HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No M46/2018

KATHLEEN CLUBB APPELLANT

AND

ALYCE EDWARDS & ANOR RESPONDENTS

Matter No H2/2018

JOHN GRAHAM PRESTON APPELLANT

AND

ELIZABETH AVERY & ANOR RESPONDENTS

Clubb v Edwards
Preston v Avery
[2019] HCA 11
10 April 2019
M46/2018 & H2/2018

ORDER

Matter No M46/2018

1. *So much of the appellant's appeal from the judgment of Magistrate Bazzani made on 11 October 2017 as has been removed into this Court is dismissed.*

2. *The appellant pay the respondents' costs.*

Matter No H2/2018

1. *So much of the appellant's appeal from the judgment of Magistrate Rheinberger made on 27 July 2016 as has been removed into this Court is dismissed.*

2. *The appellant pay the respondents' costs.*

On appeal from the Magistrates' Court of Victoria (M46/2018) and the Magistrates Court of Tasmania (H2/2018)

Representation

G O'L Reynolds SC with F C Brohier and D P Hume for the appellant in both matters (instructed by Khor & Burr Lawyers and DL Legal Lawyers)

F L Dalziel with J M Davidson for the first respondent in M46/2018 (instructed by Director of Public Prosecutions (Vic))

K L Walker QC, Solicitor-General for the State of Victoria, with K E Foley and S Gory for the second respondent in M46/2018 and for the Attorney-General for the State of Victoria, intervening in H2/2018 (instructed by Victorian Government Solicitor)

M E O'Farrell SC, Solicitor-General for the State of Tasmania, with S K Kay for the respondents in H2/2018 (instructed by Solicitor-General for Tasmania)

S P Donaghue QC, Solicitor-General of the Commonwealth, with C L Lenehan and C G Winnett for the Attorney-General of the Commonwealth, intervening in both matters (instructed by Australian Government Solicitor)

P J Dunning QC, Solicitor-General of the State of Queensland, with F J Nagorcka for the Attorney-General of the State of Queensland, intervening in both matters (instructed by Crown Solicitor (Qld))

C D Bleby SC, Solicitor-General for the State of South Australia, with P D Stirling for the Attorney-General for the State of South Australia, intervening in both matters (instructed by Crown Solicitor's Office (SA))

G T W Tannin SC with F B Seaward for the Attorney-General for the State of Western Australia, intervening in both matters (instructed by State Solicitor for Western Australia)

J K Kirk SC with Z C Heger for the Attorney-General for the State of New South Wales, intervening in both matters (instructed by Crown Solicitor's Office (NSW))

T J Moses for the Attorney-General for the Northern Territory, intervening in H2/2018 (instructed by the Solicitor-General for the Northern Territory)

The Castan Centre for Human Rights Law, The Fertility Control Clinic (A firm) and The Human Rights Law Centre appearing as amici curiae in M46/2018, each limited to its written submissions

LibertyWorks Inc appearing as amicus curiae in H2/2018, limited to its written submissions

CATCHWORDS

Clubb v Edwards
Preston v Avery

Constitutional law (Cth) – Implied freedom of communication about governmental or political matters – Where s 185D of *Public Health and Wellbeing Act 2008* (Vic) and s 9(2) of *Reproductive Health (Access to Terminations) Act 2013* (Tas) prohibit certain communications and activities in relation to abortions within access zone of 150 m radius around premises at which abortions are provided – Where appellants engaged in communications and activities in relation to abortions within access zone – Whether communications and activities in relation to abortions are communications about governmental and political matters – Whether provisions effectively burden implied freedom – Whether provisions imposed for legitimate purpose – Whether provisions reasonably appropriate and adapted to that purpose – Whether provisions suitable, necessary and adequate in balance.

Constitutional law (Cth) – Implied freedom of communication about governmental or political matters – Severance, reading down and disapplication – Where appellant charged and convicted of offence against s 185D of *Public Health and Wellbeing Act 2008* (Vic) – Where it was not contended that appellant's conduct involved political communication – Where substantial overlap with issues raised in proceedings in relation to interstate Act – Whether s 185D able to be severed, read down or partially disapplied so as to have valid operation in respect of appellant – Whether appropriate to proceed to determine constitutional validity of s 185D.

Words and phrases – "access zone", "adequate in its balance", "calibration", "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government", "compelling purpose", "dignity", "discriminatory", "legitimate purpose", "necessary", "partial disapplication", "political communication", "privacy", "prohibited behaviour", "proportionality testing", "protest", "rational connection", "reading down", "reasonably appropriate and adapted", "safe access zone", "severance", "structured proportionality", "suitable", "undue burden", "viewpoint neutral".

Interpretation of Legislation Act 1984 (Vic), s 6.
Public Health and Wellbeing Act 2008 (Vic), ss 185A, 185B, 185C, 185D, 185E.
Reproductive Health (Access to Terminations) Act 2013 (Tas), s 9.

1 KIEFEL CJ, BELL AND KEANE JJ. The Parliaments of the States of Victoria and Tasmania have decriminalised the termination of pregnancies by artificial means in certain circumstances[1]. In addition, the legislature of each State has sought to provide that those seeking access to, or working in, premises where terminations are available are protected from hindrance.

2 In Matter M46 of 2018 ("the Clubb appeal"), the appellant, Mrs Kathleen Clubb, challenges the validity of s 185D of the *Public Health and Wellbeing Act 2008* (Vic) ("the Public Health Act"), which, by virtue of the definition of "prohibited behaviour" in s 185B(1), prohibits, in certain circumstances, "communicating by any means in relation to abortions". Section 185D was inserted into the Public Health Act by the *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic) ("the Safe Access Zones Act").

3 In Matter H2 of 2018 ("the Preston appeal"), the appellant, Mr John Graham Preston, challenges the validity of s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) ("the Reproductive Health Act"), which, by virtue of the definition of "prohibited behaviour" in s 9(1), prohibits, in certain circumstances, "a protest in relation to terminations".

4 Each of the appellants argues that the challenged provision is invalid because it impermissibly burdens the freedom of communication about matters of government and politics which is implied in the *Constitution* ("the implied freedom"). This argument falls to be resolved by application of the test for invalidity stated in *Lange v Australian Broadcasting Corporation*[2] as explained in *McCloy v New South Wales*[3] and *Brown v Tasmania*[4].

5 The test to be applied was adopted in *McCloy* by French CJ, Kiefel, Bell and Keane JJ[5], and it was applied in *Brown* by Kiefel CJ, Bell and Keane JJ[6] and

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1 *Abortion Law Reform Act 2008* (Vic); *Reproductive Health (Access to Terminations) Act 2013* (Tas).

2 (1997) 189 CLR 520; [1997] HCA 25.

3 (2015) 257 CLR 178; [2015] HCA 34.

4 (2017) 261 CLR 328; [2017] HCA 43.

5 (2015) 257 CLR 178 at 193-195 [2].

6 (2017) 261 CLR 328 at 363-364 [104].

Nettle J[7]. For convenience that test will be referred to as "the *McCloy* test". It is in the following terms[8]:

1. Does the law effectively burden the implied freedom in its terms, operation or effect?

2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3. If "yes" to question 2, 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 representative and responsible government?

6 The third step of the *McCloy* test is assisted by a proportionality analysis which asks whether the impugned law is "suitable", in the sense that it has a rational connection to the purpose of the law, and "necessary", in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is "adequate in its balance". This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom[9].

7 The appellants argued that the challenged laws fail to satisfy the *McCloy* test. In addition, they invited the Court to approach the question as to the validity of the challenged provisions on the footing that they derogate impermissibly from what their Senior Counsel described as the right to protest and demonstrate. This invitation cannot be accepted, for reasons that may be stated briefly.

8 It is well settled that the implied freedom is a limitation upon the power of government to regulate communication relating to matters of government and politics. It does not confer a right to communicate a particular message in a

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7 (2017) 261 CLR 328 at 398 [236], 413 [271], 416-417 [277]-[278].

8 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2] as modified by *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [104]. See also (2017) 261 CLR 328 at 375-376 [155]-[156], 416 [277], 478 [481].

9 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2]-[3].

particular way[10]. The common law right to protest or demonstrate may be abrogated by statute. The issue in each appeal is whether the statutory abrogation is valid. Senior Counsel for the appellants acknowledged in the course of argument that to accept his invitation would be contrary to the settled understanding in this Court's decisions. Notwithstanding that acknowledgment, he advanced no basis on which this Court might now adopt a different understanding of the juridical nature of the implied freedom, and so the invitation must be rejected.

9 The statutory provision challenged in each appeal operates within a "safe access zone", which is the area within a radius of 150 m from premises at which terminations are provided. In each case, the restriction is confined to communications about terminations that are able to be seen or heard by a person seeking access to such premises. There is thus an overlap of issues that arise in the appeals. Accordingly, the convenient course is to deal comprehensively with those issues in the Clubb appeal, and then to address the different aspects of the issues that arise in the Preston appeal.

The Clubb appeal

The charge

10 Mrs Clubb was charged in the Magistrates' Court of Victoria with the following offence:

> "[Mrs Clubb] at East Melbourne on the 4/8/16 did engage in prohibited behaviour namely communicating about abortions with persons accessing premises at which abortions are provided while within a safe access zone, in a way that is reasonably likely to cause anxiety or distress."

11 On 4 August 2016, Mrs Clubb was seen by police to be standing at the eastern boundary of the East Melbourne Fertility Control Clinic ("the Clinic")

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10 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 150; [1992] HCA 45; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Levy v Victoria* (1997) 189 CLR 579 at 623-624, 625-626; [1997] HCA 31; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223-225 [107]-[112], 246-248 [184]-[188], 298 [337], 303-304 [354]; [2004] HCA 41; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 [381]; [2005] HCA 44; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551-552 [30], 554 [36], 574 [119]; [2013] HCA 58; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30]; *Brown v Tasmania* (2017) 261 CLR 328 at 359-360 [88]-[90], 407-408 [258], 430 [313], 503-504 [558]-[560].

shortly after 10 am. Mrs Clubb stood about 5 m from the entrance to the Clinic with pamphlets in her hand. At 10.30 am she approached a young couple entering the Clinic, spoke to them, and attempted to hand them a pamphlet. The young man declined the proffered pamphlet and moved, with the young woman, away from Mrs Clubb. The evidence did not establish what was said between Mrs Clubb and the young couple, but the pamphlet that Mrs Clubb proffered offered counselling and assistance to enable pregnancy to proceed to birth.

The proceedings

12 The Magistrate upheld the validity of the law under which Mrs Clubb was charged, concluding that it imposed no burden upon the implied freedom because the Public Health Act is not directed at political communication. The Magistrate found that Mrs Clubb communicated with the young couple for the sole purpose of a discussion relevant to abortion, and proceeded to convict Mrs Clubb of the offence charged.

13 Mrs Clubb appealed to the Supreme Court of Victoria. In that Court, she advanced three grounds of appeal. On 23 March 2018, Gordon J, pursuant to s 40 of the *Judiciary Act 1903* (Cth), ordered the removal of that part of the appeal concerned with two of those grounds into this Court.

14 Mrs Clubb subsequently filed an amended notice of appeal in this Court. She now contends, in substance, that s 185D of the Public Health Act, read with para (b) of the definition of "prohibited behaviour" in s 185B(1), impermissibly burdens the implied freedom and is therefore invalid, so that the charge against her should have been dismissed.

Legislation

15 Part 9A of the Public Health Act is entitled "Safe access to premises at which abortions are provided". The purpose of Pt 9A is set out in s 185A, which provides:

> "The purpose of this Part is –
>
> (a) to provide for safe access zones around premises at which abortions are provided so as to protect the safety and wellbeing and respect the privacy and dignity of –
>
> (i) people accessing the services provided at those premises; and

(ii) employees and other persons who need to access those premises in the course of their duties and responsibilities; and

(b) to prohibit publication and distribution of certain recordings."

16 "[A]bortion" is defined in s 185B(1) by reference to the *Abortion Law Reform Act 2008* (Vic). That Act defines "abortion" in s 3:

"***abortion*** means intentionally causing the termination of a woman's pregnancy by –

(a) using an instrument; or

(b) using a drug or a combination of drugs; or

(c) any other means".

17 Section 185C of the Public Health Act sets out the principles that apply to Pt 9A:

"The following principles apply to this Part –

(a) the public is entitled to access health services, including abortions;

(b) the public, employees and other persons who need to access premises at which abortions are provided in the course of their duties and responsibilities should be able to enter and leave such premises without interference and in a manner which –

(i) protects the person's safety and wellbeing; and

(ii) respects the person's privacy and dignity."

18 The offence-creating provision in Pt 9A is s 185D, which provides:

"A person must not engage in prohibited behaviour within a safe access zone.

Penalty: 120 penalty units or imprisonment for a term not exceeding 12 months."

19 "[S]afe access zone" is defined in s 185B(1) to mean "an area within a radius of 150 metres from premises at which abortions are provided".

20 "[P]rohibited behaviour" is defined in s 185B(1) to include:

> "(b) subject to subsection (2), communicating by any means in relation to abortions 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 and is reasonably likely to cause distress or anxiety".

21 Sub-section (2) of s 185B provides that "[p]aragraph (b) of the definition of ***prohibited behaviour*** does not apply to an employee or other person who provides services at premises at which abortion services are provided".

22 Section 185D, read with para (b) of the definition of "prohibited behaviour", will be referred to in these reasons as "the communication prohibition".

23 "[P]rohibited behaviour" is also defined to mean:

> "(a) in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means; or
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> ...
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> (c) interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided; or
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> (d) intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person's consent".

24 Section 185E provides that a person must not, without the consent of the other person or without reasonable excuse, publish or distribute a recording of a person accessing, attempting to access, or leaving premises at which abortions are provided, if the recording contains particulars likely to lead to the identification of that other person and the identification of that other person as a person accessing premises at which abortions are provided.

A threshold issue

25 The Attorney-General of the Commonwealth, intervening in the proceeding pursuant to s 78A of the *Judiciary Act*, submitted that it would be

inappropriate for this Court to determine whether the communication prohibition impermissibly burdens the implied freedom in the Clubb appeal because there is no evidence that Mrs Clubb's conduct actually involved *political* communication. It was argued that, although the evidence does not establish what Mrs Clubb actually said to the couple seeking access to the Clinic, it may be inferred that her conduct in proffering the pamphlet was directed solely at dissuading the young lady from having an abortion. On that basis, in its application to Mrs Clubb s 185D imposed no burden on the implied freedom.

26 It was then said on behalf of the Attorney-General that, even if the communication prohibition were held to impermissibly burden the implied freedom in some areas of its application, the prohibition is to be construed in accordance with s 6(1) of the *Interpretation of Legislation Act 1984* (Vic) so as not to apply to communications about governmental or political matters. Section 6(1), which mirrors s 15A of the *Acts Interpretation Act 1901* (Cth), relevantly requires that every Act "shall be construed as operating to the full extent of, but so as not to exceed" legislative power:

> "to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power".

27 Construed in this way, the communication prohibition would be valid in its application to Mrs Clubb's conduct whether or not it might impermissibly burden the implied freedom in other areas of its application.

28 Mrs Clubb resisted the Attorney-General's submission, arguing that this Court should hold that her communications were political in the requisite sense, and further that the communication prohibition could not be severed into valid and invalid areas of application.

29 There is force in the submission of the Attorney-General. The implied freedom protects the exercise by the people of the Commonwealth of a free and informed choice as electors. A discussion between individuals of the moral or ethical choices to be made by a particular individual is not to be equated with discussion of the political choices to be made by the people of the Commonwealth as the sovereign political authority. That is so even where the

choice to be made by a particular individual may be politically controversial. In *Cunliffe v The Commonwealth*[11], Brennan J (as he then was) said:

> "The immunity from legislative control which the Constitution implies in order to secure freedom of political discussion does not preclude the making of laws to control any activity the control of which might be politically controversial."

30 In *APLA Ltd v Legal Services Commissioner (NSW)*[12], Hayne J, referring to the observations of Brennan J in *Cunliffe*, explained that laws that seek to control "communications about events (actual or hypothetical) and about rights and remedies ... are not directed at communications about whether the happening of events should be regulated differently or whether available rights and remedies should be changed".

31 In the present case, the communication effected by the handing over of the pamphlet by Mrs Clubb lacked any evident connection with the electoral choices to be made by the people of the Commonwealth. It was designed to persuade a recipient against having an abortion as a matter for the individual being addressed. It was not addressed to law or policy makers, nor did it encourage the recipient to vote against abortion or to take part in any public debate about the issue. It may therefore be accepted that the proscription of this communication did not involve an interference with the implied freedom.

32 On behalf of the Attorney-General it was noted that in *Knight v Victoria*[13] the Court unanimously reaffirmed that, as stated in *Lambert v Weichelt*[14]:

> "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties".

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11 (1994) 182 CLR 272 at 329; [1994] HCA 44.

12 (2005) 224 CLR 322 at 451 [380]. See also at 350-351 [26]-[28], 403-404 [217]-[220], 477-478 [447]-[453].

13 (2017) 261 CLR 306 at 324 [32]; [2017] HCA 29.

14 (1954) 28 ALJ 282 at 283.

33 In *Knight*[15], the Court declined to deal with a constitutional question which was hypothetical because it had not arisen and might never arise. The Court explained that[16]:

> "it is ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid".

34 It is generally accepted that courts will not determine whether a statute contravenes a constitutional provision or guarantee unless it is necessary to secure and protect the rights of a party against an unwarranted exercise of legislative power[17]. That practice has been followed both in this Court and in the Supreme Court of the United States[18].

35 The practice is based upon prudential considerations[19]. It has been said that for the Court to proceed to determine the validity of a statute where a case does not require it may create the appearance of an "eagerness" that may detract from the Court's standing[20]. A further, and powerful, prudential consideration is that justice does not require the question to be resolved. These considerations do not detract from the understanding that whether a statute impermissibly burdens the implied freedom is not to be answered by reference to whether it limits the freedom on the facts of a particular case, but rather by reference to its effect more

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15 (2017) 261 CLR 306 esp at 317 [6], 326 [37].

16 (2017) 261 CLR 306 at 324 [33], citing *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 258; [1949] HCA 44 and *Tajjour v New South Wales* (2014) 254 CLR 508 at 585-589 [168]-[176]; [2014] HCA 35.

17 *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 356; [1927] HCA 50. See also at 342, 350-351.

18 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 590; [1908] HCA 94; *Lambert v Weichelt* (1954) 28 ALJ 282; *Chicago & Grand Trunk Railway Co v Wellman* (1892) 143 US 339 at 345.

19 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473 [249]; [2001] HCA 51.

20 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 590.

generally[21]. As noted above, the implied freedom is not a personal right; it is to be understood as a restriction upon legislative power.

36 It would ordinarily be inappropriate as a matter of practice for the Court to determine a question as to the validity of a statute by reference to the *Constitution* where doing justice in the case did not require it[22]. But the practice is "not a rigid rule imposed by law which cannot yield to special circumstances"[23]. As was acknowledged on behalf of the Attorney-General, whether or not the Court should entertain Mrs Clubb's appeal is a matter for the Court. And while the Court will generally be astute to adhere to the practice, this case exhibits three unusual features which together warrant the Court dealing with the matter as an exception to its usual practice.

37 First, the line between speech directed towards agitating for legislative change, or changes in the attitude of the executive government to the administration of a law, and speech directed to the making of a moral choice by a citizen may be very fine where politically contentious issues are being discussed.

38 Secondly, while it may be accepted that there is no intersection between the implied freedom and the facts of the Clubb appeal, it cannot be said that the question may never arise. The likelihood of the question arising is obvious; indeed, the Solicitor-General of the Commonwealth was not disposed to argue that the Preston appeal does not involve political communication.

39 Finally, if Mrs Clubb's contentions in relation to the invalidity of the communication prohibition were to be accepted, she would be entitled, subject to the possibility of the prohibition being applied so as to give it a valid operation in respect of non-political speech, to have her conviction set aside. Mrs Clubb disputed the contention that the prohibition can properly be applied in a way that does not exceed the power of the Victorian Parliament to regulate non-political communication. And so, considerations of judicial economy do not strongly favour adhering to the practice in this case. That is because it would be necessary for the Court finally to resolve this dispute in favour of the view advanced by the Solicitor-General of the Commonwealth in order to uphold his threshold submission.

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21 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36].

22 *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [32]-[33].

23 *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 350-351.

40 In these circumstances, the prudential considerations reflected in the rule of practice referred to in *Lambert* do not weigh decisively against entertaining Mrs Clubb's contention that the communication prohibition impermissibly burdens the implied freedom. It is expedient in the interests of justice to proceed to determine whether Mrs Clubb is entitled to have her conviction set aside on the grounds asserted by her in this Court.

A burden on the implied freedom?

41 The first step in applying the *McCloy* test is to ask whether the communication prohibition burdens the implied freedom. To answer that question, it is necessary to consider the terms, legal operation and practical effect of the statute[24].

42 Mrs Clubb argued that the communication prohibition effectively proscribes many communications which can be characterised as "political", including communications about whether governments should encourage or discourage abortions and whether laws should be changed to restrict or facilitate abortions. Mrs Clubb submitted that in its legal operation the prohibition proscribes such communications, and in its practical operation it deters them.

43 The Solicitor-General for Victoria accepted that the prohibition may capture a broad range of communications. Even though it is not expressly targeted at communications concerning governmental and political matters, it may apply to such communications. On that basis, it must be accepted that the prohibition burdens the implied freedom. A consideration of the nature and extent of the burden can best be left until discussion of the third step of the *McCloy* test[25].

