IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M46 OF 2018**

KATHLEEN CLUBB

Appellant

and

ALYCE EDWARDS

First Respondent

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Second Respondent

HIGH COURT OF AUSTRALIA
FILED IN COURT
10 OCT 2018
No.
THE REGISTRY CANBERRA

HOBART REGISTRY **NO H2 OF 2018**

JOHN GRAHAM PRESTON

Appellant

and

ELIZABETH AVERY

First Respondent

SCOTT WILKIE

Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (intervening)

The Australian Government Solicitor
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PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Communication on matters of politics and government

2. There is a "significant difference" between the implied freedom of political communication and "an unlimited freedom of expression". The implied freedom protects communications on "matters of politics and government" rather than communication generally. "Matters of politics and government" are matters that are capable of bearing on electoral choice, being matters concerning how people are governed or how they should govern themselves: **Cth (C) [9]**.

   2.1. *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104 at 124-125 (Mason CJ, Toohey and Gaudron JJ) (**Vol 8, Tab 47**)

   2.2. *McCloy v New South Wales* (2015) 257 CLR 178 at [119]-[120] (Gageler J) (**Vol 5, Tab 35**)

3. Ms Clubb was present in the access zone in order to offer "help" to women, in the course of which she engaged in a private communication with one couple in relation to abortion. That communication was not proved by Ms Clubb to be of a kind capable of bearing on electoral choice: **CAB (C) 295-296 (note also CAB (C) 289[4])**.

II. Threshold question

4. As it was not shown that Ms Clubb engaged in any communication on "matters of politics and government", she failed to establish a "state of facts which makes it necessary to decide" the question said to arise involving the implied freedom of political communication. **Cth (C) [13]**; cf **Cth (P) [6]**.

   4.1. *Knight v Victoria* (2017) 345 ALR 560 at 567-568 [32]-[35] (the Court) (**Vol 4, Tab 30**)

5. That point is distinct from, and entirely consistent with, the proposition that when a challenge based on the implied freedom is properly raised the burden of the impugned law is assessed generally, and not by reference to the burden that exists on the specific facts of the case: **Cth (C) [32]**.

III. Calibrating factors

6. The level of justification that a law requires depends on the extent and nature of the burden that it imposes upon political communication: **Cth (C) [19]**.

7. Factors that inform the level of justification ("calibrating factors") include: (a) the purpose of the law; (b) whether the law is "discriminatory" in the relevant sense; and (c) whether the law is a "time, place and manner" restriction": **Cth (C) [21]**.

8. Other than purpose, these factors are relevant to the nature and extent of the burden, and should be considered as part of the "effective burden" inquiry (Step 1). That is appropriate because, in cases where there is an effective burden on political communication, it is necessary to identify the nature and extent of that burden before it is possible to consider whether the burden is justified: **Cth (C) [22]-[27]**.

IV. Discrimination

9. A law is relevantly "discriminatory" only if it: (a) singles out political communication; or (b) discriminates against particular viewpoints on political matters: **Cth (C) [28]-[31]**.

   9.1. *ACTV v Commonwealth* (1992) 177 CLR 106 at 143-144 (Mason CJ), 169 (Deane and Toohey JJ), 235 (McHugh J) (**Vol 3, Tab 19**)

   9.2. *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578 [137], 579 [140] (Keane J) (**Vol 9, Tab 50**)

10. A law is not relevantly "discriminatory" merely because it happens to operate in a way that burdens a group wishing to express a particular political viewpoint more than other groups: **Cth (C) [32]-[38]**.

11. Neither the Victorian nor the Tasmanian provisions discriminate against political communication, or against particular political viewpoints: **Cth (C) [47]**; **Cth (P) [8]-[10]**.

   11.1. **CAB (C) 86.3, 78,5, 81.6**

   11.2. *Hill v Colorado*, 530 US 703 (2000), 719-720 and 724-725 (**Vol 9, Tab 56**)

V. "Time, place and manner" restrictions

12. The impugned provisions leave open many other methods of engaging in political communication concerning abortion. They are framed to operate in limited and precisely defined areas, where they apply in order to advance a regulatory purpose unrelated to political communication. As such, the impugned provisions are properly characterised as "time, place and manner" restrictions: **Cth (C) [49]; Cth (P) [11]**.

13. Such restrictions generally do not impose a substantial or direct burden on political communication, and therefore require less justification than laws that prohibit certain political communications: **Cth (C) [39]**.

13.1. *ACTV* (1992) 177 CLR 106 at 143, 145-146 (Mason CJ), 235 (McHugh J)

13.2. *McCloy* (2015) 257 CLR 178 at 268 [252] (Nettle J), 238 [152] (Gageler J)

13.3. *Brown v Tasmania* (2017) 91 ALJR 1089 at 1178 [478] (Gordon J) (**Vol 3, Tab 21**)

14. Sometimes a restriction on the ability to conduct a site-specific protest might impose a substantial burden on political communication. However:

14.1. There is no evidence that is the case with respect to protests against abortion: **Cth (P) [12]**.

14.2. This Court has applied this approach only where presence on-site is shown to be an integral part of the content of the relevant communication: *Brown* (2017) 91 ALJR 1089 at [240] (Nettle J); see also [32] (plurality), [191] (Gageler J); *Levy v Victoria* (1997) 189 CLR 579 at 625 (McHugh J) (**Vol 5, Tab 33**).

14.3. As there is no constitutional right to communicate via a preferred mode, it is not to the point that protestors may <u>believe</u> that a protest near a clinic is the best way to communicate: *Brown* (2017) 91 ALJR 1089 at [258] (Nettle J).

14.4. The Court cannot infer that a site-specific protest would amplify the appellant's communication (eg via television), given the unchallenged prohibitions on recording and distributing images within a safe-access zone without consent.

15. In these circumstances, a restriction on the "time, place and manner" of communication can be justified simply by showing that it has a <u>rational connection</u> to its identified purpose: **Cth (C) [40], [49]; Cth (P) [12], [16]**. Alternatively, once "suitability" is established, the answers to the further inquiries under the *McCloy* approach will be obvious: **Cth (C) [41]**.

16. On either analysis, the impugned provisions are valid: **Cth (C) [52]-[53]**; **Cth (P) [22]-[29]**.

Date: 10 October 2018

Stephen Donaghue **Craig Lenehan** **Celia Winnett**