neither would be an 'obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom'.[43]

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26. The qualification of 'obvious and compelling' was first introduced by Crennan, Kiefel and Bell JJ in *Monis v The Queen*.[44] Chief Justice French later pointed out in *Tajjour v New South Wales* that the qualification prevents courts from 'substituting their own legislative judgments for those of parliaments', and ensures that consideration of alternative means remains merely a tool of analysis.[45] It ensures that the choice of a preferred means from within the 'domain of selections' is the legislature's.[46]

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27. In light of those observations, it is submitted that 'obvious and compelling' qualifies the alternative means in two respects. First, it must be 'obvious and compelling' that the alternative is as practicable and as effective as the impugned law. Second, it must be 'obvious and compelling' that the alternative has a significantly[47] less restrictive effect on the freedom.

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[42] *Brown v Tasmania* (2017) 91 ALJR 1087, 1143 [279] (Nettle J).
[43] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2(B)(3)] (French CJ, Kiefel, Bell and Keane JJ.
[44] *Monis v The Queen* (2013) 249 CLR 92, 214 [347] (Crennan, Kiefel and Bell JJ).
[45] *Tajjour v New South Wales* (2014) 254 CLR 508, 550 [36] (French CJ), adopted in *McCloy v New South Wales* (2015) 257 CLR 178, 211 [58] (French CJ, Kiefel, Bell and Keane JJ).
[46] *McCloy v New South Wales* (2015) 257 CLR 178, 217 [82]; *Brown v Tasmania* (2017) 91 ALJR 1089, 1145 [286].
[47] *Brown v Tasmania* (2017) 91 ALJR 1089, 1144 [282] (Nettle J).

28. That it should be obvious and compelling that the alternative measure is significantly less restrictive on the freedom flows from the nature of the inquiry[48] and from the fact that the *Lange* test 'does not call for nice judgments as to whether one course is slightly preferable to another'.[49] As Nettle J observed in *Brown*, the inquiry as to necessity neither requires nor permits the Court to 'engage in an assessment of the relative merits of competing legislative models'.[50] To attach the qualification 'obvious and compelling' to both aspects of the test recognises that 'what is necessary is, to a large extent, within the exclusive purview of the Parliament'.[51]

29. Because it cannot be said that the extent of the burden imposed by the Victorian law is greater or lesser than the burden imposed by the Tasmanian law, they cannot be obvious and compelling alternatives to one another. Queensland otherwise adopts the submissions of the second respondent in *Clubb* and of the respondents in this proceeding as to other hypothetical alternatives.[52]

30. The two sides of the scales in the 'adequacy of balance' inquiry are identified by Professor Barak as 'the social importance of the benefit gained by the limiting law and the social importance of preventing harm to the limited constitutional right'.[53] Notwithstanding the difficulties with this particular tool of analysis,[54] it is true that any methodology for answering the third *Lange* question must take account of the importance of the legislative end pursued.[55] Moreover, all formulations of the *Lange* test have recognised that the extent of the effect on the freedom is relevant.[56] For that reason, in the context of the present proceedings, and irrespective of the analytical method employed, it is instructive to note the analogical consequences that would flow

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[48] Which is *not* 'a free-ranging inquiry as to whether the legislature should have made different policy choices': *McCloy v New South Wales* (2017) 91 ALJR 1089, 1117 [139] (Kiefel CJ, Bell and Keane JJ).
[49] *Coleman v Power* (2004) 220 CLR 1, 53 [100] (McHugh J).
[50] *Brown v Tasmania* (2017) 91 ALJR 1089, 1143 [282], 1144 [286] (Nettle J).
[51] Ibid.
[52] Second respondent's submissions in *Clubb* at 16-18 [54]-[61]; Respondent's submissions in *Preston* at 16 [81]-[97].
[53] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 349.
[54] As to which, see *McCloy v New South Wales* (2015) 257 CLR 178, 235-238 [142]-[150] (Gageler J); *Brown v Tasmania* (2017) 91 ALJR 1089, 1171-1173 [431]-[437] (Gordon J).
[55] *McCloy v New South Wales* (2015) 257 CLR 178, 218 [86] (French CJ, Kiefel, Bell and Keane JJ).
[56] *McCloy v New South Wales* (2015) 257 CLR 178, 218 [83] (French CJ, Kiefel, Bell and Keane JJ).

(for example) for the Tasmanian law if it were considered that the Victorian law was 'adequately balanced'.

31. As to the first scale, Professor Barak suggests that the importance of the purpose of legislation is gauged by reference to the 'normative' or 'value' structure of each legal system.[57] The normative or value structure of the legal system of each Australian jurisdiction is, and must be, the same. It follows that the importance of the purpose of the Victorian law is indistinguishable from the importance of the purpose of the Tasmanian law.

32. The Tasmanian legislature was entitled to act, as it did, by reference to evidence of a social issue in Victoria.[58] It is open to the legislatures of the different States to act in response to experiences interstate, just as it is open to them to act 'prophylactically' or in response to inferred legislative imperatives.[59] Accordingly, even if no clinic within Tasmania had experienced problems of the duration and extent of those experienced by the Fertility Control Clinic in East Melbourne, the importance of the purpose of each law would remain the same.

33. Gauged by reference to the normative structure of the legal system, the social importance of the impugned laws' purposes – essentially, to prevent persons causing harm to others – is indisputably high.

34. As to the second scale, given that the implied freedom derives from the Constitution, its importance is constant throughout Australia. Further, for the reasons given above, the extent of the burdens imposed by the Victorian and Tasmanian laws is relevantly indistinguishable. It follows that the importance of preventing limitations to the same extent upon the free flow of political communication will be the same, regardless of where in Australia the limitation applies.

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[57] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 349.
[58] Respondents' submissions in *Preston* at 6 [36].
[59] *Brown v Tasmania* (2017) 91 ALJR 1089, 1145 [288] (Nettle J); *McCloy v New South Wales* (2015) 257 CLR 178, 262 [233] (Nettle J).

35. Thus, when determining adequacy of balance, the values assigned to the two sides of the scales in respect of Victoria's law will be the same in respect of Tasmania's law. The result is that even if one engages in 'balancing' as a tool of analysis, the answer to the third *Lange* question must be the same in respect of those laws.

PART I: Time estimate

36. It is estimated that no time additional to the estimate for *Clubb v Edwards* will be required for the presentation of oral argument in this proceeding.

Dated 10 August 2018.

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