Legitimate purpose

44 For the purposes of the second step of the *McCloy* test, a purpose is compatible with the maintenance of the constitutionally prescribed system of

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24 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Wotton v Queensland* (2012) 246 CLR 1 at 30 [78], 31 [80]; [2012] HCA 2; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548-549 [19], 553-554 [35]-[36], 572 [112], 578 [135], 586 [166]; *Brown v Tasmania* (2017) 261 CLR 328 at 353 [61], 398-399 [237].

25 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [40]; *Brown v Tasmania* (2017) 261 CLR 328 at 360 [90], 398-399 [237].

representative and responsible government, and therefore legitimate, if it does not impede the functioning of that system[26].

45 As will be seen, Mrs Clubb argued that the true purpose of the communication prohibition is the suppression of public expression of anti-abortion sentiment, and that this is not a legitimate purpose. An important theme of her argument in this regard was that the connection between the prohibition and its purpose as propounded by the Solicitor-General for Victoria is so tenuous or remote that this "true purpose" can be discerned notwithstanding the terms of the Public Health Act. To this end, Mrs Clubb deployed arguments that were intended to demonstrate the absence of a rational connection between the prohibition and the purpose put forward by the Solicitor-General. These arguments were also directed to negativing the suitability of the prohibition for the purposes of the third step of the *McCloy* test. For the sake of convenience, some of these arguments will be addressed under this heading, with others being considered under the heading of "Suitability" in the discussion of the third step of the *McCloy* test.

46 The Solicitor-General for Victoria submitted that the activities of protesters had previously created an environment of "conflict, fear and intimidation" outside abortion clinics, and that these activities were harmful to both patients and staff in a number of ways. It was said to be the concern about the effect of these activities on women accessing abortion services, and on clinic staff, and not the suppression of anti-abortion views, that led to the enactment of the Safe Access Zones Act. In particular, it was said that existing laws did not adequately protect women and staff against the effects of these activities.

47 In this regard, s 185A of the Public Health Act expressly declares the purpose of Pt 9A to be the protection of the safety and wellbeing of, and the preservation of the privacy and dignity of, persons accessing lawful medical services, as well as staff and others accessing the premises in the course of their duties, within the area of a safe access zone.

48 In the Second Reading Speech for the Bill for the Safe Access Zones Act, the Minister explained why this protective purpose was focused within the area of the safe access zones[27]:

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26 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567; *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [31].

27 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3975.

> "It is unreasonable for anti-abortion groups to target women at the very time and place when they are seeking to access a health service, or to target health service staff. The impact of such actions on these women must be understood within the context of their personal circumstances. Many are already feeling distressed, anxious and fearful about an unplanned pregnancy, or a procedure that they are about to undergo. To be confronted by anti-abortion groups at this time is likely to exacerbate these feelings. It is intimidating and demeaning for women to have to run the gauntlet of anti-abortion groups outside health services."

49 An additional aspect of the purpose of the challenged legislation relates to the preservation and protection of the privacy and dignity of women accessing abortion services. Privacy and dignity are closely linked; they are of special significance in this case. That significance will be discussed at greater length later in these reasons, but at this point it is desirable to note the protection of dignity as an aspect of the purpose of the communication prohibition.

50 Aharon Barak, a former President of the Supreme Court of Israel, writing extra-judicially, said[28]:

> "Most central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole."

51 Generally speaking, to force upon another person a political message is inconsistent with the human dignity of that person. As Barak said[29], "[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others". Within the present constitutional context, the protection of the dignity of the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom[30], is a purpose readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and

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28 *The Judge in a Democracy* (2006) at 85 (footnotes omitted), cited in *Monis v The Queen* (2013) 249 CLR 92 at 182-183 [247]; [2013] HCA 4.

29 *The Judge in a Democracy* (2006) at 86, cited in *Monis v The Queen* (2013) 249 CLR 92 at 182-183 [247].

30 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548 [17]; *McCloy v New South Wales* (2015) 257 CLR 178 at 206 [42], 257 [215]-[216], 280 [303], 283-284 [317]-[318].

responsible government. Thus, when in *Lange*[31] the Court declared that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia", there was no suggestion that any member of the Australian community may be *obliged* to receive such information, opinions and arguments.

52 Mrs Clubb submitted that the communication prohibition does not serve a legitimate purpose compatible with the maintenance of the constitutionally prescribed system of representative and responsible government because the object pursued by the prohibition is offensive to that system in that it burdens the anti-abortion side of the abortion debate more than the pro-choice side. Mrs Clubb also argued that to prohibit communications on the ground that they are apt to cause discomfort is not compatible with the constitutional system. In this regard, it was said that political speech is inherently apt to cause discomfort, and causing discomfort may be necessary to the efficacy of political speech. These submissions should not be accepted, for the reasons which follow.

53 In dealing with Mrs Clubb's submissions, some reference to the nature of the burden on the implied freedom is necessary because it bears on the second step of the *McCloy* test. In *Coleman v Power*[32], McHugh J, for example, said:

> "Ordinarily ... serious interference with, political communication would itself point to the inconsistency of the objective of the law with the system of representative government."

Discriminatory?

54 It is an important part of Mrs Clubb's argument that the communication prohibition discriminates against her side of the debate about abortion. A law that burdens one side of a political debate, and thereby necessarily prefers the other, tends to distort the flow of political communication.

55 Contrary to Mrs Clubb's contention that the communication prohibition is aimed at, and biased against, the anti-abortion viewpoint, the prohibition is not directed exclusively at anti-abortion communication. In truth, the prohibition is viewpoint neutral. That is so as a matter of the ordinary meaning of the text of para (b) of the definition of "prohibited behaviour" in s 185B(1), which is concerned with communicating "in relation to abortions" rather than "against

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31 (1997) 189 CLR 520 at 571.

32 (2004) 220 CLR 1 at 52 [98]; [2004] HCA 39.

abortions". The ordinary meaning of the text is confirmed by s 185B(2); that provision would be unnecessary if only anti-abortion communications were caught by the definition. It is also confirmed by the consideration that a person seeking access to premises where abortions are provided is likely to be caused distress or anxiety by attempts by pro-choice activists to co-opt her as part of their message as well as by the reproach of anti-abortionists.

56 It may well be that the prohibition is likely to be breached in practice more frequently by those espousing an anti-abortion message than by those of a contrary view, but it is simply not the case that the prohibition targets only one side of the controversy. The mischief at which the prohibition is directed, namely interference by activists with those seeking access to premises where abortions are provided to obtain, or to assist in providing, abortions, may arise no less from the activities of those espousing a pro-abortion message as from those espousing an anti-abortion message. The privacy and the dignity of the persons intended to be protected by the prohibition may be adversely affected by either kind of communication. And, in the nature of things, pro-abortion activities outside a clinic where abortions are provided are apt to attract countermeasures by anti-abortion activists.

Discomfort or hurt feelings

57 Mrs Clubb argued that if the objects of the communication prohibition are truly those set out in s 185A, then s 185D lacks a rational connection to those objects because it applies to conduct apt to cause no more than "discomfort" or "hurt feelings".

58 This argument ignores the plain words of the statutory text. The conduct in question must be "reasonably likely to cause distress or anxiety", not mere discomfort or hurt feelings. The connection required by the prohibition between the communication and the potential to cause distress or anxiety to another person is not illusory. In the context of para (b) of the definition of "prohibited behaviour", the word "likely" bears its ordinary meaning, namely, "to convey the notion of a substantial – a 'real and not remote' – chance regardless of whether it is less or more than 50 per cent"[33].

59 The tendentious suggestion that the communication prohibition might be engaged by conduct apt to cause no more than "discomfort" or "hurt feelings" calls to mind suggestions to the effect that political speech cannot be truly free if it can be silenced for no reason other than to spare the feelings of those spoken

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33 *Boughey v The Queen* (1986) 161 CLR 10 at 21; [1986] HCA 29.

about. Suggestions to that effect may have some attraction in the context of public conflict between commercial or industrial rivals or in the context of a political debate between participants who choose to enter public controversy. But they have no attraction in a context in which persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain.

60 One may conclude that the second step of the *McCloy* test is satisfied. The purposes of the communication prohibition do not impede the functioning of the constitutionally prescribed system of representative and responsible government. To the extent that the purposes include protection against attempts to prevent the exercise of healthcare choices available under laws made by the Parliament, those purposes are readily seen to be compatible with the functioning of the system of representative and responsible government. Further, a law that prevents interference with the privacy and dignity of members of the people of the Commonwealth through co-optation as part of a political message is consistent with the political sovereignty of the people of the Commonwealth and the implied freedom which supports it[34].

Advancing the legitimate purpose: is proportionality testing necessary?

61 The Solicitor-General for Victoria submitted that it is not necessary in this case to undertake all of the proportionality testing involved in the third step of the *McCloy* test. That was said to be because any burden on the implied freedom is minimal and the burden is imposed to further a compelling legislative purpose. It was said that all that is required in the present case is that the means adopted by the law are rationally related to the pursuit of that compelling purpose. It was said that there is ample evidence of a rational connection between the legislative purpose and the communication prohibition.

62 The Solicitor-General submitted that the public interest in protecting those accessing abortion clinics from harm is so compelling that any restriction on the implied freedom is more than balanced by the benefits sought to be achieved. In addition, she argued that the communication prohibition is no broader than is necessary to achieve its object, because it is not possible to eliminate the prohibition, or reduce its scope, while still retaining its effectiveness.

63 These submissions by the Solicitor-General should not be accepted.

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34 cf *McCloy v New South Wales* (2015) 257 CLR 178 at 206-207 [42]-[45], 220-221 [93].

64 It may be accepted that when the burden on the implied freedom is very slight it becomes difficult to say, consistently with the limitations on judicial power, that alternative measures are available that would be less burdensome while at the same time equally efficacious. However, *McCloy* requires that *any* effective burden on the freedom must be justified[35]. It could hardly be said that a measure which is more restrictive of the freedom than is necessary can rationally justify the burden[36].

65 Further, that a burden upon the implied freedom is of small magnitude and for a compelling legitimate purpose does not dispense with the need to determine whether the impugned law is reasonably appropriate and adapted to the achievement of its purpose[37].

66 At this point in the application of the *McCloy* test, the focus has shifted to the relationship between the purpose and the extent to which the implied freedom is burdened. The issue for the courts is not to determine the correct balance of the law; that is a matter for the legislature. The question is whether the law can be seen to be irrational in its lack of balance in the pursuit of its object. While it may be accepted that the court will reach that conclusion only where the disproportion is such as to manifest irrationality, it is desirable, in the interests of transparency, that the court face up to, and explicitly deal with, this question.

67 The ultimate question to which the enquiry is directed is whether the burden effected by the law is, as stated in *Lange*[38], "undue". In the plurality judgment in *McCloy*[39], it was said:

> "The inquiry must be whether the burden is undue, not only by reference to the extent of the effect on the freedom, but also having regard to the public importance of the purpose sought to be achieved. This is the balance which necessarily, and logically, inheres in the *Lange* test."

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35 *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [24]. See also *Brown v Tasmania* (2017) 261 CLR 328 at 369 [127].

36 *Brown v Tasmania* (2017) 261 CLR 328 at 370 [130].

37 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68]; *Brown v Tasmania* (2017) 261 CLR 328 at 369 [127].

38 (1997) 189 CLR 520 at 569, 575. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 214-215 [71].

39 (2015) 257 CLR 178 at 218 [86].

68 In this context, to speak of an impermissible burden on the implied freedom is to speak of a burden that is undue in the sense that it is disproportionate to the law's effect in achieving its legitimate purpose[40]. So in *Brown*[41], the impugned law was held invalid by Kiefel CJ, Bell and Keane JJ because of the "overreach of means over ends". In that case, the impugned law, in its operation and effect, burdened the implied freedom in a way that exceeded the rational pursuit of the legitimate purpose of protecting businesses from disruption by protesters.

69 The question whether a law is "adequate in its balance" is not concerned with whether the law strikes some ideal balance between competing considerations. It is no part of the judicial function to determine "where, in effect, the balance should lie"[42]. Rather, the question is whether the law imposes a burden on the implied freedom which is "manifestly excessive by comparison to the demands of legitimate purpose"[43].

70 Proportionality testing is an assessment of the rationality of the challenged law as a response to a perceived mischief that must also respect the implied freedom. A law which allows a person to be shot and killed in order to prevent damage to property can be seen to have a connection to the purpose of preventing damage to property. It may also be accepted that other means of preventing damage to property would not be as effective. Nevertheless, the law is not a rational response to the mischief at which it is directed because it is manifestly disproportionate in its effect on the peace, order and welfare of the community. In the same way, it is only if the public interest in the benefit sought to be achieved by the legislation is manifestly outweighed by an adverse effect on the implied freedom that the law will be invalid.

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40 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 569, 575. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 214-215 [71].

41 (2017) 261 CLR 328 at 365 [109].

42 *Brown v Tasmania* (2017) 261 CLR 328 at 422-423 [290].

43 *Brown v Tasmania* (2017) 261 CLR 328 at 422-423 [290]. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 219-220 [89]-[92].

71 In *McCloy*[44], the plurality said:

> "To say that the courts are able to discern public benefits in legislation which has been passed is not to intrude upon the legislative function. The courts acknowledge and respect that it is the role of the legislature to determine which policies and social benefits ought to be pursued. This is not a matter of deference. It is a matter of the boundaries between the legislative and judicial functions."

72 It is important to be clear that what is involved is *not* a comparison of the general social importance of the purpose of the impugned law and the general social importance of keeping the implied freedom unburdened. Rather, what is to be balanced are the effects of the law – in terms of the benefits it seeks to achieve in the public interest and the extent of the burden on the implied freedom. Such an exercise is familiar as an exercise of judicial power from cases including *Sankey v Whitlam*[45], *Hinch v Attorney-General (Vict)*[46] and *Hogan v Hinch*[47]. And as the plurality noted in *McCloy*[48], "notions of balancing may be seen in *Castlemaine Tooheys Ltd v South Australia*[49], in the context of the s 92 freedom".

73 The proportionality analysis applied in *McCloy* and *Brown* accords with the foundational authority of the decision in *Lange*, where the Court said[50]:

> "Different formulae have been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including

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44 (2015) 257 CLR 178 at 220 [90].

45 (1978) 142 CLR 1 at 39, 43; [1978] HCA 43. See also at 63-64, 98-99.

46 (1987) 164 CLR 15 at 85-87; [1987] HCA 56. See also at 26-27, 41-43, 50, 75.

47 (2011) 243 CLR 506 at 536-537 [32]; [2011] HCA 4.

48 (2015) 257 CLR 178 at 219 [87].

49 (1990) 169 CLR 436; [1990] HCA 1.

50 (1997) 189 CLR 520 at 562.

proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts."

74 Furthermore, the abstract and indeterminate language of the second limb in *Lange*[51] (which was stated as the third step of the *McCloy* test) can be a source of difficulty in its application. The proportionality analysis referred to in *McCloy* and *Brown* addresses this and explains how the conclusion required by *Lange* – whether the burden is "undue" – is to be reached. In addition, a structured proportionality analysis provides the means by which rational justification for the legislative burden on the implied freedom may be analysed, and it serves to encourage transparency in reasoning to an answer[52]. It recognises that to an extent a value judgment is required but serves to reduce the extent of it. It does not attempt to conceal what would otherwise be an impressionistic or intuitive judgment of what is "reasonably appropriate and adapted"[53].

Suitability

75 Whether a law that burdens the implied freedom is justified in accordance with the third step of the *McCloy* test requires a consideration of the nature and extent of the burden. In this regard, the Solicitor-General for Victoria submitted that any burden on the implied freedom is incidental: not all communication about abortions is political, and the communication prohibition is not directed to political communication. Only communications about abortions are targeted. Further, any effect on political communication is insubstantial because, outside a safe access zone, people may protest and express their views about abortions however they choose. It was said that all that is involved in s 185D is a "time, manner and place" restriction[54] that is tailored to meet a legitimate purpose and to leave political communication otherwise untrammelled.

76 Mrs Clubb argued that the prohibition applies exclusively to the anti-abortion side of the debate. This argument has already been considered and rejected.

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51 cf *Unions NSW v New South Wales* (2013) 252 CLR 530 at 576 [129].

52 *McCloy v New South Wales* (2015) 257 CLR 178 at 216 [75]; *Brown v Tasmania* (2017) 261 CLR 328 at 369 [125].

53 *McCloy v New South Wales* (2015) 257 CLR 178 at 216 [75]; *Brown v Tasmania* (2017) 261 CLR 328 at 369 [125].

54 Citing *Brown v Tasmania* (2017) 261 CLR 328 at 462 [420].

77 Mrs Clubb's other arguments under this heading will now be examined. That examination reveals that these arguments seriously exaggerate the effect of the prohibition on the implied freedom.

The protection of people in safe access zones

78 Mrs Clubb argued that the circumstance that the prohibition is directed to communications in relation to abortions, whether or not the communication is in fact seen or heard, is an impermissible burden on the freedom. Further, it was said that because there need not be an actual person accessing or leaving the premises for the purposes of an abortion, the prohibition applies whether or not distress or anxiety is in fact caused to any person and irrespective of whether there is in fact harm to safety, wellbeing, privacy or dignity.

79 Mrs Clubb's argument that the prohibition is excessive in its effect because it does not require proof of actual harm to any person fails to appreciate the protective purpose of the legislation. The prohibition on communicating about abortions in a safe access zone is intended to protect and preserve a corridor of ready access to reproductive healthcare facilities rather than merely to punish an actual interference with a person seeking such access. It is the creation of safe access zones that prevents a situation in which an unwilling listener or viewer cannot avoid exposure to communication about abortions outside the clinic because they are obliged to enter the clinic from the area in which activists are present. That the prohibition may be breached without a person actually hearing or seeing a communication about abortions, or actually being caused distress or anxiety, is an aspect of the prophylactic approach of creating safe access zones.

On-site protests

80 Mrs Clubb argued that abortion has been a topic of political debate in Australia for many years. It was said that it is, and has been, a characteristic feature of that debate that many of those who have views on the issue choose to express those views outside or near premises at which abortions can be obtained. As a result, political communications about abortions are often most effective when they are engaged in at a place where abortions are provided. Further, it was said that persons entering or leaving premises at which abortions are provided are especially vulnerable to distress or anxiety, and, as a result, the prohibition is likely to proscribe or deter all or almost all communications in relation to that topic, and so to proscribe political communications in relation to abortion near abortion facilities is to proscribe those communications in the very location that they are typically most effective.

81 It may be noted immediately that Mrs Clubb's submission that anti-abortion communication is most effective when it occurs near an abortion clinic is not supported by any finding of fact or evidence. In this regard, the present case may be contrasted with *Brown*[55], where it was established as a matter of fact that "on-site protests against forest operations and the broadcasting of images of parts of the forest environment at risk of destruction are the primary means of bringing such issues to the attention of the public and parliamentarians". There was thus no evidence in the present case upon which an argument for the special efficacy of on-site protests as a form of political communication about the issue of abortion could be based.

82 In any event, there is a more important point of distinction between this case and *Brown*. The on-site protests against forest operations discussed in *Brown* did not involve an attack upon the privacy and dignity of other people as part of the sending of the activists' message. Even if the argument for Mrs Clubb as to the special potency of on-site protests as a mode of political communication were to be accepted, her argument would still fail because the implied freedom is burdened only within the safe access zones. It is within those zones that intrusion upon the privacy, dignity and equanimity of persons already in a fraught emotional situation is apt to be most effective to deter those persons from making use of the facilities available within the safe access zones. This, after all, is the very reason for Mrs Clubb's activities. Mrs Clubb's own argument demonstrates that the legitimate purpose which justifies the burden is at its strongest within the perimeter of the safe access zones. Within those zones, the burden on the implied freedom is justified by the very considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom.

83 Those wishing to say what they want about abortions have an unimpeded ability to do so outside the radius of the safe access zones. The 150 m radius of the safe access zones serves merely to restrict their ability to do so in the presence of a captive audience of pregnant women seeking terminations and those involved in advising and assisting them. In relation to the radius of the safe access zones, the Minister explained in her Second Reading Speech[56]:

> "A zone of 150 metres was chosen after consultation with a wide range of stakeholders. Hospitals and clinics provided examples of the activities of

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55 (2017) 261 CLR 328 at 400 [240].

56 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3976.

> anti-abortion groups and the places where they confronted patients and staff. This included waiting at places where patients parked their cars and at public transport stops. Some health services asked for a much larger zone, but after careful consideration it was determined that a zone of 150 metres would be sufficient to protect people accessing premises."

84 The impugned law is suitable, in that it has a rational connection to its purpose. The communication prohibition has a rational connection to the statutory purpose[57] of promoting public health. Unimpeded access to clinics by those seeking to use their services and those engaged in the business of providing those services is apt to promote public health. A measure that seeks to ensure that women seeking a safe termination are not driven to less safe procedures by being subjected to shaming behaviour or by the fear of the loss of privacy is a rational response to a serious public health issue. The issue has particular significance in the case of those who, by reason of the condition that gives rise to their need for healthcare, are vulnerable to attempts to hinder their free exercise of choice in that respect[58].

85 In addition, the communication prohibition has a rational connection to the statutory purpose of protecting the privacy and dignity of women accessing abortion services. As noted above, that connection accords with the constitutional values that underpin the implied freedom.

Necessity

86 The unchallenged evidence in this case is that, in contrast to the pre-existing law, the effect of the communication prohibition has been to reduce the deterrent effect of anti-abortion activities near premises where abortions are provided. There was evidence before the Magistrate from Dr Allanson of her observations that until the commencement of Pt 9A of the Public Health Act in 2015, attempts by the Clinic to engage the assistance of the police and the Melbourne City Council to help stop harassment of the Clinic's patients by anti-abortion groups were ineffective.

87 Mrs Clubb submitted that the communication prohibition is not necessary to achieve the objects referred to in s 185A because there are less burdensome

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57 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557-558 [50]-[55], 561 [64], 579 [140]-[141]; *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [80].

58 *Hill v Colorado* (2000) 530 US 703 at 728-729.

alternatives. Mrs Clubb sought to develop this argument in a number of ways, each of which may be dealt with briefly.

88 First, she drew attention, as an example, to para (a) of the definition of "prohibited behaviour". This argument cannot be accepted. The communication prohibition is necessary because non-violent protest that would not fall within para (a) of the definition of "prohibited behaviour" may well be apt to shame or frighten a pregnant woman into eschewing the services of a clinic. As was said by Saunders J in *R v Lewis*[59]:

> "Although much of the protest activity has been described as peaceful, in my view that is a mischaracterization. Peace connotes harmony. There is, on the evidence tendered at trial, no harmony here between protesters and those entering the clinic. At its most benign the protest activity could be described as non-violent."

89 Silent but reproachful observance of persons accessing a clinic for the purpose of terminating a pregnancy may be as effective, as a means of deterring them from doing so, as more boisterous demonstrations. Further, there is the pragmatic consideration that "the line between peaceful protest and virulent or even violent expression against abortion is easily and quickly crossed"[60].

90 The communication prohibition gives effect to a legislative judgment that the laws in Victoria prior to the enactment of the Safe Access Zones Act did not adequately protect women seeking to access reproductive health clinics from activities which, though non-violent, had the potential to deter them from availing themselves of those facilities. The legislative judgment that activities falling short of intentional intimidation, harassment, threatening behaviour or physical interference in terms of personal violence were also capable of deterring unimpeded access to clinics cannot be said to impose an unnecessary burden upon the implied freedom. The statement of compatibility in relation to the Bill for the Safe Access Zones Act tabled by the Minister for Health in accordance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) explained[61]:

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59 (1996) 139 DLR (4th) 480 at 493 [32]. See also *R v Spratt* (2008) 298 DLR (4th) 317 at 338-339 [80]-[81].

60 *R v Spratt* (2008) 298 DLR (4th) 317 at 338 [80].

61 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3973.

"Provisions that only prohibit intimidating, harassing or threatening conduct, or conduct which impedes access to premises are inadequate for a number of reasons, including:

(a) They can only be enforced after the harmful conduct has occurred and there are significant difficulties in enforcing such laws. This is particularly the case in relation to conduct directed toward women accessing legal abortion services. Although such conduct has often extended to criminal conduct, women and their support persons are generally unwilling to report the conduct to police or assist in a prosecution which would expose them to the stress and possible publicity of a criminal proceeding. The intensely private nature of the decision that the protesters seek to denounce, effectively operates to protect the protesters from prosecution for criminal conduct.

(b) It will not fully protect staff members and others from the harmful effect of the otherwise peaceful protests given their sustained nature and the background of extreme conduct against which they occur. Staff and members of the public are entitled to be safe and to feel safe in undertaking their lawful work activities and accessing lawful health services.

I consider that it is necessary to create a safe access zone around premises at which abortions are provided, and prohibit certain communications in relation to abortions within that zone, in order to prevent the harm and not just to respond to inappropriate conduct when it occurs."

91 Mrs Clubb also argued that a less burdensome law could have excluded conduct apt to cause no more than discomfort. That argument has already been considered and rejected.

92 Mrs Clubb argued that the communication prohibition is unnecessarily burdensome because of the absence of a requirement that an offending communication actually be heard or seen by any person. Such a requirement would lessen the effectiveness of the prohibition. A contravention of the communication prohibition can be proved without the need to call a person protected by the legislation to give evidence. That can readily be understood as an aspect of the protection of the privacy of women seeking access to abortion services.

93 Mrs Clubb also argued that the burden on the implied freedom is unduly heavy because of the absence of a requirement that the communication occur without the consent of the recipient. That argument should be rejected. Such a

requirement would mean that in many, practically speaking all, cases the harm to which the prohibition is directed would be done before consent is sought. In addition, such a requirement would facilitate avoidance of the prohibition by the simple expedient of having someone within the safe access zone consent to receiving an otherwise prohibited communication.

94 Next, Mrs Clubb argued that the extent of the burden might have been reduced by providing for an exception to the prohibition during election campaigns. That argument too should be rejected. In the nature of things the need for abortion services and the anxiety and distress associated with accessing those services is not lessened during election campaigns. If anything, the contrary is likely to be the case.

95 Mrs Clubb also argued that the communication prohibition is excessive in its effect because it is a strict liability offence not confined by a mens rea requirement. Once again that is not so. The prohibition is not engaged unless there is an intentional act of communication of matter relating to abortions, and that act must be performed in a manner that is capable of being heard by a person who may be accessing or attempting to access the relevant premises. Further, the communication must occur, and be intended to occur, within 150 m of premises at which abortions are provided[62]. Whether the matter communicated is reasonably likely to cause distress or anxiety is a matter of fact to be determined objectively.

Adequacy of balance

96 If an impugned law's purpose is compatible with the constitutionally prescribed system of representative and responsible government, the law will nevertheless be invalid if it pursues that purpose by means that have the effect of impermissibly burdening the implied freedom[63].

97 As noted above, it is no part of the implied freedom to guarantee a speaker an audience, much less a captive audience. As Nettle J observed in *Brown*[64]:

> "The implied freedom of political communication is a freedom to communicate ideas to those who are willing to listen, not a right to force

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62 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528-529, 546, 549-550, 574, 591-592; [1985] HCA 43.

63 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568.

64 (2017) 261 CLR 328 at 415 [275].

> an unwanted message on those who do not wish to hear it[65], and still less to do so by preventing, disrupting or obstructing a listener's lawful business activities. Persons lawfully carrying on their businesses are entitled to be left alone to get on with their businesses and a legislative purpose of securing them that entitlement is, for that reason, a legitimate governmental purpose."

98 The implied freedom is not a guarantee of an audience; a fortiori, it is not an entitlement to force a message on an audience held captive to that message[66]. As has been noted, it is inconsistent with the dignity of members of the sovereign people to seek to hold them captive in that way.

99 A law calculated to maintain the dignity of members of the sovereign people by ensuring that they are not held captive by an uninvited political message accords with the political sovereignty which underpins the implied freedom[67]. A law that has that effect is more readily justified in terms of the third step of the *McCloy* test than might otherwise be the case.

100 The burden on the implied freedom is slight in respect of both its subject matter and its geographical extent. Within the safe access zones, the only burden on the implied freedom is upon communications about abortions, and that burden is limited to preventing the capture of an audience. In these circumstances, one cannot say that a smaller safe access zone would be as effective in restricting the ability of those who wish to have their say about abortions in the presence of a captive audience of pregnant women and those involved in advising and assisting them, while at the same time imposing a lesser practical burden on the implied freedom.

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65 *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741; [1999] HCA 31; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 245-246 [182]; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 37 [54]; [2013] HCA 3; *Monis v The Queen* (2013) 249 CLR 92 at 206-207 [324]. See and compare *Cox v Louisiana* (1965) 379 US 536 at 553-556; *Frisby v Schultz* (1988) 487 US 474 at 484-488; *Hill v Colorado* (2000) 530 US 703 at 715-718; *McCullen v Coakley* (2014) 134 S Ct 2518 at 2545-2546.

66 *Hill v Colorado* (2000) 530 US 703 at 729; *Ontario (Attorney-General) v Dieleman* (1994) 117 DLR (4th) 449 at 723-724; *R v Spratt* (2008) 298 DLR (4th) 317 at 339-340 [82]-[84].

67 *McCloy v New South Wales* (2015) 257 CLR 178 at 206-207 [42]-[45], 220-221 [93].

101 In addition, in *McCloy* the public interest served by the impugned legislation was held to be the minimisation of the risk of the corruption of the electoral process. There the impugned legislation was seen to pursue objectives that "support and enhance equality of access to government, and the system of representative government which the freedom protects"[68]. For similar reasons in the present case, difficulties in the balancing exercise do not loom as large as they sometimes may. The balance of the challenged law can, in significant part, be assessed in terms of the same values as those that underpin the implied freedom itself in relation to the protection of the dignity of the people of the Commonwealth.

102 In summary in relation to the third step of the *McCloy* test, the limited interference with the implied freedom is not manifestly disproportionate to the objectives of the communication prohibition. The burden on the implied freedom is limited spatially, and is confined to communications about abortions. There is no restriction at all on political communications outside of safe access zones. There is no discrimination between pro-abortion and anti-abortion communications. The purpose of the prohibition justifies a limitation on the exercise of free expression within that limited area. And the justification of the prohibition draws support from the very constitutional values that underpin the implied freedom. Accordingly, the communication prohibition satisfies the third step of the *McCloy* test.

Conclusion and orders

103 So much of the appellant's appeal from the judgment of Magistrate Bazzani made on 11 October 2017 as has been removed into this Court should be dismissed.

104 The appellant must pay the respondents' costs.

The Preston appeal

The charge

105 Mr Preston was charged in the Magistrates Court of Tasmania with breaching s 9(2) of the Reproductive Health Act on two occasions in September 2014 and on one occasion in April 2015.

106 The events which give rise to the charges occurred within 150 m of the Specialist Gynaecology Centre situated at 1A Victoria Street, Hobart. On each

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68 *McCloy v New South Wales* (2015) 257 CLR 178 at 221 [93].

occasion, Mr Preston was on the footpath of Macquarie Street near its corner with Victoria Street and was able to be seen with placards which included statements such as "EVERY ONE HAS THE RIGHT TO LIFE, Article 3, Universal Declaration of Human Rights" and "EVERY CHILD HAS THE RIGHT TO LIFE, Article 6, UN Convention on the Rights of the Child" and depicting, among other things, a representation of a foetus at eight weeks. Mr Preston also had leaflets in his hand and was carrying a media release.

The proceedings

107 The Magistrate found that the offences charged were proved beyond a reasonable doubt. Her Honour then proceeded to determine the argument raised by the defence that s 9(2) of the Reproductive Health Act, read with para (b) of the definition of "prohibited behaviour" in s 9(1), impermissibly burdened the implied freedom. Her Honour rejected that defence, concluding that the legislation is valid.

108 Mr Preston sought review of the decision of the Magistrates Court in the Supreme Court of Tasmania. In that Court, he advanced eight grounds of review. On 23 March 2018, Gordon J, pursuant to s 40 of the *Judiciary Act*, ordered the removal of that part of the appeal concerned with six of those grounds into this Court.

109 Mr Preston subsequently filed an amended notice of appeal in this Court, which advanced six grounds of review, contending in substance that the Magistrate should have found that s 9(2) of the Reproductive Health Act, read with para (b) of the definition of "prohibited behaviour" in s 9(1), impermissibly burdens the implied freedom.

Legislation

110 Section 9 of the Reproductive Health Act relevantly provides:

"(1) In this section –

access zone means an area within a radius of 150 metres from premises at which terminations are provided;

...

prohibited behaviour means –

...

(b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or

...

(2) A person must not engage in prohibited behaviour within an access zone.

Penalty: Fine not exceeding 75 penalty units or imprisonment for a term not exceeding 12 months, or both."

111 "[T]erminate" is defined in s 3(1) of the Act as follows:

"***terminate*** means to discontinue a pregnancy so that it does not progress to birth by –

(a) using an instrument or a combination of instruments; or

(b) using a drug or a combination of drugs; or

(c) any other means –

but does not include –

(d) the supply or procurement of any thing for the purpose of discontinuing a pregnancy; or

(e) the administration of a drug or a combination of drugs for the purpose of discontinuing a pregnancy by a nurse or midwife acting under the direction of a medical practitioner".

112 Section 9(2), read with para (b) of the definition of "prohibited behaviour", will be referred to in these reasons as "the protest prohibition".

113 The expression "prohibited behaviour" is also defined to mean:

"(a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or

...

(c) footpath interference in relation to terminations; or

(d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent".

114 The expression "footpath interference" is not defined in the legislation. It seems that the expression was derived from s 2(1) of the *Access to Abortion Services Act 1995* of British Columbia, which prohibits "sidewalk interference". In *R v Lewis*[69], it was said that the expression "sidewalk interference" corresponded with "sidewalk counselling", a form of private health communication. Having regard to s 9(2) of the Reproductive Health Act, the expression "footpath interference" would catch conduct apt to waylay the user of a footpath in an access zone seeking access to a clinic in relation to a termination.

115 Finally, s 9(4) provides:

"A person must not publish or distribute a recording of another person accessing or attempting to access premises at which terminations are provided without that other person's consent."

The differences between the Tasmanian and Victorian prohibitions

116 It is apparent that the Reproductive Health Act differs from its Victorian counterpart in a number of respects. First, the Reproductive Health Act does not expressly state its objects. Secondly, the impugned prohibition is directed at "a protest" about terminations. Thirdly, the scope of the operation of the prohibition is not limited by a requirement that the protest be reasonably likely to cause distress or anxiety.

117 It might be said that the case to be made for the invalidity of the protest prohibition as an impermissible burden on the implied freedom is stronger than the case to be made against its Victorian counterpart because the prohibition is directed squarely at what is a familiar form of political communication, because the Tasmanian legislation does not articulate the objects that justify its intrusion on the implied freedom, and because the protest prohibition does not require a potential to cause distress or anxiety. It might also be said that the Victorian legislation is an example of an obvious and compelling alternative measure less intrusive upon the implied freedom. In the end, however, these differences do not warrant a different result in the Preston appeal.

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69 (1996) 139 DLR (4th) 480 at 512 [108].

A burden on the implied freedom

118 Mr Preston submitted that in the phrase "protest in relation to terminations", the word "protest" should be understood as referring exclusively to a protest expressing a message that is in opposition to terminations. Mr Preston argued that the protest prohibition is in terms directed to "protest", which is a characteristic mode of political communication. It was said that the prohibition imposes a more direct burden on political communication than the Victorian legislation because its sole focus is "protest".

119 The Solicitor-General for Tasmania accepted that a protest in relation to terminations may in some cases contain political communication. That concession was rightly made. The protest prohibition is a burden on the implied freedom. Given the express inclusion of "footpath interference" in the definition of "prohibited behaviour", it is impossible to understand the word "protest" in the prohibition on protest as referring to anything other than a public demonstration about abortion. In context, the term "protest" is apt to encompass the dissemination of a message "in relation to terminations" that concerns governmental or political matters.

Legitimate purpose

120 The Solicitor-General for Tasmania submitted that, notwithstanding the absence of a statement in the Reproductive Health Act of its objects, the protest prohibition can readily be seen to serve the purpose of protecting the safety, wellbeing, privacy and dignity of persons accessing premises where terminations are provided. That submission should be accepted.

121 While the Reproductive Health Act is not as explicit as to its objects as its Victorian counterpart, its purpose is apparent from its terms and subject matter as well as from the Second Reading Speech for the Bill for the Reproductive Health Act. The Minister for Health, having stated that "without the provision of a full range of safe, legal and accessible reproductive services, women experience poorer health outcomes"[70], went on to identify, as a significant obstacle to women accessing safe termination services, the "stigma" and "shame" associated with having to run the gauntlet of protesters

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70 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 44.

in order to gain access to medical clinics providing those services[71]. She went on to say[72]:

> "[S]tanding on the street outside a medical facility with the express purpose of dissuading or delaying a woman from accessing a legitimate reproductive health service is ... quite unacceptable."

122 The object of the prohibition is to protect the safety and wellbeing, physical and emotional, of persons accessing and leaving abortion clinics and to ensure that women may have unimpeded access to, and doctors may provide, terminations.

123 Mr Preston argued that the prohibition does not serve a legitimate purpose because it applies exclusively to anti-abortion protests and could apply to protests against the Reproductive Health Act itself. Contrary to this submission, the prohibition is viewpoint neutral. It would be contravened by a protest *in favour of* the Reproductive Health Act. One cannot ignore the use of viewpoint neutral language rather than an obvious alternative, such as "protest against abortions", if the legislation was targeted only at anti-abortion protests. Further, protest about terminations is a public demonstration or manifestation of opinion in relation to one or other side of the debate about terminations. Whichever side of the debate is engaged in the public demonstration or manifestation, the emotional temperature within the access zone will be raised, and that, it can readily be accepted, will create a disincentive to a person previously disposed to seek access to medical advice and assistance in relation to a termination. Further, as noted earlier, pro-abortion activities outside a clinic where abortions are provided are likely, in the nature of things, to attract countermeasures by anti-abortion activists.

Suitability

124 The protest prohibition has a rational connection to the purpose of facilitating effective access to pregnancy termination services. Where pregnancy termination-related protests can be seen or heard by persons attempting to access premises providing that health service, pregnant women may be deterred from accessing the premises. Conduct avowedly undertaken with a view to persuading another person to desist from a course of conduct is apt to produce that result.

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71 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50-51.

72 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 51.

The type of communication caught by the protest prohibition is a termination-related protest that, in practice, a woman attempting to access an abortion facility cannot avoid except by eschewing the medical advice and assistance that she seeks.

Necessity

125 Mr Preston argued that the protest prohibition applies whether or not any harm, anxiety or distress is in fact caused, whether or not any harm, anxiety or distress is likely, reasonably likely or reasonably possible, and whether or not any harm, anxiety or distress is in fact intended. But the absence of a limiting requirement that the protest be likely to cause distress or anxiety is of little moment once it is appreciated that the protest prohibition is concerned, as it plainly is, to prevent demonstrations about terminations in the vicinity of facilities where terminations are provided.

126 A public demonstration or manifestation about abortions in the vicinity of a clinic inevitably constitutes a threat to the equanimity, privacy and dignity of a pregnant woman seeking medical advice and assistance in relation to a termination. And that will be so whether or not such a person is likely to suffer distress or anxiety as a result. A decision to avoid a protest about abortions may reflect a calm and reasonable decision to eschew an unwelcoming environment as well as a stressed and anxious reaction to it.

Adequacy of balance

127 The Reproductive Health Act, in targeting a "protest" about abortion, is directed at public demonstration, whatever its viewpoint, which is likely to be confronting to those in need of medical advice and assistance from a clinic. The purposes of the Reproductive Health Act in this respect are the same as those of Pt 9A of the Victorian Act. The cardinal features of both pieces of legislation are that the burden on the implied freedom operates only within safe access zones and is confined to the discussion of abortion. The burden on political communication imposed by the protest prohibition is slight, in that, to the extent that it does affect political communication, it does so only within access zones, and without discriminating between sources of protest.

128 The restriction in the Tasmanian Act on the ability of people to engage in public debate about abortions is adapted to meet the same considerations of the advancement of public health and the protection of the privacy and dignity of citizens as the restriction in the Victorian Act. There is no manifest disproportion between the burden on political communication effected by the protest prohibition and the law's legitimate purpose.

Conclusion and orders

129 So much of the appellant's appeal from the judgment of Magistrate Rheinberger made on 27 July 2016 as has been removed into this Court should be dismissed.

130 The appellant must pay the respondents' costs.

GAGELER J.

Clubb v Edwards

131 Mrs Clubb does not assert that she was engaged in any form of political communication when she attempted to hand a pamphlet to a couple outside the East Melbourne Fertility Control Clinic on 4 August 2016. Mrs Clubb accepts that the prohibition against "communicating ... in relation to abortions" in s 185D read with para (b) of the definition of "prohibited behaviour" in s 185B(1) of the *Public Health and Wellbeing Act 2008* (Vic) ("the Public Health Act") can and should be read in accordance with s 6(1) of the *Interpretation of Legislation Act 1984* (Vic) ("the Interpretation Act") to exclude political communication if the prohibition infringes the implied constitutional freedom in its application to political communication.

132 The combination of those circumstances means that Mrs Clubb's challenge to her conviction in the Magistrates' Court of Victoria of the offence created by s 185D of the Public Health Act, on the ground that the prohibition in that section read with para (b) of the definition of "prohibited behaviour" in s 185B(1) infringes the implied constitutional freedom of political communication, is doomed to fail. Unless set aside on some other ground, Mrs Clubb's conviction will stand irrespective of whether or not she succeeds in establishing that the prohibition infringes the implied constitutional freedom.

133 Because the answer to the question of whether the prohibition in s 185D read with s 185B(1) of the Public Health Act infringes the implied constitutional freedom can make no difference to Mrs Clubb's conviction, so much of Mrs Clubb's appeal to the Supreme Court of Victoria as has been removed into the High Court under s 40 of the *Judiciary Act 1903* (Cth) to raise that question should be dismissed without the High Court embarking on the provision of an answer. There is no need to answer the question in order to determine Mrs Clubb's criminal liability. Absent a need to answer the question, the proper course is to decline to do so.

134 The institutional practice and the principle of statutory construction which combine to commend that approach are important enough for me to want to add the following to the analysis of Gordon J in this case, with which I wholly agree.

Necessity as a precondition to constitutional adjudication

135 The practice of the High Court has fairly consistently been to decline to answer a constitutional question unless there has been shown to exist a state of facts which has made answering the question necessary in order to determine a right or liability in issue in the matter in which its original or appellate

jurisdiction has been invoked[73]. The practice is closely associated with two principles of judicial restraint which the Supreme Court of the United States has long treated as "safe guides to sound judgment" and which the High Court too can be seen to have observed in practice: "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"[74].

136 The practice is founded on the same basal understanding of the nature of the judicial function as that which has informed the doctrine that the High Court lacks original or appellate jurisdiction to answer any question of law (including but not confined to a question of constitutional law) if that question is divorced from the administration of the law[75]. The basal understanding is that the primary function served by the conferral of original or appellate jurisdiction on the Court, no differently from the primary function served by the conferral of federal jurisdiction on any other court, is not the declaration of legal principle but the resolution of a controversy about a legal right or legal liability[76].

137 The practice stems from recognition of the institutional discipline which concentration on that primary function imposes on the judicial process, no less than on disputant parties[77]. The institutional discipline is such that curial exposition of legal principle proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy. Legal analysis is then directed only to issues that are real and not imagined. Legal principle is then honed through practical application. Academic abstraction is then curbed by the parameters of a concrete dispute. The overarching importance of constitutional principle makes maintenance of that institutional discipline imperative in constitutional cases.

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73 *Knight v Victoria* (2017) 261 CLR 306 at 324 [32]; [2017] HCA 29, quoting *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

74 *Liverpool, New York & Philadelphia Steamship Co v Commissioners of Emigration* (1885) 113 US 33 at 39, quoted in *United States v Raines* (1960) 362 US 17 at 21 and *Washington State Grange v Washington State Republican Party* (2008) 552 US 442 at 450.

75 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303-305; [1991] HCA 53, explaining *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266-267; [1921] HCA 20.

76 *Fencott v Muller* (1983) 152 CLR 570 at 608-609; [1983] HCA 12.

77 cf *Kuczborski v Queensland* (2014) 254 CLR 51 at 109 [184]; [2014] HCA 46.

138 The practice, in my view, ought not to be departed from on the basis of mere convenience. Especially, the practice ought not to be departed from on the basis that the executive government of a polity whose newly minted legislation is sought to be challenged is content to view an inadequately constructed but earnestly pursued challenge as a vehicle for mounting a spirited defence of the constitutional validity of that legislation. If a case is to be brought to the High Court as a test case, it is not asking too much to expect that the case will be properly constituted lest the judgment that is sought from the Court be traduced to the status of an advisory opinion.

Severance explained and distinguished from reading down

139 The High Court has long recognised as a primary principle or "fundamental rule" of statutory construction that "the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid", from which it follows that "[i]f the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open"[78]. That, however, is not the principle of statutory construction now relevant.

140 The relevant principle of statutory construction is a secondary or subsidiary principle, application of which is required by the operation of a severance clause (sometimes referred to as a "severability" or "separability" clause) of the kind introduced in relation to Commonwealth legislation in 1930 with the insertion of s 15A into the *Acts Interpretation Act 1901* (Cth)[79] and since replicated in s 6(1) of the Interpretation Act and equivalent provisions in interpretation legislation in each other State, the Australian Capital Territory and the Northern Territory[80]. Subject always to a legislature manifesting a contrary

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78 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28]; [2000] HCA 33, referring to *Davies and Jones v Western Australia* (1904) 2 CLR 29 at 43; [1904] HCA 46, *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180; [1926] HCA 58, *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267; [1945] HCA 30 and *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 14; [1992] HCA 64.

79 *Acts Interpretation Act 1930* (Cth). See earlier s 2(2) of the *Navigation Act 1912* (Cth), considered in *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357 at 369-370; [1921] HCA 31. See also *Harrington v Lowe* (1996) 190 CLR 311 at 326-327; [1996] HCA 8.

80 *Acts Interpretation Act 1915* (SA), s 22A; *Acts Interpretation Act 1931* (Tas), s 3; *Acts Interpretation Act 1954* (Qld), s 9(2); *Interpretation Act* (NT), s 59; *Interpretation Act 1984* (WA), s 7; *Interpretation Act 1987* (NSW), s 31(2); *Legislation Act 2001* (ACT), s 120(2)-(3).

intention as to the operation of a particular law, a severance clause of that kind takes effect as a general declaration of the contingent intention of the legislature that if a law in the form enacted would operate to transgress a constitutional limitation on legislative power then the law is still to operate to the extent constitutionally permitted.

141 The settled effect of a severance clause is "to reverse the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail"[81]. The result, in other words, is that "legislation, found partially invalid, must be treated as distributable or divisible, unless it appears affirmatively that it was not part of the legislative intention that so much as might have been validly enacted should become operative without what is bad"[82]. That operation of a severance clause to "require that an entirely artificial construction shall be placed on a statute found to be invalid in part in order to save so much of it as might have been validly enacted" can arise, according to orthodox analysis, in either of two categories of case. One is where "it is found that particular clauses, provisos or qualifications, which are the subject of distinct or separate expression, are beyond the power of the legislature". The other is where "a provision which, in relation to a limited subject matter or territory, or even class of persons, might validly have been enacted, is expressed to apply generally without the appropriate limitation, or to apply to a larger subject matter, territory or class of persons than the power allows"[83].

142 The difference between the primary principle of construction and the presently relevant secondary principle of construction can be illustrated by contrasting the reasoning of different members of the majority in *Coleman v Power*[84] ("*Coleman*"). Construing a statutory prohibition on using "insulting words" in a public place to be confined to words intended or reasonably likely to provoke unlawful physical retaliation, Gummow and Hayne JJ (with whom Kirby J relevantly agreed) gave effect to the primary principle that the prohibition was to be read in a way that would not lead to invalidity[85]. In

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81 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371; [1948] HCA 7.

82 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 651; [1939] HCA 19.

83 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652.

84 (2004) 220 CLR 1; [2004] HCA 39.

85 (2004) 220 CLR 1 at 76-79 [188]-[200], 98-99 [254]-[256].

construing the same statutory prohibition to exclude "insulting words" used in the course of a political communication, McHugh J gave effect to the secondary principle that the prohibition was to be operative to the extent that it was constitutionally unobjectionable[86].

Constitutional adjudication unnecessary if severance available

143 In *R v Poole; Ex parte Henry [No 2]*[87], *Fraser Henleins Pty Ltd v Cody*[88] and *Bank of New South Wales v The Commonwealth*[89], Dixon J noted that inclusion of severance clauses in legislation had first occurred in the United States in the early part of the twentieth century and that a great deal of consideration had been given there to their operation and effect[90].

144 An important effect of severance clauses in the United States has been to support a practice, generally although by no means universally observed[91], whereby, in the absence of "'weighty countervailing' circumstances", "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional"[92]. The foundation for that practice has been identified as the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected"[93].

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86 (2004) 220 CLR 1 at 55-56 [110].

87 (1939) 61 CLR 634 at 651.

88 (1945) 70 CLR 100 at 127; [1945] HCA 49.

89 (1948) 76 CLR 1 at 370.

90 See generally Stern, "Separability and Separability Clauses in the Supreme Court" (1937) 51 *Harvard Law Review* 76 at 115-125.

91 See Fallon, "Fact and Fiction About Facial Challenges" (2011) 99 *California Law Review* 915.

92 *Brockett v Spokane Arcades Inc* (1985) 472 US 491 at 502, quoting *United States v Raines* (1960) 362 US 17 at 21-22.

93 *Brockett v Spokane Arcades Inc* (1985) 472 US 491 at 502, quoting *Allen v Louisiana* (1881) 103 US 80 at 83-84.

145 In *Tajjour v New South Wales*[94] ("*Tajjour*"), I explained with reference to case law and to the explanation given by Barwick CJ in *Harper v Victoria*[95] how and why a similar practice was adopted in Australia as a consequence of the application of severance clauses in matters arising under s 92 of the *Constitution* during the period between *Bank of New South Wales v The Commonwealth* and *Cole v Whitfield*[96]. In accordance with that practice, severance ordinarily came to be addressed as a threshold issue with the result that, if a statute had a severable operation in its application to commercial conduct that was not within the protection of the freedom of interstate trade understood to be guaranteed by s 92, a person engaged in that conduct would not be heard to challenge the statute on the basis that the statute was invalid in its application to some other commercial conduct that was within the protection of the freedom.

146 What I suggested in *Tajjour*, and now repeat, is that there are sound reasons for adopting the same approach where the validity of a statute is sought to be impugned on the basis that the statute infringes the implied freedom of political communication[97]. If the facts to which the statute is claimed to have application are not shown to involve political communication, and if the statute is severable to the extent that the statute has application to political communication, it is worse than nonsensical to require a court to step through each of the three stages of the *Lange-Coleman-McCloy-Brown* analysis only to dismiss the challenge on the basis that the statute has a valid severable application to the circumstances of the case. Irrespective of what that analysis might reveal about the potential for invalidity in the application of the statute to the circumstances of some other real or imagined case, the High Court should not be obliged to engage in such laborious and fraught work of supererogation. Much less should a busy magistrate.

147 One objection to adopting such an approach, faintly mentioned in argument by the Solicitor-General for Victoria, is that severance can itself give rise to complex questions. So it can; but quite often it doesn't; and it doesn't in this case.

148 Complexity can arise where severance might be effected in a variety of ways, the choice between which is argued to lie in the borderland between

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94 (2014) 254 CLR 508 at 586-587 [172]; [2014] HCA 35.

95 (1966) 114 CLR 361 at 371; [1966] HCA 26.

96 (1988) 165 CLR 360; [1988] HCA 18.

97 (2014) 254 CLR 508 at 589 [176].

legislative and judicial power[98]. Complexity can also arise where severance is argued to distort the legal operation of what would remain of the statute[99]. Those difficulties do not detract from the proposition that "where a law is intended to operate in an area where Parliament's legislative power is subject to a clear limitation, it can be read as subject to that limitation"[100]. Severance, in a case to which that proposition is applicable, turns not on curial divination of an "intuitive understanding of the underlying purpose of the plan of the framer of the instrument"; "it is precisely that uncertain and undesirable mode of solution that [a severance clause] supersedes"[101]. Severance in such a case turns rather on the answer to the straightforward question of whether or not there exists a positive indication of a legislative intention that, contrary to the general presumption, the particular law is not to have a distributive operation but is to apply in its totality if it is to apply at all[102] with the result that all are to go free unless all are bound[103].

Severance in this case

149 There is no difficulty reading the prohibition against "communicating ... in relation to abortions" in s 185D with para (b) of the definition of "prohibited behaviour" in s 185B(1) of the Public Health Act to exclude political communication. The determination of whether s 185D would be read in that way in the event of the prohibition being invalid in its application to political communication accordingly comes down to asking whether there is something in the text or context of the Public Health Act to indicate that, contrary to the presumption favouring severance expressed in the Interpretation Act, the

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98 *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502; [1996] HCA 56, referring to *Pidoto v Victoria* (1943) 68 CLR 87 at 108; [1943] HCA 37.

99 *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371.

100 *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502-503.

101 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 93; [1945] HCA 41.

102 *Knight v Victoria* (2017) 261 CLR 306 at 325 [35], quoting *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502 and *Pidoto v Victoria* (1943) 68 CLR 87 at 108.

103 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652.

prohibition is to have no application to any communication if the prohibition can have no application to political communication. As Mrs Clubb accepts, and as the reasons for judgment of Gordon J demonstrate, the answer to that question is no.

150 There remains for me to address the only real argument put on behalf of Mrs Clubb in response to severance. The argument is that severance of the offence-creating provision which she was found to have breached, to exclude political communication, would cast the onus on the prosecution to prove beyond reasonable doubt that the conduct with which she was charged was not political communication, and that the prosecution did not so prove in this case. That is not how severance works at all.

151 If the statutory prohibition were invalid but severed in its application to political communication, the effect of severance would not be to alter the statement of the obligation created by the prohibition, but to take political communication outside the scope of its operation. Severance would operate in substance to require recognition of a statutory exception for prohibited behaviour which amounts to political communication.

152 Whether or not conduct the subject of a charge amounts to political communication is a question of constitutional fact in respect of which the whole notion of a legal onus of proof is inapposite[104]. Neither the statutory rule in Victoria that an accused who wishes to rely on an exception must present evidence that suggests a reasonable possibility of the existence of facts establishing the exception[105] nor the common law rule which would cast the burden on the accused to prove the existence of facts establishing the exception on the balance of probabilities[106] therefore have application. Whether valid in its entirety or invalid and severable in its application to political communication, the statutory prohibition must be treated by a court as applicable according to its terms to conduct proved by the prosecution absent the court being apprised of material sufficiently probative for the court to be satisfied that the conduct amounted to political communication.

153 If the freedom of political communication was to be relied on to impugn her prosecution for the offence created by s 185D of the Public Health Act, the

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104 *Thomas v Mowbray* (2007) 233 CLR 307 at 514-522 [620]-[639]; [2007] HCA 33; *Maloney v The Queen* (2013) 252 CLR 168 at 298-299 [351], [355]; [2013] HCA 28.

105 Section 72 of the *Criminal Procedure Act 2009* (Vic).

106 *Dowling v Bowie* (1952) 86 CLR 136 at 139-140; [1952] HCA 63; *Ex parte Ferguson; Re Alexander* (1944) 45 SR (NSW) 64 at 66-67.

practical onus was on Mrs Clubb to bring such material forward. She did not do so.

Preston v Avery

154 Mr Preston was engaged in political communication when he stood on the footpath outside the Specialist Gynaecology Centre located in a building in Victoria Street, Hobart on 5 and 8 September 2014 and again on 14 April 2015 holding placards containing words and images indicating his opposition to abortion. There is no suggestion that the words and images cloaked a communication which was essentially personal or commercial[107]. Mr Preston gave evidence that he sought to inform and to challenge the conscience of women entering the centre but, as he also made clear in his evidence, that was not his only purpose. The words and images on his placards conveyed a message to the world at large. His placards were visible to persons who might enter or attempt to enter the Specialist Gynaecology Centre but also to all who might pass by.

155 Mr Preston was, in the language of para (b) of the definition of "prohibited behaviour" in s 9(1) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) ("the Reproductive Health Act"), engaged in "a protest" – a public demonstration of opposition, disapproval or discontent – "in relation to terminations" – on the subject matter of abortion. So much was common ground in his trial in the Magistrates Court of Tasmania for the offence created by s 9(2) of the Reproductive Health Act, of which he was convicted by that Court[108].

156 Unlike the constitutional question sought to be raised in Mrs Clubb's appeal, the question of whether the protest prohibition in the Reproductive Health Act infringes the implied constitutional freedom of political communication, having been raised by Mr Preston at his trial and again in so much of his appeal to the Supreme Court of Tasmania as has been removed by order under s 40 of the *Judiciary Act*, is ripe for determination by the High Court.

157 The parties to the appeal and interveners all accept that the question of whether the protest prohibition infringes the implied constitutional freedom of political communication falls to be determined in the application of the three-staged *Lange-Coleman-McCloy-Brown* analysis. There are differences between them as to the propriety and utility of importing into the third stage of that analysis (concerned with determining whether an impugned law is reasonably

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107 cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [28]; [2005] HCA 44.

108 *Police v Preston and Stallard* (unreported, Magistrates Court of Tasmania, 27 July 2016).

appropriate and adapted to advance an identified constitutionally permissible purpose in a manner compatible with maintenance of the constitutionally prescribed system of representative and responsible government) a further three stages of structured proportionality analysis.

158 The three stages of the *Lange-Coleman-McCloy-Brown* analysis are anchored in our constitutional structure. They are part of our constitutional doctrine. Their application is mandated by precedent. Structured proportionality has not been suggested to be more than an intellectual tool[109].

159 That there continue to be differences of opinion about the propriety and utility of importing the three stages of the structured proportionality analysis is hardly surprising. The Australian constitutional tradition derives from that of the common law. Lawyers brought up in the tradition of the common law are comfortable with the application of precedent. Lawyers brought up in that tradition are less than comfortable with being constrained to adopt a standardised pattern of thought and expression in determining whether a given measure in a given context can be justified as reasonable or appropriate or adapted to an end. We value predictability of outcomes more than we value adherence to analytic forms. We have learned through long and sometimes bitter experience that "[l]inguistic refinement of concept" can "result in fineness of distinction which makes it ever more difficult to predict a course of judicial decision" whereas "an overtly imprecise concept can yield a degree of certainty in application, provided the reasons for choice are also made as overt as we can"[110].

160 My own reservations about structured proportionality have been outlined in the past[111]. Nothing is to be gained by me elaborating further on those reservations. Nor would it contribute to the elaboration of my reasons for judgment in this case for me to demonstrate my knowledge of the competing strands of argument within the contemporary debate amongst pan-constitutional proponents of structured proportionality about what each of the three (or sometimes more) stages of analysis involves and why each stage is or should be

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109 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68]; [2015] HCA 34; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 52 [37], 60-61 [62]; [2016] HCA 36.

110 Jacobs, "The Successor Books to 'The Province and Function of Law' – Lawyers' Reasonings: Some Extra-judicial Reflections" (1967) 5 *Sydney Law Review* 425 at 428, quoted in Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 674.

111 *McCloy v New South Wales* (2015) 257 CLR 178 at 234-238 [140]-[149]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 71-72 [99]-[101]; *Brown v Tasmania* (2017) 261 CLR 328 at 376-377 [157]-[161]; [2017] HCA 43.

undertaken. The articulation and application of the stages of analysis have in practice varied from time to time and from place to place and have in practice been influenced by marked differences in institutional settings and in intellectual traditions. There is something of a gap between rhetoric and practice and much, I fear, can be lost in translation.

161 Just as my reservations about structured proportionality have been outlined in the past, so my reasons have been set out in the past for considering it appropriate to address the third stage of the requisite *Lange-Coleman-McCloy-Brown* analysis by applying a precedent-based calibrated scrutiny. The approach seeks to address the stage in a way which adjusts the level of scrutiny brought to bear on an impugned law to the nature and intensity of the risk which the burden imposed by the law on political communication poses for the constitutionally prescribed system of representative and responsible government[112]. I doubt my capacity to spell out the approach with greater clarity, and I doubt that there is much more that I can usefully say in support of it at the level of constitutional and adjudicative principle. Like all of the numerous competing approaches to the judgment calls required of the High Court in matters arising under the Australian *Constitution* which have come and gone since 1903, it will be evaluated over time as case law accumulates by reference to its capacity to inform sound and consistent outcomes.

162 Consistently with the structure of my reasons for judgment in *Brown v Tasmania*[113] ("*Brown*"), which also concerned on-site protesting, the framework for the analysis which I propose to undertake in the present case is: first, to examine the nature and intensity of the burden which the protest prohibition places on political communication; second, to calibrate the appropriate level of scrutiny to the risk which a burden of that nature and intensity poses to maintenance of the constitutionally prescribed system of representative and responsible government; third, to isolate and assess the importance of the constitutionally permissible purpose of the prohibition; and finally, to apply the appropriate level of scrutiny so as to determine whether the protest prohibition is justified as reasonably appropriate and adapted to achieve that purpose in a manner compatible with maintenance of the constitutionally prescribed system of government.

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112 *Tajjour v New South Wales* (2014) 254 CLR 508 at 576-581 [139]-[152]; *McCloy v New South Wales* (2015) 257 CLR 178 at 222-234 [99]-[139], 238-239 [150]-[154]; *Brown v Tasmania* (2017) 261 CLR 328 at 377-379 [162]-[166].

113 (2017) 261 CLR 328 at 377-379 [162]-[166].

Burden

163 Understanding the nature and intensity of the burden which the protest prohibition places on political communication can be assisted by isolating a number of aspects of the legal and practical operation of the prohibition.

164 First, the prohibition is specifically directed against engaging in a protest: a public demonstration – the oldest and most orthodox form of public expression of political dissent in a representative democracy. The juxtaposition of paras (a) and (b) of the definition of "prohibited behaviour" makes clear that the prohibition is not confined to a prohibition on engaging in a protest that besets, harasses, intimidates, interferes with, threatens, hinders, obstructs or impedes any person. The prohibition extends to peaceful demonstration. It extends to a picket. It extends to a silent vigil.

165 Second, the protest prohibition is content-specific. The prohibition is limited to a prohibition against engaging in a protest on the subject of abortion. The availability of abortion has been restricted by State and Territory legislation throughout Australian history and has been able to be affected by Commonwealth legislation applicable in every State at least since the insertion of s 51(xxiiiA) into the *Constitution* in 1946. Beginning in the 1950s and gaining momentum in the 1970s, abortion has been the focus of agitation for legislative change first by pro-choice activists arguing for, and then by pro-life activists arguing against, its liberalisation[114].

166 Unlike in the United States[115] and in Canada[116], where the movement towards liberalisation of abortion received impetus from landmark constitutional decisions resulting in uniform national constraints on continuing state or provincial legislative restrictions, liberalisation of abortion in Australia has occurred through legislation enacted at various times in each State and self-governing Territory[117]. In Tasmania, abortion remained a crime subject to limited defences until 2001 when a medical exception was introduced[118]. Only with the enactment of the Reproductive Health Act in 2013 was abortion decriminalised in Tasmania. Abortion has since then been an offence in

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114 Munson, *The Making of Pro-life Activists* (2008) at 77-89.

115 *Roe v Wade* (1973) 410 US 113.

116 *R v Morgentaler* [1988] 1 SCR 30.

117 See Victorian Law Reform Commission, *Law of Abortion: Final Report* (2008) at 142-147.

118 *Criminal Code Amendment Act (No 2) 2001* (Tas).

Tasmania only where carried out other than by a medical practitioner or the pregnant woman, or where carried out without the woman's consent[119].

167 The legislative changes which have occurred in Australia have not been without dissent and the legislated accommodation reached has not removed abortion from the realm of public controversy. No doubt there can be communications on the subject of abortion which have no substantial bearing on legislative possibilities and therefore no substantial bearing on electoral choice. Mrs Clubb's attempted communication with the couple outside the East Melbourne Fertility Control Clinic may well have been one. And no doubt there can arise factual questions of some delicacy as to whether particular conduct (such as silent prayer) might in particular circumstances amount to a public demonstration answering the statutory description of a protest. But it is barely conceivable that there could be a public demonstration relating to abortion which does not involve some explicit or implicit expression of approval or disapproval of the currently legislated position. A protest on the subject of abortion is inherently political.

168 Third, the protest prohibition is site-specific. The prohibition operates only within a radius of 150 m around premises which provide abortion services. The perimeter marks out an "access zone" (equally capable of being referred to as a "safe zone", "safe access zone", "buffer zone" or "bubble zone"[120]) within which no public demonstration on the subject of abortion is permitted to be seen or heard.

169 Fourth, the protest prohibition is in its practical operation time-specific. The requirement that the protest be able to be seen or heard by a person accessing, or attempting to access, premises at which abortions are provided means that the prohibition can only operate to restrict protest activity at times when those premises are available to be accessed. An argument that the same requirement means that a protest within the access zone is prohibited only if it is able to be seen or heard by a person from the vantage point of entering or being about to enter the premises was pressed on and accepted by the Magistrate[121] but was abandoned by the Solicitor-General for Tasmania on behalf of the prosecution in the course of oral submissions in the appeal.

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119 Sections 178D and 178E of the *Criminal Code* (Tas).

120 Drabsch, *Abortion and the law in New South Wales*, New South Wales Parliamentary Library Research Service, Briefing Paper No 9/05 (2005) at 58-59.

121 *Police v Preston and Stallard* (unreported, Magistrates Court of Tasmania, 27 July 2016) at [27].

170 Fifth, although the prohibition is viewpoint-neutral in its legal operation, the prohibition in its practical operation impacts differentially on pro-choice and pro-life activists. That is to say, acknowledging that the prohibition would prevent the holding of a pro-choice protest just as it would prevent the holding of a pro-life protest, the real-world effect of the prohibition operating only within a radius of 150 m around premises which provide abortion services can only be that the prohibition curtails protests by those who seek to express disapproval of the availability of services of the kind provided at the premises to a significantly greater extent than it curtails protests by those who seek to express approval.

171 That is certainly how the prohibition was expected to work in practice, as was spelt out by the Minister for Health on the reading of the Bill for the Reproductive Health Act for a second time in the Tasmanian House of Assembly. After explaining that the prohibition would not stop a sermon in a church or "an exchange of personal views between mates at a restaurant or pub", the Minister said[122]:

> "It will, however, stop a person from standing in an access zone holding up a placard or handing out pamphlets denouncing terminations. It will stop a person from engaging in vocal anti-choice protest and it will stop the silent protests outside termination clinics that purport to be a vigil of sorts or a peaceful protest but which, by their very location, are undoubtedly an expression of disapproval."

There is no reason to think that the prohibition does not measure up to that expectation.

172 Mr Preston's circumstances well illustrate that the prohibition operates to stop peaceful protests against abortion which would otherwise occur within a radius of 150 m around premises at which abortion services are provided in Tasmania. His own largely solitary protests outside the Specialist Gynaecology Centre which resulted in his conviction cannot be treated as isolated instances. Mr Preston gave evidence that, together with others, he had been engaged in pro-life lobbying, education and protesting elsewhere in Australia since 1990. Evidence adduced in *Clubb v Edwards* and accepted by the parties to be available to be taken into account on questions of legislative or constitutional fact in the present case reveals that pro-life protesters, typically in groups of between three and 12 but sometimes numbering up to 100, had stood outside the East Melbourne Fertility Control Clinic almost every morning for a quarter of a century up to May 2016.

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122 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50.

173 There is a difference between this case and *Brown* to which the prosecution and the Commonwealth, State and Territory interveners draw attention. The difference is that there is no evidence that on-site protesting of the kind engaged in by Mr Preston has the particular communicative power of generating sounds and images that can be expected to be broadcast to a wider audience[123]. In contrast to pro-conservation protests in forests over the past quarter century, pro-life protests outside abortion clinics over the same period can be accepted to have been largely ignored in the mainstream media. The difference is of no moment. The protection of the implied freedom is not greater for those who are media-savvy or for those whose causes have popular appeal. The important feature that this case has in common with *Brown* is that it involves legislation which impedes the holding of a protest in close proximity to the place of occurrence of a currently lawful activity, at which those who oppose the lawfulness of the occurrence of that activity would seek publicly to express their disapproval.

174 In a manner not qualitatively different from the legislation directed against on-site protesting in *Brown*[124], the burden which the protest prohibition places on political communication is direct, substantial and discriminatory. The prohibition discriminates on its face against a traditional form of political communication and discriminates in its practical operation against use of that form of communication to express a particular viewpoint.

Calibration

175 The Attorney-General for Victoria submits that no greater justification for the burden on political communication is required than showing a rational connection between the prohibition and a constitutionally permissible purpose. I reject that submission.

176 To search for no more than a rational connection between the prohibition and a constitutionally permissible purpose is to apply a level of scrutiny appropriate to be applied to a law which imposes a burden on political communication that is no more than indirect or incidental[125]. That level of scrutiny is inappropriate to be applied to laws "which prohibit or regulate communications which are inherently political or a necessary ingredient of political communication"[126]. Much less is that level of scrutiny appropriate to be

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123 cf *Brown v Tasmania* (2017) 261 CLR 328 at 346 [32].

124 (2017) 261 CLR 328 at 389 [199].

125 eg, *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[99]; [2011] HCA 4.

126 *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30]; [2012] HCA 2.

applied to a law which in its practical operation discriminates against political communication that expresses a particular point of view.

177 The reason why that minimal level of scrutiny is inappropriate here is that it fails to align the requisite standard of justification with the level of risk which a burden of the identified nature poses to maintenance of the constitutionally prescribed system of representative and responsible government, the safeguarding of which is the structural purpose of the freedom of political communication[127]. The constitutionally prescribed system of representative and responsible government is characterised by the tolerance of dissenting minority opinion.

178 The Attorney-General of the Commonwealth, with the support of the Attorney-General for New South Wales, suggests that some assistance is to be gained in considering the appropriate level of scrutiny and corresponding standard of justification from an examination of the approach taken to determining whether laws restricting the time, place and manner of communications infringe the express guarantee of freedom of speech in the First Amendment to the Constitution of the United States. I agree.

179 The First Amendment's guarantee of freedom of speech has come to be understood as a personal right extending beyond political communication. "[S]peech which bears, directly or indirectly, upon issues with which voters have to deal" has nevertheless long been understood to have the greatest claim to protection under the First Amendment[128]. Aspects of First Amendment case law and scholarship can for that reason be instructive in considering the implied freedom of political communication. First Amendment case law and scholarship have been drawn upon extensively by the High Court from the earliest articulation of the implied freedom in *Nationwide News Pty Ltd v Wills*[129] and *Australian Capital Television Pty Ltd v The Commonwealth*[130]. Reference to them is appropriately continued as our own body of case law develops, provided

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127 *Brown v Tasmania* (2017) 261 CLR 328 at 378 [164]. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 214 [70], 238-239 [150]-[152].

128 Meiklejohn, *Political Freedom* (1960) at 79, quoted in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124; [1994] HCA 46.

129 (1992) 177 CLR 1; [1992] HCA 46.

130 (1992) 177 CLR 106; [1992] HCA 45.

that it is constantly borne in mind that danger lies in "uncritical translation" of any foreign doctrine[131].

180 Instructively for present purposes, the Supreme Court of the United States has repeatedly held that a time, place or manner restriction on freedom of speech will withstand First Amendment scrutiny provided the restriction: (1) is content-neutral; (2) serves a significant governmental interest; and (3) is narrowly tailored to serve that interest in the sense that it does not burden substantially more speech than is necessary to serve that interest, and leaves open ample alternative channels for communication[132]. A content-based time, place or manner restriction, on the other hand, will withstand First Amendment scrutiny only if the restriction is narrowly tailored to promote a compelling governmental interest[133].

181 Leaving precise verbal formulations to one side, the notion that a content-based time, place or manner restriction demands closer scrutiny corresponding to a need for greater justification than a content-neutral time, place or manner restriction is consistent with the approach taken to the implied freedom of political communication by Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth*[134] and by Gaudron J in *Levy v Victoria*[135] as subsequently endorsed by Gleeson CJ in *Mulholland v Australian Electoral Commission*[136] and unanimously applied in *Hogan v Hinch*[137]. The time, place and manner restriction on political communication held to withstand implied freedom scrutiny in *Levy* was a content-neutral restriction found to involve "no greater curtailment of the constitutional freedom than was reasonably

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131 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178 [17]; [2007] HCA 43. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 229 [120].

132 eg, *Ward v Rock Against Racism* (1989) 491 US 781 at 791, citing *Clark v Community for Creative Non-Violence* (1984) 468 US 288 at 293.

133 eg, *United States v Playboy Entertainment Group Inc* (2000) 529 US 803 at 813.

134 (1992) 177 CLR 106 at 143-144.

135 (1997) 189 CLR 579 at 618-619; [1997] HCA 31, referring to *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143, 169, 234-235, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77, *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299-300, 337-339, 388; [1994] HCA 44 and *Kruger v The Commonwealth* (1997) 190 CLR 1 at 126-128; [1997] HCA 27.

136 (2004) 220 CLR 181 at 200 [40]; [2004] HCA 41.

137 (2011) 243 CLR 506 at 555-556 [95]-[99].

necessary to serve the public interest in the personal safety of citizens"[138]. The time, place and manner restriction on political communication later held to withstand implied freedom scrutiny in *Attorney-General (SA) v Adelaide City Corporation*[139] was similarly content-neutral. Confined relevantly to preaching, canvassing or haranguing on a public road without prior permission of a local council, the granting or withholding of which could not validly be based on approval or disapproval of the content of the communication, and having no application to communications during an election period or in a designated area known as "Speakers Corner", the restriction was found adequately to balance "the competing interests in political communication and the reasonable use by others of a road"[140].

182 Later in these reasons, I will turn to the assistance to be derived from cases in which the Supreme Court of the United States has considered time, place and manner restrictions creating buffer zones around premises providing abortion services[141]. Suffice it for the present to record that I find unpersuasive the prevailing view of a majority of the Supreme Court that prohibitions on communicative activity in buffer zones are content-neutral[142]. With the minority, I think that "[i]t blinks reality to say ... that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur – and where that speech can most effectively be communicated – is not content based"[143]. That said, unlike the impugned prohibition here and unlike the buffer zone legislation considered in two cases in British Columbia arising under the *Canadian Charter of Rights and Freedoms* ("the Canadian Charter") to which I will also later turn[144], none of the First Amendment buffer zone cases have involved a legislated time, place and manner restriction cast in terms of a prohibition against holding a protest.

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138 (1997) 189 CLR 579 at 614. See also at 597-598, 619-620, 627-628, 647-648.

139 (2013) 249 CLR 1; [2013] HCA 3.

140 (2013) 249 CLR 1 at 64 [141]. See also at 44 [68], 84 [203], 90 [224].

141 *Madsen v Women's Health Center Inc* (1994) 512 US 753; *Schenck v Pro-Choice Network of Western New York* (1997) 519 US 357; *Hill v Colorado* (2000) 530 US 703; *McCullen v Coakley* (2014) 134 S Ct 2518.

142 *McCullen v Coakley* (2014) 134 S Ct 2518 at 2531.

143 *McCullen v Coakley* (2014) 134 S Ct 2518 at 2543.

144 *R v Lewis* (1996) 139 DLR (4th) 480; *R v Spratt* (2008) 298 DLR (4th) 317.

183 The burden which the protest prohibition places on political communication, as I have already concluded, is direct, substantial and discriminatory. That being so, my opinion is that the burden could only be justified as reasonably appropriate and adapted to advance a legitimate purpose in a manner that is compatible with maintenance of the constitutionally prescribed system of government if it can withstand the same close scrutiny consistent with a compelling justification which I considered was required of the legislation which operated to prohibit on-site protesting in *Brown*[145].

184 Two conditions, in my opinion, therefore need to be satisfied for the burden to be justified. The first is that the purpose of the prohibition needs to be more than just constitutionally permissible; it needs to be compelling. The second is that the prohibition needs to be closely tailored to the achievement of that purpose; it must not burden the freedom of political communication significantly more than is reasonably necessary to do so.

185 In other words, for the protest prohibition to withstand scrutiny under the final stages of the *Lange-Coleman-McCloy-Brown* analysis, the burden imposed by the prohibition on political communication needs to be in pursuit of a compelling governmental purpose and needs to be no greater than is reasonably necessary to achieve that purpose.

Purpose

186 The Reproductive Health Act contains no statement of legislative objects. The purpose of the protest prohibition – the "public interest sought to be protected and enhanced" by its enactment[146] – therefore falls to be determined inferentially by reference to its subject matter, text and context[147].

187 Mr Preston submits that the singling out of protests reveals that the purpose of the protest prohibition is the quietening of political dissent on the subject matter of abortion. That characterisation of legislative purpose does not adequately account for the statutory creation of an "access zone" and for the complementary operation of other elements of the definition in s 9(1) of the Reproductive Health Act of "prohibited behaviour" within an access zone. The inclusion within the definition by paras (a), (c) and (d) of "besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding" a person, "footpath interference in relation to terminations" and "intentionally recording ... a person accessing or attempting to access premises ... without that

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145 (2017) 261 CLR 328 at 390-391 [203]-[204].

146 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300.

147 *Brown v Tasmania* (2017) 261 CLR 328 at 391-392 [208]-[209].

person's consent", together with the catch-all reference in para (e) to "any other prescribed behaviour", indicates that the overall concern of the proscription by s 9(2) of "prohibited behaviour" within an "access zone" is the elimination of conduct of kinds which have been shown in the past or which might be shown in the future to have a tendency to hinder or deter access to premises at which abortion services are provided.

188 That inference as to the legislative purpose underlying the protest prohibition is supported by the Second Reading Speech for the Bill for the Reproductive Health Act. The Minister for Health there referred to a study of patients at the East Melbourne Fertility Control Clinic which indicated that "patients experience considerable distress, shame and anxiety in response to protestors"[148]. The Minister went on to express the belief that "[w]omen are entitled to access termination services in a confidential manner without the threat of harassment" and that "access zones provide the appropriate balance between the right to protest and protecting women from being exposed to those who seek to shame and stigmatise them"[149].

189 Drawing those threads together, the Solicitor-General for Tasmania submits for the prosecution that the protest prohibition has the multiple purposes of maintaining the safety, privacy, well-being and dignity of persons entering and leaving premises at which abortion services are provided. Each of those purposes, he argues, is compatible with maintenance of the constitutionally prescribed system of representative and responsible government. Each, he says, is "in the interests of an ordered society"[150].

190 For his part, Mr Preston concedes that protecting physical safety and protecting privacy are compatible with maintenance of the constitutionally prescribed system of representative and responsible government. Mr Preston argues, however, that protecting the psychological well-being or dignity of a person from the consequences of a political communication is not. Relying on passages in reasons for judgment of the majority in *Coleman*[151] and of three members of the evenly divided High Court in *Monis v The Queen*[152] ("*Monis*"),

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148 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50.

149 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 51.

150 Quoting *Levy v Victoria* (1997) 189 CLR 579 at 608.

151 (2004) 220 CLR 1 at 45-46 [81], 77 [193], 87 [226]. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200 [87].

152 (2013) 249 CLR 92 at 133-134 [73], 139-140 [97], 178 [236]; [2013] HCA 4.

Mr Preston argues that maintenance of the constitutionally prescribed system of government demands tolerance of political communication that is unwelcome and offensive.

191 The Attorney-General for Victoria meets Mr Preston's submission head on with a submission that is equally categorical but to the exact opposite effect. Extrapolating from a statement in *Brown*[153], and marginalising both the reasoning and the outcomes in *Coleman* and in *Monis*, the Attorney-General for Victoria argues that the implied freedom of political communication is a guarantee of freedom to communicate only with willing recipients.

192 Neither the argument of Mr Preston nor the argument of the Attorney-General for Victoria can be accepted. Each argument implicitly, and derivatively, incorporates elements of an approach that has been adopted by the Supreme Court of the United States when dealing with time, place and manner restrictions on freedom of speech. However, neither argument reflects the richness of the approach in the United States, and neither argument adequately relates that approach to the implied freedom of political communication.

193 The Supreme Court of the United States has repeatedly recognised that there are circumstances in which freedom of speech can legitimately be curtailed by time, place and manner restrictions protective of an "unwilling listener's interest in avoiding unwanted communication"[154]. In *Hill v Colorado*, a significant buffer zone case about which I will need to say more, a majority of the Supreme Court referred to that interest of an unwilling listener as an aspect of a broader "right to be let alone". The majority immediately added, however, that the "right" was "more accurately characterized as an 'interest' that States can choose to protect in certain situations"[155].

194 Before and after *Hill v Colorado*, the approach of the Supreme Court has been to treat the interest of an unwilling listener in avoiding unwanted communication as significant in some situations but not in others. For the most part, an interest in avoiding unwanted communication has been found to be capable of justifying sufficiently tailored restrictions on the freedom of speech

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153 (2017) 261 CLR 328 at 415 [275].

154 *Hill v Colorado* (2000) 530 US 703 at 716.

155 (2000) 530 US 703 at 717 n 24, referring to *Katz v United States* (1967) 389 US 347 at 350-351. See generally at 716-718.

only where unwilling listeners have in some way been "captive" to unwanted and intrusive speech[156].

195 Unsolicited, unwelcome, uncivil or offensive political communication is not carved out as an exception from the freedom of political communication impliedly guaranteed by ss 7, 24, 61, 64 and 128 of the *Constitution*. To acknowledge such a carve-out would turn the approach to the implied freedom of political communication in the unfortunate direction of that long-jettisoned unworkable approach to s 92 of the *Constitution* which sought to draw a distinction between legitimate trade or commerce and conduct *extra commercium*[157].

196 *Coleman* and *Monis* should not be understood as authority for the proposition that a purpose of curtailing unsolicited, unwelcome, uncivil or offensive speech is incompatible with the constitutionally prescribed system of representative and responsible government. Consistently with how the Supreme Court of the United States has treated the interest of an unwilling listener in avoiding unwanted communication, the better explanation of those decisions is that protecting against unwanted or offensive communication is a permissible purpose the capacity of which to justify a burden on freedom of political communication can vary in different contexts. In some contexts, the purpose of protecting against unwanted or offensive communication can be insignificant. In other contexts, of which the present in my opinion is one, the purpose of protecting against unwanted or offensive communication can be compelling.

197 In my opinion, the purpose of the protest prohibition as an element of s 9(2)'s proscription of "prohibited behaviour" within an "access zone" is best identified as being to ensure that women have access to premises at which abortion services are lawfully provided in an atmosphere of privacy and dignity. The purpose so identified is unquestionably constitutionally permissible and, by any objective measure, of such obvious importance as to be characterised as compelling.

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156 See "Too Close for Comfort: Protesting Outside Medical Facilities" (1988) 101 *Harvard Law Review* 1856 at 1863-1866; Phillipps, "The Unavoidable Implication of *McCullen v Coakley*: Protection Against Unwelcome Speech Is Not A Sufficient Justification For Restricting Speech in Traditional Public Fora" (2015) 47 *Connecticut Law Review* 937 at 944-950.

157 Compare *R v Martin; Ex parte Wawn* (1939) 62 CLR 457; [1939] HCA 39 and *Mansell v Beck* (1956) 95 CLR 550; [1956] HCA 70 with *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; [2008] HCA 11.

198 That identification of legislative purpose accords substantially with the purpose which the Supreme Court of British Columbia in *R v Lewis*[158] and the Court of Appeal of British Columbia in *R v Spratt*[159] identified as the purpose of a prototypical prohibition against "protest" within a legislated buffer zone and which those courts characterised as "pressing and substantial". It accords also with the United States Supreme Court's recognition of protecting a woman's freedom to seek pregnancy-related services as a significant governmental interest[160].

Justification

199 The public interest sought to be protected and enhanced by the protest prohibition being both constitutionally permissible and compelling, the question that remains is whether the burden which the protest prohibition imposes on political communication is significantly more than is reasonably necessary to give effect to that purpose.

200 To the obvious argument that the Victorian prohibition against "communicating by any means in relation to abortions 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 and is reasonably likely to cause distress or anxiety" in s 185D read with s 185B(1) of the Public Health Act is a considerably less restrictive means of achieving the purpose of the protest prohibition, the response of the Solicitor-General for Tasmania and of the interveners is to invoke the approach of the Court of Appeal of British Columbia in *R v Spratt.* The response is to say that it was open to the Tasmanian Parliament to take the view that "[t]o try to characterize each individual approach to every woman entering the clinic is too difficult a calculus when the intent of the legislation is to give unimpeded access to those entering the clinic" and, thus, that "a clear rule against *any* interference [was] the best way to achieve the ends of the legislation"[161].

201 Bright lines can have benefits. Their appropriateness depends on how and where they are drawn. The quoted words were uttered in *R v Spratt* in the context of accepting as "justified in a free and democratic society", within the meaning of s 1 of the Canadian Charter, a restriction on freedom of expression

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158 (1996) 139 DLR (4th) 480 at 508-511 [87]-[102].

159 (2008) 298 DLR (4th) 317 at 327 [32], 336-337 [71], [75].

160 *Madsen v Women's Health Center Inc* (1994) 512 US 753 at 767-768; *Schenck v Pro-Choice Network of Western New York* (1997) 519 US 357 at 376; *Hill v Colorado* (2000) 530 US 703; *McCullen v Coakley* (2014) 134 S Ct 2518.

161 (2008) 298 DLR (4th) 317 at 338-339 [80]-[81] (emphasis in original).

wrought by a prohibition against "protest"[162] applicable within a buffer zone which did not exceed 50 m from the boundary of the parcel of land on which a facility providing abortion services was located[163]. The same prohibition within the same buffer zone had earlier been in issue in *R v Lewis*. In this case, the perimeter set for the operation of the protest prohibition has a radius that is three times that distance.

202 None of the cases in the Supreme Court of the United States have involved buffer zones as extensive in their geographical reach. *Hill v Colorado* concerned a buffer zone extending 100 feet from the entrance to a health care facility. The prohibition within that zone, which was upheld by a majority, was against knowingly approaching a non-consenting person within eight feet "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with [that] person"[164]. *McCullen v Coakley*[165] concerned a wider prohibition applicable within a narrower zone. The buffer zone in that case extended no more than 35 feet from the entrance to a place where abortions were offered or performed. The prohibition unanimously struck down in that case was against knowingly standing on a sidewalk within that zone[166].

203 Earlier, in *Madsen v Women's Health Center Inc*[167] ("*Madsen*") and *Schenck v Pro-Choice Network of Western New York*[168] ("*Schenck*"), the Supreme Court had considered the compatibility with the First Amendment of injunctions issued by state courts to remedy continuing tortious conduct by pro-life protesters. *Madsen* relevantly concerned two injunctions, the different fate of which in the Supreme Court is instructive. The first, which was upheld by the Supreme Court, prohibited demonstrating within 36 feet of the entrance to an abortion clinic. The second, which was struck down by the Supreme Court as burdening more speech than was necessary to accomplish its goal, prohibited physically approaching a person who sought the services of the clinic without that person's consent in an area within 300 feet of the clinic. *Schenck* relevantly

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162 Section 2(1)(b) of the *Access to Abortion Services Act*, RSBC 1996, c 1.

163 (2008) 298 DLR (4th) 317 at 322 [14].

164 Colorado Revised Statutes, (1999) §18-9-122(3).

165 (2014) 134 S Ct 2518.

166 Massachusetts General Laws (2012), ch 266, §§120E½(a), (b).

167 (1994) 512 US 753.

168 (1997) 519 US 357.

concerned an injunction which prohibited demonstrating within 15 feet of the entrance to a clinic. The injunction was upheld.

204 More recently, the High Court of Justice of England and Wales concluded on judicial review[169] that the establishment by legislative instrument made by a local authority of a "safe zone" around an abortion clinic, within which engaging in an act of approval or disapproval with respect to issues related to abortion services was prohibited, withstood scrutiny as compatible with the freedom of expression guaranteed by Art 10 of the European Convention on Human Rights. The Court took into account that the "safe zone" was a specified geographical area from which was excepted a "designated area" for protests comprising a well-defined grassy space about 100 m from the entrance to the clinic[170].

205 Although not specifically concerned with a buffer zone, the decision of the European Court of Human Rights in *Annen v Germany*[171] is also instructive. The Court there held, by a majority of five votes to two, that German courts had violated Art 10 by making and upholding an order that the applicant, an individual, desist from further disseminating in the "immediate vicinity" of a particular abortion clinic leaflets which contained the names of two doctors and asserted that those doctors performed unlawful abortions there. Examining whether the restriction on freedom of expression produced by the order could be characterised as "necessary in a democratic society" within the meaning of Art 10, the majority stated that "in view of the special degree of protection afforded to expressions of opinion which were made in the course of a debate on matters of public interest ... and despite the margin of appreciation enjoyed by the Contracting States, [it came] to the conclusion that the domestic courts failed to strike a fair balance between the applicant's right to freedom of expression and the doctors' personality rights"[172].

206 The judgment required to be made by an Australian court when determining whether legislation burdening political communication is reasonably appropriate and adapted to advance a constitutionally permissible purpose in a manner which is compatible with maintenance of the constitutionally prescribed system of government might not in every case be as fine-grained as those made by the North American and European courts in the cases to which I have

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169 *Dulgheriu v Ealing London Borough Council* [2018] 4 All ER 881.

170 [2018] 4 All ER 881 at 887 [13], 906 [89].

171 European Court of Human Rights, Fifth Section, Application No 3690/10, 26 November 2015.

172 European Court of Human Rights, Fifth Section, Application No 3690/10, 26 November 2015 at 16 [64].

referred[173]. However, I reject the submission of the Attorney-General of the Commonwealth that an Australian court is not competent to conclude that a particular prohibition on political communication would advance its constitutionally permissible purpose in a manner compatible with maintenance of the constitutionally prescribed system of government if the prohibition were confined to a smaller geographical area (say, an area having a radius of 50 m) but would not advance that purpose in such a manner if extended to a larger geographical area (say, an area having a radius of 500 m).

207 Australian courts have no constitutional mandate to tinker with legislative design in order to improve on the product of democratic choice[174]. If and to the extent necessary to address the question of whether legislation infringes the implied freedom of political communication in order to determine rights or liabilities in issue in properly constituted proceedings, Australian courts do have a duty to ensure that such burden as a particular democratically chosen legislative restriction places on political communication does not undermine the constitutionally prescribed system of government which made that democratic choice possible. That is the structural imperative which underlies the implication of the freedom of political communication and which frames the ultimate issue to which the *Lange-Coleman-McCloy-Brown* analysis is directed[175]. Application of that analysis is an aspect of the unique and essential function of the judicial power. Performance of that function by a court innately involves the exercise of judgment. Unsurprisingly, there will be times when a court's judgment will differ from that of the legislature.

208 Referring to the judgment to be made by the High Court in the application of what is now understood as the third stage of the *Lange-Coleman-McCloy-Brown* analysis, Mason CJ said in *Australian Capital Television Pty Ltd v The Commonwealth*[176]:

> "In weighing the respective interests involved and in assessing the necessity for the restriction imposed, the Court will give weight to the legislative judgment on these issues. But, in the ultimate analysis, it is for the Court to determine whether the constitutional guarantee has been infringed in a given case."

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173 cf *Levy v Victoria* (1997) 189 CLR 579 at 598.

174 cf *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 53 [39], 74 [110].

175 *McGinty v Western Australia* (1996) 186 CLR 140 at 286; [1996] HCA 48; *McCloy v New South Wales* (2015) 257 CLR 178 at 227-228 [114]-[118].

176 (1992) 177 CLR 106 at 144.

209 Why the protest prohibition was thought by the Tasmanian Parliament appropriate to be applied throughout an access zone having a radius of 150 m from premises at which abortions are provided does not appear from the Second Reading Speech of the Minister for Health or otherwise from the legislative history or the evidence. Perhaps the idea of having an access zone of that dimension was simply borrowed from Victoria without it being thought to make any difference that the Tasmanian protest prohibition was to be more restrictive of political communication than its Victorian equivalent. Perhaps it was thought, consistently with the argument that the protest needs to be able to be seen or heard by a person entering or about to enter the premises which was abandoned in the appeal, that the practical reach of the protest prohibition would be more limited than 150 m through the need to establish that direct line of sight or hearing.

210 Total and permanent prohibition of public expression of political opinion on a particular subject matter within normal working hours within an area defined by a radius of 150 m (covering at least 70,650 m^2) in an urban environment is not trivial, and it is not automatically justified by pointing to the ability to express the opinion at other times and places. Were the reach of the protest prohibition to have the effect of preventing a protest on the subject matter of abortion being held at a location meaningfully proximate to a place at which abortion services are provided during the hours of its operation, I would consider enactment of the protest prohibition to be legislative overreach. That is because the prohibition would effectively ban all on-site protests in relation to abortion. To ban all on-site protests in relation to abortion would, in my opinion, suppress political dissent to an extent greater than is reasonably necessary to achieve the permissible and compelling purpose of ensuring that women have access to those premises in an atmosphere of privacy and dignity in a manner compatible with maintenance of the constitutionally prescribed system of government. If I were pressed to re-cast my opinion in the language of structured proportionality, I would say that proscription of all protests in relation to abortion in the proximity of an abortion clinic, even if it were to be accepted as "necessary" ("erforderlich"), would not be "adequate in its balance" ("unzumutbar").

211 Helpfully, there is a finding of Magistrate Rheinberger (as her Honour then was) which bears on the issue of whether the 150 m reach of the protest prohibition has such an effect. In the course of her comprehensive and well-structured reasons for decision, the Magistrate catalogued a number of specific locations on public streets in Hobart beyond a radius of 150 m from the Specialist Gynaecology Centre in Victoria Street at which protesters remain able to stand and communicate with "a wide number of people who are entering into

the access zone for a variety of different reasons"[177]. That finding of constitutional fact is to my mind decisive.

212 The protest prohibition applies within other access zones each having a radius of 150 m from other premises at which abortion services are provided in Tasmania. There is no evidence as to where those other premises are located. There is accordingly no basis for considering that the circumstances pertaining to the Specialist Gynaecology Centre in Victoria Street are unique or aberrant.

213 The 150 m reach of the protest prohibition around premises at which abortion services are provided must be close to the maximum reach that could be justified as appropriate and adapted to achieve the protective purpose of facilitating access to those premises in a manner compatible with maintenance of the constitutionally prescribed system of government. Nevertheless, I am satisfied that confining the protest prohibition within that 150 m limit leaves enough opportunity for protests to be held at other locations meaningfully proximate to the premises to warrant the conclusion that the burden that the protest prohibition places on political communication, although not insubstantial, is not undue.

Conclusion

214 Mr Preston's appeal, in so far as it has been removed into the High Court, must be dismissed.

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177 *Police v Preston and Stallard* (unreported, Magistrates Court of Tasmania, 27 July 2016) at [53]-[54].

215 NETTLE J. I agree with Kiefel CJ, Bell and Keane JJ that so much of each appeal as has been removed into this Court should be dismissed with costs. My reasons, however, are in some respects different from theirs.

The Clubb appeal

The threshold question

216 The principal question for decision in the Clubb appeal is whether, by proscribing the kind of conduct identified in para (b) of the definition of "prohibited behaviour" in s 185B(1) of the *Public Health and Wellbeing Act 2008* (Vic) ("the PHW Act"), s 185D of the PHW Act imposes an unjustified burden on the implied freedom of political communication. First, however, it is necessary to dispose of what the Attorney-General of the Commonwealth, intervening, referred to as a threshold question of whether the Court should determine that issue.

217 The Attorney-General of the Commonwealth contended that the conduct of the appellant, Mrs Clubb, did not amount to political communication and, therefore, that her argument that s 185D imposes an unjustified burden on the implied freedom of political communication is an academic or hypothetical question which should not be decided. It was submitted that the Court should thus dispose of the matter on the basis that, assuming without deciding that s 185D would so burden the implied freedom of political communication, para (b) of the definition of prohibited behaviour could be read down pursuant to s 6(1) of the *Interpretation of Legislation Act 1984* (Vic) as excluding governmental or political communications. That approach was supported by the Attorney-General of Queensland, but opposed by the Attorney-General for Victoria and the Attorney-General for New South Wales.

218 In response, Mrs Clubb submitted that there was insufficient evidence before this Court to determine whether or not her conduct amounted to political communication. Counsel for Mrs Clubb assented to the proposition that he was not in a position to mount a positive case that Mrs Clubb's conduct was a political communication. His position was, however, that, if upon its proper construction para (b) of the definition of prohibited behaviour excludes political communications, the Crown would be required to prove that Mrs Clubb's conduct was not a political communication.

219 The approach of the Attorney-General of the Commonwealth is based on obiter dicta observations of Gageler J in *Tajjour v New South Wales*[178] to the effect that, where an impugned law is attacked as an infringement of the implied freedom of political communication but it appears that potentially offending

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178 (2014) 254 CLR 508 at 586-589 [170]-[176]; [2014] HCA 35.

provisions of the law are severable, it may be sufficient to resolve the attack to hold that, assuming without deciding that the impugned law infringes the implied freedom, the potentially offending provisions can be severed. The idea traces back to some earlier decisions of the Court in which it was held or implied that, assuming without deciding that an impugned law were a restriction on the freedom of interstate trade and commerce guaranteed by s 92 of the *Constitution*, the potentially offending provisions of the law could be read down pursuant to s 15A of the *Acts Interpretation Act 1901* (Cth) or cognate Commonwealth or State provisions to the extent necessary to avoid that conclusion[179]. The Commonwealth also referred to the approach which the Court took[180] to an hypothetical issue in *Knight v Victoria* of what the position would have been in that case if a judicial officer had been appointed to the parole board and was required to decide whether Knight's application for parole should be granted.

220 Ordinarily, the Court would not have regard to the application of a reading down or severance provision to an impugned law unless and until the Court has first come to the view that, according to the natural and ordinary meaning of the impugned law construed in context and having regard to its purpose, the impugned law would be invalid unless read down or unless one or more of its provisions were severed. As Dixon J observed[181] in *Bank of New South Wales v The Commonwealth* on the severance provision in s 6 of the *Banking Act 1947* (Cth):

> "For this reason, no doubt, s 6 is framed as a statement of intention and not as a command addressed to the Court. The question of interpretation is whether, *after the extent to which the intended operation of the enactment is invalid has been ascertained*, it is nevertheless the expressed will of the legislature that the whole or any part of the rest of the intended operation of the enactment should take effect by itself as a law of the Commonwealth. In so stating the question I have preferred to speak of the

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179 *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454, 455 per Dixon, Williams, Webb, Fullagar and Kitto JJ; [1951] HCA 59; *Carter v The Potato Marketing Board* (1951) 84 CLR 460 at 477, 478; [1951] HCA 60; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 73 per Dixon CJ, McTiernan, Webb and Kitto JJ, 82 per Fullagar J; [1955] HCA 6; *Nominal Defendant v Dunstan* (1963) 109 CLR 143 at 151-152; [1963] HCA 5; *Harper v Victoria* (1966) 114 CLR 361 at 371, 372-373 per Barwick CJ; [1966] HCA 26; *Buck v Bavone* (1976) 135 CLR 110 at 122-123 per Gibbs J, 131-132 per Mason J; [1976] HCA 24.

180 (2017) 261 CLR 306 at 324-326 [30]-[37]; [2017] HCA 29.

181 (1948) 76 CLR 1 at 369; [1948] HCA 7. See also *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488; [1952] HCA 17.

> two parts of the intended operation of the statute rather than of portions of its provisions capable and incapable of valid enactment. The latter way of stating the matter suggests that the problem is one of separating clauses or expressions. But more often than not, when a statute or statutory instrument goes beyond the Constitution the question for the Court is whether a provision too widely or generally expressed should be confined in its operation to so much of the subject it is capable of covering as is constitutionally competent to the legislature, or, as it is sometimes said, whether the general words are to be read and applied distributively". (emphasis added)

221 That said, however, there have been occasions on which severability has been considered before validity. In *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales*[182], s 40B(1) of the *Fisheries and Oyster Farms Act 1935* (NSW) required persons selling fish for human consumption to bring such fish for sale in the market in the district or in a market established by a trading society under the *Co-operation Act 1923* (NSW). Section 1(3) of the *Fisheries and Oyster Farms Act* contained the following severability clause:

> "This Act shall be read and construed subject to the Commonwealth of Australia Constitution Act, and so as not to exceed the legislative power of the State, to the intent that where any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances shall not be affected."

Dixon, Williams, Webb, Fullagar and Kitto JJ held[183]:

> "Plainly s 40B(1) cannot validly operate, consistently with s 92 of the Constitution, to prevent the plaintiff from disposing of its fish in the course of inter-State trade; but s 1(3) makes it impossible to hold that s 40B(1) is intended to have such an operation. … The section must therefore be construed … so as to leave untrammelled the freedom of trade and commerce among the States for which s 92 provides. So construed, it is plainly valid."

Notably, their Honours expressed that conclusion *before* rejecting[184] the respondents' argument that s 40B(1) was valid in its full operation because it was merely regulatory.

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182 (1951) 84 CLR 442.

183 (1951) 84 CLR 442 at 454.

184 (1951) 84 CLR 442 at 455.

222 In *Carter v The Potato Marketing Board*[185], the Court was called upon to decide whether s 15(3) of the *Primary Producers' Organisation and Marketing Act 1926* (Qld) – which imposed a penalty on any person who sold or delivered potatoes to, or bought or received any potatoes from, a person other than the Potato Marketing Board – had valid application to a transaction involving the appellants. This Court (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ) unanimously stated[186]:

> "The legislation contains a severability clause, and, unless the transaction to which the charge relates is itself one of inter-State commerce falling within the protection of s 92, the questions raised by the contentions for the appellants will depend upon the application of that clause with respect to sub-s (3). That is to say, it will depend upon the extent to which, having regard to the scope of the protection afforded by s 92, the severability clause validly may give an operation to the material part of sub-s (3) and upon the extent to which, as a matter of interpretation, it does so. …
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> That the appeal must depend upon the possibility of giving the provisions a severable or distributive application is apparent almost from a bare perusal of the provisions in question. *For, consistently with the decided cases, it would not be easy to deny that if the general language of sub-s (3) were given a literal application it would include transactions of inter-State commerce and interfere with the freedom of trade commerce and intercourse among the States*. On the other hand it is just as difficult to deny that if by appropriate words of restriction or exception or by a corresponding implication, the operation of sub-s (3) was confined to the domestic trade of the State and the possibility of interference with the freedom of inter-State commerce was excluded, it would be competent to the State to enact such a law." (emphasis added)

223 It may be, however, that the emphasised sentence of their Honours' judgment meant no more than that it was plain on the decided cases that, if s 15(3) were given its full literal scope, it would offend s 92. That is supported by their Honours' later statement[187]:

> "Certainly the language in which sub-s (3) is expressed, interpreted naturally, and without the imposition of any artificial restriction by

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185 (1951) 84 CLR 460.

186 (1951) 84 CLR 460 at 477.

187 (1951) 84 CLR 460 at 484.

> reference to constitutional limitations, extends to inter-State transactions upon which it cannot validly operate. To that extent it would be invalid."

Their Honours had earlier observed[188] that "[i]t is seldom, if ever, desirable to decide any question of constitutional validity *in abstracto* and independently of the facts" and concluded[189] that the transaction in respect of which the appellants had been charged did not fall within the protection of s 92. They thus disposed[190] of the appeal on the basis that s 15(3) could be given a severable and distributive application.

224 *Grannall v Marrickville Margarine Pty Ltd*[191] provides greater support for the idea of dealing with severability before validity. At issue in that case was whether s 22A(1)(b) of the *Dairy Industry Act 1915* (NSW) (which prohibited a person from manufacturing table margarine without a table margarine licence) was a statutory attempt to restrict the freedom of interstate commerce in margarine guaranteed by s 92 of the *Constitution*. Section 2(2) of the *Dairy Industry Act* was a standard form severability clause. Section 22C was an overriding provision enabling the Minister to grant a special permit for the manufacture or preparation of table margarine for export from Australia, and sub-s (2)(a) required the special permit to contain such conditions as the Minister thought necessary to ensure that none of the margarine manufactured thereunder was to be sold or distributed within the Commonwealth. Section 22C(3) made it an offence to breach any condition imposed by the special permit. Dixon CJ, McTiernan, Webb and Kitto JJ held that s 22A did not infringe s 92 of the *Constitution*. But in the course of reasoning to that conclusion, their Honours made[192] the following passing observations regarding severability:

> "One provision of the original Act forbids the exportation of margarine from New South Wales unless it is submitted first for examination, a certificate is obtained that the margarine has been prepared in accordance with the Act, and the package is branded as prescribed: s 21. Export from New South Wales necessarily includes delivery into another State and accordingly there may be some doubt as to the validity to that extent of this section. *But it is clearly severable; indeed probably it would be read*

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188 (1951) 84 CLR 460 at 478. See also *Chapman v Suttie* (1963) 110 CLR 321 at 325, 328-333 per Dixon CJ, dissenting in part; [1963] HCA 9.

189 (1951) 84 CLR 460 at 479.

190 (1951) 84 CLR 460 at 484, 489.

191 (1955) 93 CLR 55.

192 (1955) 93 CLR 55 at 73.

> *distributively as a result of the severability clause, if it were considered constitutionally incapable of applying to inter-State trade*. The section can have no bearing upon the validity of s 22A(1)(b)." (emphasis added)

225 The statement that s 21 was "clearly severable" conveys that it was considered not to be inappropriate to assess severability before, and independently of, the determination of validity. It may appear equivocal, inasmuch as their Honours then went on to observe that "probably it would be read distributively … *if* it were considered constitutionally incapable of applying to inter-State trade" (emphasis added). But their Honours then dealt[193] specifically with s 22C on the basis of severability before reaching a concluded view about its validity:

> "When, therefore, sub-s (3) of s 22C makes contravention of a condition an offence it purports to penalize, among other things, the sale from New South Wales into another State of a commodity which it assumes has been brought into existence. To this extent at all events s 22C may well be considered to infringe upon the freedom of inter-State trade established by s 92. … It is not difficult to suppose that under the doctrines affecting the severance of invalid from valid statutory provisions which it has been the object of 'severability clauses' to exclude and to reverse, the invalidity of part of the operation of the provisions in question … might have been regarded as infecting the whole of s 22C and a question might have existed as to the presumed dependence thereon of s 22A itself. But clauses of the description of s 2(2) were designed to prevent such a result … Even if it were considered that the whole of sub-s (2)(a) of s 22C fell because it could not extend to inter-State transactions and it were further considered that sub-s (1) could not survive the separation of sub-s (2)(a), no ground exists for discovering in the statute an affirmative intention that s 22A should have no operation unless s 22C proved valid and operative."

226 Fullagar J, writing separately, reasoned to similar effect. His Honour held[194] that it was not necessary to form any opinion as to the validity of s 22C as s 2(2) made it plain that the validity and operation of s 22A could not be affected by any vice which could be discovered in s 22C.

227 *Nominal Defendant v Dunstan*[195] is also pertinent although less compelling. It turned on the operation of certain provisions of the *Motor Vehicles (Third Party Insurance) Act 1942* (NSW). Section 92 was not a central

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193 (1955) 93 CLR 55 at 75-76.

194 (1955) 93 CLR 55 at 82.

195 (1963) 109 CLR 143.

issue. The Court (Dixon CJ, Taylor and Owen JJ) observed[196] in passing that, to the extent that s 7(1) of the Act might be considered to offend s 92 in its application to motor vehicles exclusively engaged in interstate trade, it could be read by virtue of s 3 of the Act to apply to all motor vehicles other than those exclusively engaged in interstate trade, commerce or intercourse.

228 By comparison, some of the clearest support in the s 92 cases for deciding this matter on the basis of the threshold question is in the observations of Barwick CJ, in dissent, in *Harper v Victoria*[197]. In that case, the plaintiff challenged provisions of the *Marketing of Primary Products Act 1958* (Vic) as a substantial impediment to his interstate trade in the importation and retail sale of eggs from outside of Victoria. The majority (McTiernan, Taylor, Menzies and Owen JJ) held that the impugned provisions did not infringe the freedom of interstate trade and commerce, and thus in effect that there was no need to consider any question of severability. Barwick CJ held that it was appropriate to decide the matter on the basis of severability without the determination of validity. His Honour reasoned thus[198]:

> "Where such a provision as s 3 of the *Acts Interpretation Act* [*1958* (Vic)] is available [now s 6 of the *Interpretation of Legislation Act*], and the statute can be given a distributive operation, its commands or prohibitions will then be held inapplicable to the person whose inter-State trade would thus be impeded or burdened. Of course, the question of validity or applicability will only be dealt with at the instance of a person with a sufficient interest in the matter; and, in my opinion, in general, need only be dealt with to the extent necessary to dispose of the matter as far as the law affects that person.
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> ...
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> I have confined my attention to the situation of the plaintiff and the particular interest which he has in the question of the invalidity or in that of the applicability of the Act. In consequence, I have no need in this case to consider the question whether the prohibition on sale by retail in s 41D has a direct as distinct from a consequential or remote operation upon the inter-State trade of an importer of eggs into Victoria who sells his eggs by wholesale. That question, which I do not regard as directly arising in this case, remains unresolved as far as I am concerned."

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196 (1963) 109 CLR 143 at 151-152.

197 (1966) 114 CLR 361.

198 (1966) 114 CLR 361 at 371-373.

229 Similarly, in *Buck v Bavone*[199] Stephen J (with whom Mason J[200] and Jacobs J[201] agreed) disposed[202] of a s 92 attack on s 12 of the *Potato Marketing Act 1948* (SA) by holding that, assuming without deciding that s 12 were a restriction on the freedom of interstate trade and commerce, it could be read down or severed. Stephen J considered[203] that there was much to be said for the view that "s 92 should be applied only for the protection of transactions actually existing which come within it and not to imaginary cases"[204], and stated[205]:

> "A law should not, in my view, be declared invalid when no interested party's interstate trade is shown to have been burdened by it and when there may never exist any trade so circumstanced as to be liable to be so burdened."

230 Taken as a whole, these cases support the idea that there are matters in which it is sufficient to dispose of an attack on the constitutional validity of a provision to conclude that, assuming without deciding that the impugned law would otherwise be invalid, it could be read down or severed in its operation in relation to the plaintiff and so be considered as valid to that extent. There is also this Court's statement in *Lambert v Weichelt*[206] that "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties". As the Attorney-General of the Commonwealth submitted, these considerations led this Court to adopt the approach in *Knight*[207] that, assuming without deciding that the provision there in suit would have otherwise offended the *Kable*[208] doctrine –

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199 (1976) 135 CLR 110.

200 (1976) 135 CLR 110 at 131.

201 (1976) 135 CLR 110 at 132.

202 (1976) 135 CLR 110 at 127, 130.

203 (1976) 135 CLR 110 at 125-126.

204 *Wilcox Mofflin* (1952) 85 CLR 488 at 520 per Dixon, McTiernan and Fullagar JJ.

205 (1976) 135 CLR 110 at 126.

206 (1954) 28 ALJ 282 at 283.

207 (2017) 261 CLR 306.

208 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24.

because it provided for the possibility of a judicial officer being appointed to a parole board that was statutorily bound to make a parole decision in a designated fashion – the provision could be read down to exclude judges from the board.

231 Despite the occasional utility of that sort of approach, however, the suggestion that the Clubb appeal should be resolved on that basis has little to commend it. As the matter stands, Mrs Clubb has been convicted of a criminal offence of contravening s 185D of the PHW Act by engaging in conduct of the kind described in para (b) of the definition of prohibited behaviour in s 185B(1). She was so convicted consequent upon the Magistrate's rejection of Mrs Clubb's contention that, insofar as s 185D proscribes conduct of the kind referred to in para (b) of the definition of prohibited behaviour, s 185D is invalid as an unjustified burden on the implied freedom of political communication. Following conviction, Mrs Clubb appealed against conviction to the Supreme Court of Victoria on grounds including that the Magistrate had erred in holding that, insofar as s 185D proscribes conduct of the kind referred to in para (b) of the definition of prohibited behaviour, it is not an unjustified burden on the implied freedom of political communication. The determination of that ground of appeal was thereafter removed into this Court pursuant to s 40 of the *Judiciary Act 1903* (Cth) as a cause or part of a cause involving the interpretation of the *Constitution*.

232 Contrary, therefore, to the submissions of the Attorney-General of the Commonwealth, the constitutional validity of s 185D insofar as it proscribes conduct of the kind referred to in para (b) of the definition of prohibited behaviour is not an academic or hypothetical question. If it were held that the proscription of that kind of conduct is an unjustified burden on political communication, and so an infringement of the implied freedom of political communication, it would follow that Mrs Clubb was wrongly convicted and that her conviction should be quashed. Alternatively, if it were held that the proscription in s 185D of that kind of conduct is not an unjustified burden on political communication, and so not an infringement of the implied freedom, then, subject to any other grounds of appeal yet to be considered by the Supreme Court of Victoria, the conviction would be affirmed. Either way, Mrs Clubb has a direct and immediate interest in the question of whether, insofar as s 185D proscribes conduct of the kind referred to in para (b) of the definition of prohibited behaviour, it is an unjustified burden on the freedom of political communication and thus an infringement of the implied freedom.

233 There are also a number of constructional problems in resolving the appeal on the basis that, assuming without deciding that the proscription in s 185D of the para (b) conduct were otherwise an infringement of the implied freedom of political communication, s 185D could be read down under s 6(1) of the *Interpretation of Legislation Act* to the extent necessary to avoid that result.

234 First, in the ordinary course of events it would not be appropriate to apply s 6(1) unless the Court has reached the view that, upon its natural and ordinary construction having regard to its context and purpose, the provision would amount to an unjustified restraint on the implied freedom of political communication. Otherwise, the exercise could result in the Court giving the provision a more limited reach than Parliament intended without there being any constitutional need to do so.

235 Secondly, it is doubtful that s 6(1) would apply to s 185D in its proscription of the para (b) conduct. Granted, as the Attorney-General of the Commonwealth submitted, provisions such as s 6(1) may permit a distributive construction of provisions that would not be possible under the ordinary rules of statutory construction. But s 6(1) cannot apply in the face of a "contrary intention"[209]; and a "contrary intention" for the purposes of severance provisions such as s 6(1) is an intention that the legislative enactment "have either a full and complete operation or none at all"[210]. Here, such an intention can be discerned. Although the concept of governmental or political communication has been stated in simple terms – a communication which could facilitate the making of a free and informed choice as an elector[211] – previous decisions of this Court[212]

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209 *Interpretation of Legislation Act*, s 4(1)(a).

210 *Cam & Sons* (1951) 84 CLR 442 at 454 per Dixon, Williams, Webb, Fullagar and Kitto JJ. See also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 per Dixon J; [1939] HCA 19; *Knight* (2017) 261 CLR 306 at 325 [35].

211 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; [1997] HCA 25. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 234 per McHugh J; [1992] HCA 45; *McCloy v New South Wales* (2015) 257 CLR 178 at 193-194 [2], 206 [42] per French CJ, Kiefel, Bell and Keane JJ, 228 [118] per Gageler J, 280 [303] per Gordon J; [2015] HCA 34.

212 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 123 per Mason CJ, Toohey and Gaudron JJ; [1994] HCA 46; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 329 per Brennan J; [1994] HCA 44; *Lange* (1997) 189 CLR 520 at 560; *Levy v Victoria* (1997) 189 CLR 579 at 594-595 per Brennan CJ, 613 per Toohey and Gummow JJ, 622-626 per McHugh J, 638 per Kirby J; [1997] HCA 31; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 281-282 [195]-[199] per Kirby J; [2001] HCA 63; *Coleman v Power* (2004) 220 CLR 1 at 30-31 [27]-[28] per Gleeson CJ, 45-46 [81]-[82] per McHugh J, 78 [197] per Gummow and Hayne JJ, 88-89 [229] per Kirby J; [2004] HCA 39; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 195-196 [27]-[30] per Gleeson CJ, 219 [94] per McHugh J, 274-275 [273]-[274] per Kirby J, 304-305 [355] per Heydon J; [2004] HCA 41; *APLA Ltd v Legal Services Commissioner*

(Footnote continues on next page)

show that determinations of whether a communication satisfies that description are fraught with difficulty and disagreement. Against that background, it can hardly be supposed that Parliament envisaged a police officer dealing with the immediacy of an abortion protest within 150 m of premises where abortions are provided making an informed decision as to whether the protest is or is not a governmental or political communication. Yet, in effect, that is what would be required if para (b) of the definition of prohibited behaviour were read down as excluding governmental or political communications. The police officer could not or at least should not arrest or charge a culprit without having reasonable grounds to do so[213] and that would require the police officer forming a view as to whether there were reasonable grounds to conclude that the communication was not a governmental or political communication.

236 Those concerns are reflected in the statement of French CJ in *International Finance Trust Co Ltd v New South Wales Crime Commission*[214]:

> "The court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity. There are two reasons for this. The first is that if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity. The second reason is that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished. Moreover, there is a real risk that,

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(NSW) (2005) 224 CLR 322 at 350-351 [27]-[28] per Gleeson CJ and Heydon J, 360-361 [63]-[67] per McHugh J, 440 [347] per Kirby J, 450-451 [379]-[380] per Hayne J, 477-478 [450] per Callinan J; [2005] HCA 44; *Wotton v Queensland* (2012) 246 CLR 1 at 15 [26]-[27] per French CJ, Gummow, Hayne, Crennan and Bell JJ, 21-22 [46]-[51] per Heydon J, 31 [79] per Kiefel J; [2012] HCA 2; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548-552 [18]-[30] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 572 [112] per Keane J; [2013] HCA 58.

213 *Crimes Act 1958* (Vic), s 458. On the meaning of "reasonable grounds", see *George v Rockett* (1990) 170 CLR 104; [1990] HCA 26; *Prior v Mole* (2017) 261 CLR 265 at 270 [4] per Kiefel CJ and Bell J, 277 [24] per Gageler J, 292 [73] per Nettle J, 298 [98]-[100] per Gordon J; [2017] HCA 10.

214 (2009) 240 CLR 319 at 349 [42]; [2009] HCA 49.

> notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning." (footnote omitted)

237 There being doubt as to whether s 185D in its proscription of the para (b) conduct is severable, it would not be appropriate for this Court to proceed on the basis that, because Mrs Clubb has not demonstrated that her conduct was a political communication, it is unnecessary to decide on the constitutional validity of s 185D.

238 There are also pragmatic reasons why this Court should determine whether the proscription in s 185D of para (b) conduct is an unjustified burden on the freedom of political communication. As will be recalled, that issue of law was raised before the Magistrate for determination as a preliminary question. The Crown did not then contend that s 185D could or should be read down as excluding communications on government or political matters; it was content for the matter to be litigated on an all-or-nothing basis. In deciding the issue of law on that basis against Mrs Clubb, the Magistrate held that abortion protests as described in the affidavit evidence (for the purpose of "constitutional fact finding") "could *never* be described" as political because abortion is "a medical procedure legally accessible by women" (emphasis added). Hence, on the law as determined by the Magistrate, whether Mrs Clubb's conduct amounted to a communication on a government or political matter could not thereafter be treated at the hearing as an issue of (adjudicative) fact, and evidence adduced by Mrs Clubb directed only to that issue would have been inadmissible as irrelevant.

239 Had the Magistrate determined that s 185D on its face impermissibly burdened the implied freedom and so read the provision as limited to communications other than on government or political matters, her Honour would have had occasion then to decide the non-trivial[215] question of whether the effect of that limitation was to introduce an element of the offence, which the Crown would be bound to prove in all cases, or merely an exception within s 72 of the *Criminal Procedure Act 2009* (Vic), as to which no proof would be necessary unless raised by the evidence[216]. As the matter proceeded, however, no question as to onus of proof arose, because the preliminary determination shut out proof on that issue.

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215 *Allied Interstate (Qld) Pty Ltd v Barnes* (1968) 118 CLR 581 at 593-594 per Windeyer J; [1968] HCA 76. See and compare *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 258-259 per Dawson, Toohey and Gaudron JJ; [1990] HCA 41.

216 See generally Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 909-910 §295; Fisse, *Howard's Criminal Law*, 5th ed (1990) at 19-22.

240 As a result of this procedural history, no finding has yet been made as to whether Mrs Clubb's communication is on a government or political matter. Thus, if this Court were now to decide the preliminary question by assuming without deciding that the prohibition is limited to communications other than on government or political matters, the matter would need to be remitted to the Magistrate for rehearing. At that point, it would be open for the first time to Mrs Clubb, and indeed the Crown, to lead evidence bearing upon, and to address submissions to, whether the charged conduct amounted to a governmental or political communication. And at that point it would be necessary for the Magistrate to decide the very point proposed to be assumed (viz, whether the law *would* offend the *Constitution* and so requires reading down).

241 Moreover, if the Magistrate persisted in the view that the prohibition is ex facie constitutional, or alternatively accepted that it should be read down but held that the charged conduct was not a governmental or political communication, Mrs Clubb would then be entitled to appeal to the Supreme Court of Victoria on the questions of law so determined[217]; and, if unsuccessful, to apply for leave to appeal to the Court of Appeal[218]; and, if such leave were granted but the appeal dismissed, to apply for special leave to appeal to this Court.

242 In those circumstances, there would be a practical injustice and little practical advantage in this Court disposing of the matter on the basis of the threshold question[219]. It is preferable that this Court decide now whether, upon its proper construction, the proscription in s 185D of conduct of the kind described in para (b) of the definition of prohibited behaviour infringes the implied freedom of political communication.

Facts and legislative provisions

243 The facts of the Clubb appeal and the relevant legislative provisions are set out in the judgment of Kiefel CJ, Bell and Keane JJ and need not be rehearsed. But it is necessary to say something more at this stage of the elements of the offence created by s 185D of the PHW Act comprised of engaging in conduct of the kind specified in para (b) of the definition of prohibited behaviour.

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217 *Criminal Procedure Act 2009* (Vic), s 272(1); *Supreme Court (Criminal Procedure) Rules 2017* (Vic), r 3A.02.

218 *Supreme Court Act 1986* (Vic), ss 10(1)(a), 14A.

219 See and compare *Thomas v Mowbray* (2007) 233 CLR 307 at 515-516 [624] per Heydon J; [2007] HCA 33.

244 The offence is a regulatory statutory offence and, consequently, although s 185D does not specify a mental element, it may be taken that it requires a general intent to do the act charged[220]. Accordingly, in any prosecution for contravention of s 185D comprised of conduct of the kind specified in para (b) of the definition of prohibited behaviour, it would be incumbent upon the Crown to prove both that the accused did, and that the accused intended to, communicate at a point within a 150 m radius of premises where abortions are provided in relation to abortions in a manner which would be able to be seen or heard by a person accessing, attempting to access or leaving the premises.

245 It would be open to the Crown to establish that general intent by proving that the accused believed that he or she was within a radius of 150 m of premises at which abortions are provided, and that the accused there communicated regarding abortions by means which would be capable of being seen or heard by a person accessing, attempting to access or leaving the premises. It would not be necessary for the Crown to prove that a person accessing, attempting to access or leaving the premises in fact saw or heard the communication. Parliament's use of the words "able to be seen or heard", as opposed to words such as "is seen or heard", and the problems of proof which, as will be seen, Parliament noticed the Crown would face if proof of the offence required calling a person who had heard or seen the communication[221], imply a statutory intention that "able to be seen or heard" is an objective conception tantamount to "would be capable of being seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided"[222]. Nor would it be necessary for the Crown to prove that the accused believed that the communication would be capable of being seen or heard by a person accessing, attempting to access or leaving the premises. But the accused would be entitled to raise the possibility that he or she had an honest and reasonable belief that the communication was incapable of being seen or heard by a person accessing, attempting to access or leaving the premises; in which event the Crown would be left with the persuasive if not evidential burden of excluding that possibility beyond reasonable doubt[223].

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220 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528-529 per Gibbs CJ (Mason J agreeing at 546), 566-567 per Brennan J; [1985] HCA 43.

221 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3973.

222 See also Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3976.

223 *He Kaw Teh* (1985) 157 CLR 523 at 534-535 per Gibbs CJ, 558-559 per Wilson J, 573 per Brennan J, 592-593 per Dawson J.

246 By contrast to the requirement for proof of a general intent to commit the act charged, there is no presumption in relation to regulatory statutory offences that intent to cause specified consequences is an element of the offence charged; and, in the case of a contravention of s 185D comprised of prohibited behaviour of the kind described in para (b) of the definition, there is no reason to discern a statutory intention that an accused must intend that a charged communication be reasonably likely to cause distress or anxiety. To the contrary, the objectivity of the expression "reasonably likely to cause"[224] and the difficulty which Parliament noticed the Crown would face in proving a specific intent to communicate in the stipulated manner bespeak a conclusion that Parliament intended it to be enough for the Crown to establish that the conduct would be reasonably likely to cause distress or anxiety to a person accessing, attempting to access or leaving the premises whether or not the accused intended it to have that effect[225]. Once again, however, it would be open to an accused to raise the possibility that he or she had an honest and reasonable belief that the communication would not be reasonably likely to cause distress or anxiety; in which event the Crown would be left with the persuasive if not evidential burden of excluding that possibility beyond reasonable doubt[226].

Burden on the implied freedom

247 The constitutional requirement of freedom of political communication is a necessary implication arising from ss 7, 24, 64 and 128 and related sections of the *Constitution* and thus extends only so far as is required to give effect to those sections[227]. It arises because it is necessary in order to give efficacy to those provisions that the people be free to communicate concerning government and political matters which could affect their choices in federal and State elections and constitutional referenda or that could throw light on the performance of ministers of state or the executive branch of government[228]. Unlike the United States First Amendment right of free speech, the implied freedom is not a

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224 cf the specific intent required by para (d): "intentionally recording by any means, without reasonable excuse".

225 See and compare *He Kaw Teh* (1985) 157 CLR 523 at 595 per Dawson J.

226 *He Kaw Teh* (1985) 157 CLR 523 at 534-535 per Gibbs CJ, 558-559 per Wilson J, 573 per Brennan J, 592-593 per Dawson J.

227 *Lange* (1997) 189 CLR 520 at 567.

228 *Lange* (1997) 189 CLR 520 at 571; *Levy* (1997) 189 CLR 579 at 622 per McHugh J; *Unions NSW* (2013) 252 CLR 530 at 550-551 [25]-[26] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 582 [152]-[154] per Keane J.

personal right of free speech but a constraint on legislative power[229]. The question of whether a law imposes a burden on the implied freedom is thus to be determined according to the law's effect on political communication as a whole rather than on an individual or group's preferred mode of communication[230]. Where a restriction is limited to a preferred mode of communication, it will not infringe the implied freedom unless it significantly compromises the ability of affected persons to engage in political communication and, even then, only if and because it has a significant effect on political communication as a whole.

248 Many of Mrs Clubb's submissions proceeded from an unstated premise that the implied freedom of political communication operates in similar fashion to the First Amendment right of free speech and that, because some United States authority suggests that conduct of the kind in which Mrs Clubb engaged would be protected by the First Amendment, it should be concluded that her conduct was protected by the implied freedom of political communication. As will appear, once Mrs Clubb's arguments are stripped of that misconception, they must be rejected.

249 The content of the freedom to discuss government and political matters is to be ascertained according to what may be for the common convenience and welfare of society from time to time, and hence its ascertainment requires an examination of changing circumstances[231]. The range of matters which may qualify as government and political matters is broad[232] and, in one sense, it is enough to say of a matter that it is political if it is a matter of political controversy[233]. But bearing in mind the restricted nature of the implied freedom, there is a danger that the idea of it being enough that a matter is one of political controversy can be pressed too far. It does not follow from the fact that a subject matter is a matter of political controversy that all communications regarding that

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229 *Unions NSW* (2013) 252 CLR 530 at 554 [36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

230 *APLA* (2005) 224 CLR 322 at 451 [381] per Hayne J; *Wotton* (2012) 246 CLR 1 at 31 [80] per Kiefel J; *Unions NSW* (2013) 252 CLR 530 at 553-554 [35]-[36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 574 [119] per Keane J; *Brown v Tasmania* (2017) 261 CLR 328 at 360 [90] per Kiefel CJ, Bell and Keane JJ; [2017] HCA 43.

231 *Lange* (1997) 189 CLR 520 at 565-566.

232 *Theophanous* (1994) 182 CLR 104 at 124 per Mason CJ, Toohey and Gaudron JJ; *Hogan v Hinch* (2011) 243 CLR 506 at 543-544 [49] per French CJ; [2011] HCA 4.

233 *Monis v The Queen* (2013) 249 CLR 92 at 177 [229] per Hayne J; [2013] HCA 4.

subject matter are political communications[234]. More specifically, although abortion is a subject matter of political controversy, it does not follow that all communications about abortion are political. It may be accepted that a communication as to whether abortion law should be changed to prohibit abortion or restrict the circumstances in which it is lawful is a political communication: it is apt to facilitate the making of a free and informed choice as an elector. By contrast, a communication between a woman and her doctor as to the possible physiological and psychological sequelae of the woman undergoing an abortion is an apolitical, personal communication.

250 A law is taken to impose an effective burden on the implied freedom of political communication if it at all prohibits political communication unless perhaps the prohibition or limitation is so slight as to have no real effect[235]. By proscribing prohibited behaviour within a 150 m radius of premises at which abortions are provided, s 185D prevents persons engaging in political communications about abortion within that area. To that extent, s 185D imposes a restriction on the implied freedom of political communication. But inasmuch as s 185D leaves persons free within the law to say and do whatever they wish about abortion at any point more than 150 m from premises at which abortions are provided, it is not apparent that the proscription of prohibited behaviour within that area has any real effect on the implied freedom.

251 Unlike some other cases in which this Court has been concerned with time, manner and place restrictions of political communication[236], there is no evidence here that confining political communications about abortion to a distance of not less than 150 m from premises at which abortions are provided imposes an appreciable restriction on the total number of opportunities for, or effectiveness of, political communication about abortion. In particular, there is no evidence here or reason to suppose that the proscription of prohibited behaviour within the 150 m radius of abortion premises deprives protesters of the ability to generate the type of attention necessary or more likely than other forms

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234 *APLA* (2005) 224 CLR 322 at 449-451 [377]-[379] per Hayne J.

235 *Monis* (2013) 249 CLR 92 at 142 [108] per Hayne J, 212-213 [343] per Crennan, Kiefel and Bell JJ; *Unions NSW* (2013) 252 CLR 530 at 555 [40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 574 [119] per Keane J; *Tajjour* (2014) 254 CLR 508 at 569-570 [105]-[107] per Crennan, Kiefel and Bell JJ; *McCloy* (2015) 257 CLR 178 at 230-231 [126] per Gageler J.

236 See, eg, *Australian Capital Television* (1992) 177 CLR 106; *Levy* (1997) 189 CLR 579; *Brown* (2017) 261 CLR 328.

of communication to sway hearts and minds as to the need for abortion law reform[237].

252 What the evidence does reveal is that the proscription of prohibited behaviour within the 150 m radius significantly compromises the ability of persons like Mrs Clubb to accost and harangue women and other persons as they attempt to access premises at which abortions are provided, and thereby to deter them from aborting their pregnancies or deter persons who support and treat them from aiding them to do so. Accordingly, it may be inferred that the effect of s 185D is significantly to reduce the ability of persons like Mrs Clubb to influence particular women to forbear from aborting their pregnancies. But as has been observed, a woman's decision whether or not to abort her pregnancy is not a political decision. It is an apolitical, personal decision informed by medical considerations, personal circumstances and personal religious and ethical beliefs, qualitatively different from a political decision as to whether abortion law should be amended[238]. For the same reason, a communication directed to persuading a woman as to whether or not to abort her pregnancy is not a political communication but a communication concerning an entirely personal matter. It stands in contrast to what Hayne J described in *Monis v The Queen* as a single governmental or political communication embodying personal attacks on individuals[239].

253 Admittedly, the possibility cannot be excluded that deterring a woman from aborting her pregnancy could sooner or later result in her concluding that abortion should be outlawed, and, in that sense, affect her political choices. But in the scheme of things, the chance of a Damascene conversion of those proportions is surely very limited, and, in any event, such effect on the implied freedom of political communication as the proscription of prohibited behaviour might thus engender would be entirely adventitious. As authority in this and other contexts shows, it would not be an effective burden on the implied freedom[240].

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237 cf *Australian Capital Television* (1992) 177 CLR 106 at 145-146 per Mason CJ; *Levy* (1997) 189 CLR 579 at 613-614 per Toohey and Gummow JJ, 623-625 per McHugh J; *Brown* (2017) 261 CLR 328 at 400 [240], 407-408 [258] per Nettle J.

238 *Cattanach v Melchior* (2003) 215 CLR 1 at 80 [221] per Hayne J; [2003] HCA 38.

239 (2013) 249 CLR 92 at 177 [229].

240 *Tajjour* (2014) 254 CLR 508 at 582 [155]-[156] per Gageler J, 604 [234] per Keane J. See also *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 268 [46] per French CJ, Gummow, Hayne, Crennan and Bell JJ; [2012] HCA 12.

254 Apart from authority, there might be something to be said for the view that s 185D does not impose any effective burden on the implied freedom of political communication. Previous decisions of this Court, however, have established that the test of whether a law imposes an effective burden on the implied freedom is qualitative, not quantitative, and that the existence of a burden is to be assessed by reference to the terms, operation and effect, both legal and practical, of the law in question[241]. As Hayne J observed[242] in *Monis*:

> "submissions about 'little' burdens are contrary to and seek to discard the established and unchallenged doctrine of the Court. They do so by seeking to reformulate the accepted boundaries of the freedom, within which the freedom is absolute. Those boundaries are passed only when the impugned law is found to be reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident. By these submissions the first respondent and the interveners sought to reset the boundaries to some quantitative measure. By this means the constitutional freedom would be subordinated to small and creeping legislative intrusions until some point where it could be said that there are so few avenues of communication left that the last and incremental burden is no longer to be called a 'little' burden. This is not and cannot be right."

255 In terms, s 185D coupled with para (b) of the definition of prohibited behaviour proscribes communicating by any means in relation to abortions within a radius of 150 m of premises at which abortions are provided in a manner that is able to be seen or heard by persons accessing, attempting to access or leaving the premises and is reasonably likely to cause distress or anxiety. In operation, given that most forms of political protest about abortion conducted within 150 m of premises at which abortions are provided would likely be seen or heard by persons accessing, attempting to access or leaving the premises, and, as has been observed, would likely cause appreciable distress or anxiety to a significant proportion of them, the practical effect of the provision is all but to prohibit political protest about abortions within the 150 m radius. Qualitatively, it must be accepted that that is significant, even if it is quantitatively insignificant.

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241 *Monis* (2013) 249 CLR 92 at 145-146 [118]-[122], 160-161 [173]-[174] per Hayne J; *Unions NSW* (2013) 252 CLR 530 at 555 [40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *Tajjour* (2014) 254 CLR 508 at 578 [145] per Gageler J; *Brown* (2017) 261 CLR 328 at 382-383 [180] per Gageler J, 398-399 [237] per Nettle J, 431 [316] per Gordon J.

242 (2013) 249 CLR 92 at 145 [120].

Reasonably appropriate and adapted to serve a legitimate purpose

256 The question then is whether the law is justified as reasonably appropriate and adapted to the achievement of a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*[243]. That entails the two-step inquiry adumbrated in *Lange v Australian Broadcasting Corporation*[244], as recently restated in *Brown v Tasmania*[245], as to whether the law is for a legitimate purpose consistent with the system of representative and responsible government and, if so, whether the law is appropriate and adapted to the achievement of that purpose.

Legitimate purpose

257 As the plurality emphasised[246] in *Brown*, it is important in ascertaining the purpose of an impugned law not to confuse its purpose with its effect. Generally speaking, the identification of the purpose of an impugned law is to be arrived at by ordinary processes of statutory interpretation[247] and therefore according to the text of the statute considered in context, informed by the mischief to which it is directed and having regard to relevant extrinsic materials[248]. If the purpose of the law thus presents as one of preventing particular kinds of conduct, the fact that the law may have the effect of preventing conduct more generally is ordinarily to be regarded as immaterial.

258 As the law now stands in Victoria, abortion is a lawful medical procedure which women are entitled to undergo in accordance with medical advice as they may choose is appropriate for them. As is apparent from the terms of s 185A of

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243 *Lange* (1997) 189 CLR 520 at 561, 567-568.

244 (1997) 189 CLR 520. See *McCloy* (2015) 257 CLR 178 at 193-194 [2] per French CJ, Kiefel, Bell and Keane JJ.

245 (2017) 261 CLR 328 at 363-364 [104] per Kiefel CJ, Bell and Keane JJ, 375-376 [155]-[156] per Gageler J, 416 [277] per Nettle J, 478 [481] per Gordon J.

246 (2017) 261 CLR 328 at 362-363 [100] per Kiefel CJ, Bell and Keane JJ.

247 *Unions NSW* (2013) 252 CLR 530 at 557 [50] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

248 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2; *McCloy* (2015) 257 CLR 178 at 232 [132] per Gageler J; *Brown* (2017) 261 CLR 328 at 392 [209] per Gageler J.

the PHW Act, and is confirmed[249] in the extrinsic materials, the purpose of the proscription of prohibited behaviour is to protect the safety and wellbeing of women, support persons, and others such as staff, as they access premises at which abortions are provided. That is a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*. Just as persons lawfully going about their commercial business are entitled to get on with it unimpeded by the unwelcome, disruptive antics of insistent protesters[250], women seeking an abortion and those involved in assisting or supporting them are entitled to do so safely, privately and with dignity, without haranguing or molestation. The protection of the safety, wellbeing, privacy and dignity of the people of Victoria is an essential aspect of the peace, order and good government of the State of Victoria and so a legitimate concern of any elected State government. A legislative purpose of securing its people that entitlement is thus consistent with the system of representative and responsible government mandated by the *Constitution*.

259 Counsel for Mrs Clubb contended that the protection of dignity as such is not a legitimate purpose consistent with the system of representative and responsible government because all political speech has the potential to or does affect the dignity of at least some others. So to contend misconceives the nature of the implied freedom. It is a freedom to communicate ideas regarding matters of political controversy to persons who are willing to listen. It is not a licence to accost persons with ideas which they do not wish to hear[251], still less to harangue vulnerable persons entering or leaving a medical establishment for the intensely personal, private purpose of seeking lawful medical advice and assistance. A law which has the purpose of protecting and vindicating "the legitimate claims of individuals to live peacefully and with dignity", as is the case here, is consistent with the implied freedom[252].

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249 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3972-3973, 3975.

250 *Brown* (2017) 261 CLR 328 at 414-415 [275] per Nettle J.

251 *Brown* (2017) 261 CLR 328 at 415 [275] per Nettle J.

252 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 77 per Deane and Toohey JJ; [1992] HCA 46; *Australian Capital Television* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ; *Theophanous* (1994) 182 CLR 104 at 178-179 per Deane J. See also *Levy* (1997) 189 CLR 579 at 608-609 per Dawson J. See and compare *Monis* (2013) 249 CLR 92 at 182-183 [247] per Heydon J.

Appropriate and adapted

"Insubstantial burden"

260 The Attorney-General for Victoria argued that where, as here, a law imposes an "insubstantial burden" on the implied freedom of political communication and can be seen as rationally connected to the achievement of a compelling and legitimate purpose, the law should be held to be reasonably appropriate and adapted to the achievement of that purpose, and therefore valid, simply on the basis that it falls within the realm of matters in which it is open to Parliament to make a selection of means for the achievement of a compelling, legitimate purpose without being "second-guessed" by the court's undertaking of any more detailed analysis of the law's appropriateness and adaptedness.

261 There are a number of problems with that submission. First, it is not the law that the size of the burden which a law imposes on the implied freedom is determinative of whether the law imposes an unjustified burden on the implied freedom[253]. The predominance given to the size of the burden sits uneasily with existing authority.

262 Secondly, the submission is conclusory. It asserts that the purpose of the law is compelling – which presumably means that its purpose should be regarded as more compelling than at least some other purposes – without revealing how or why it should be so regarded.

263 Thirdly, in effect the submission invokes European human rights jurisprudential conceptions of margin of legislative respect or tolerance[254]. Those ideas have been rejected in relation to the implied freedom[255]. The question here is whether the means which Parliament has chosen are appropriate and adapted to the achievement of a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*. The extent of a burden may feature in the assessment of the appropriateness and

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253 *Monis* (2013) 249 CLR 92 at 146-147 [124] per Hayne J.

254 See *Australian Capital Television* (1992) 177 CLR 106 at 159 per Brennan J; *Cunliffe* (1994) 182 CLR 272 at 325 per Brennan J. See generally Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002).

255 *Unions NSW* (2013) 252 CLR 530 at 553 [34] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *McCloy* (2015) 257 CLR 178 at 220 [92] per Gageler J; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 124 [304] per Gordon J; [2016] HCA 36.

adaptedness of the means chosen[256]. But where, as in this case[257], a party seeking to impugn the validity of a law presents what she submits are obvious and compelling alternatives, it is not open to determine definitively that the law is appropriate and adapted to the achievement of a legitimate purpose until and unless those alternatives have been excluded and a conclusion reached that, in view of the legitimacy of purpose and degree of burden, the law does not go beyond what could reasonably be required for the achievement of that purpose.

Justification "calibrated" to burden imposed

264 The submissions of the Attorney-General of the Commonwealth were similar. He contended that where, as here, an impugned law imposes but a "slight" degree of burden on the implied freedom, the appropriateness and adaptedness of it may be assessed according to the adage that the degree of justification required for a law which infringes the implied freedom is to be "calibrated" according to the degree of burden, and therefore that the requisite degree of justification is "slight". The Attorney-General added that the "calibrating factors" which here support that conclusion are that the impugned law in terms applies equally to both the pro-abortion and anti-abortion sides of the debate and that the impugned law is a time, manner and place restriction as opposed to a restriction directed to particular persons or particular political content; although, as the Attorney-General accepted, the latter consideration is subject to the qualification that a time, manner and place restriction may require a higher degree of justification where the restricted time, manner and place of political communication is shown to be an especially important part of one or the other side's or a person's communicative capacity.

265 Those contentions face similar difficulties to the submissions of the Attorney-General for Victoria. The Commonwealth's proposed approach does not regard the supposed "slightness" of the burden as the predominant factor in assessing the validity of the law, and to that extent it is more consistent with the established and unchallenged doctrine of the Court as to the accepted boundaries of the freedom within which the implied freedom is absolute[258]. Like the Victorian Attorney-General's submissions, however, the Commonwealth's contentions are conclusory. They offer no guidance as to what absolute or relative degree of burden is to be regarded as so "slight" as to make it appropriate to prefer the suggested process of a "calibration" to a more thorough assessment of appropriateness and adaptedness. Nor do they provide any justification for abstaining from a necessity analysis where, as here, the party seeking to impugn

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256 *Brown* (2017) 261 CLR 328 at 369 [128] per Kiefel CJ, Bell and Keane JJ.

257 See [278] and [284] below.

258 See [261] above.

the validity of the law has presented what she submits are obvious and compelling alternatives. Further, by focussing on calibrating factors, like a non-discriminatory burden affecting both sides of the debate equally, and the impugned law imposing a time, manner and place restriction, they substitute for principles of analysis capable of general application facts which in some contexts may but in others should not lead to the conclusion that an impugned law is appropriate and adapted to the achievement of a legitimate purpose. For example, as the Attorney-General of the Commonwealth acknowledged, a law which, in terms, applies equally to both sides of the debate may, in some circumstances, restrict the capacity of one side of the debate more severely than the other or restrict one point of view more severely than most. Where that is so, it will be of little consequence that the law in terms applies equally to both or all sides of the debate. The question will be whether the discriminatory effect of the impugned law can be justified as reasonably appropriate and adapted to a legitimate purpose. Similarly, it is of limited assistance to ask whether a restriction is limited to a time, manner and place without also inquiring whether it affects an especially significant means of communication, and then, if it does, whether it can be justified according to established criteria.

Utility of proportionality testing

266 Consistently with the plurality's adoption[259] of three-part proportionality testing in *McCloy v New South Wales*, and the acceptance[260] by a majority in *Brown* that three-part proportionality testing can be of assistance in the determination of whether a law is appropriate and adapted to serving a legitimate purpose consistent with the system of representative and responsible government established by the *Constitution*, I adhere to the view, which I expressed[261] in *Brown*, that three-part proportionality testing comprised of the tests of suitability, necessity and adequacy in balance affords an appropriate method of assessing whether a law is reasonably appropriate and adapted to serving a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*. But with the benefit of reading in draft what the plurality has written in this matter, it is apparent that what I wrote[262] in *Brown* concerning the content of the necessity test requires some modification. As it now appears to me, in cases in which three-part proportionality testing is applied its application should proceed in accordance with the following criteria:

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259 (2015) 257 CLR 178 at 194-195 [2]-[3] per French CJ, Kiefel, Bell and Keane JJ.

260 (2017) 261 CLR 328 at 368-370 [123]-[131] per Kiefel CJ, Bell and Keane JJ, 416-417 [278]-[280] per Nettle J.

261 (2017) 261 CLR 328 at 416-417 [278]-[280] per Nettle J.

262 (2017) 261 CLR 328 at 418-419 [282].

(1) A law is reasonably appropriate and adapted to achieving a legitimate end consistent with the system of representative and responsible government if it is suitable, necessary and adequate in its balance[263].

(2) A law is suitable if it exhibits a rational connection to the purpose of the law and a law may be seen to have a rational connection to its purpose if the means for which the law provides are capable of realising the law's purpose[264].

(3) Up to a point, views may reasonably differ as to whether a law which burdens the implied freedom of political communication is necessary for the achievement of a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*. Within that range, it is for Parliament to decide what is necessary for the achievement of the purpose. It is only when and if Parliament's selection lies beyond the range of what could reasonably be regarded as necessary that the law will be adjudged as unnecessary. One circumstance, among others, in which that may appear to be the case is where a party seeking to impugn the law can point to an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom.

(4) A law is adequate in its balance if it presents as suitable and necessary in the senses described unless its effect upon the implied freedom is grossly disproportionate[265] to or goes far beyond[266] what can reasonably be conceived of as justified in the pursuit of the law's purpose.

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263 *McCloy* (2015) 257 CLR 178 at 193-195 [2], 217 [79] per French CJ, Kiefel, Bell and Keane JJ; *Brown* (2017) 261 CLR 328 at 368 [123] per Kiefel CJ, Bell and Keane JJ, 416-417 [278]-[280] per Nettle J.

264 *Tajjour* (2014) 254 CLR 508 at 563 [82] per Hayne J; *McCloy* (2015) 257 CLR 178 at 217 [80] per French CJ, Kiefel, Bell and Keane JJ.

265 *Davis v The Commonwealth* (1988) 166 CLR 79 at 99-100 per Mason CJ, Deane and Gaudron JJ (Wilson and Dawson JJ agreeing at 101); [1988] HCA 63.

266 *Nationwide News* (1992) 177 CLR 1 at 78 per Deane and Toohey JJ, 101-102 per McHugh J; *Cunliffe* (1994) 182 CLR 272 at 324 per Brennan J. See and compare *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 39-40 [58]-[59] per French CJ; [2013] HCA 3.

267 In *Brown*, I confined[267] the test of necessity to the determination of whether there are such obvious and compelling alternatives of significantly lesser burden on the implied freedom of political communication as to imply that the impugned law was enacted for an ulterior purpose inconsistent with the constitutionally prescribed system of representative and responsible government[268]. I did so because the Court has recognised that what is necessary to achieve a given legislative purpose must be, to a large extent, within the purview of Parliament and, therefore, that the ascertainment of what is reasonably appropriate and adapted to a legitimate purpose is not a prescription to engage in the assessment of the relative merits of competing legislative models[269]. To engage in such an exercise would risk passing beyond the border of judicial power into the province of the legislature[270]. I was also concerned that there is a degree of epistemic uncertainty involved in deciding whether an alternative measure would achieve the same objective as an impugned law while imposing a lesser burden on the implied freedom[271]. I concluded that it was appropriate to confine the necessity test in the manner I did as a means of minimising the risk of the Court exceeding its constitutional competence and of limiting the epistemic uncertainty of assessing the ability of alternatives to achieve the same result as an impugned law with lesser burden on the implied freedom than the impugned law.

268 On reflection, I accept that to frame the test in the terms I did was too stringent. In addition to cases of obvious and compelling alternatives indicative of an ulterior purpose, it is conceivable that there may be cases falling short of ulterior purpose where an obvious and compelling alternative would result in such a lesser degree of burden on the implied freedom as to show that the

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267 (2017) 261 CLR 328 at 418-419 [282].

268 See and compare *Cunliffe* (1994) 182 CLR 272 at 388 per Gaudron J. See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 253-254 per Fullagar J; [1951] HCA 5; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 260-261 per Deane J; [1983] HCA 21; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472-473 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 1.

269 *Maloney v The Queen* (2013) 252 CLR 168 at 183-185 [19]-[21] per French CJ; [2013] HCA 28.

270 *Murphy* (2016) 261 CLR 28 at 53 [39] per French CJ and Bell J.

271 See *Murphy* (2016) 261 CLR 28 at 110-111 [251]-[254] per Nettle J. See also Bilchitz, "Necessity and Proportionality: Towards A Balanced Approach?", in Lazarus, McCrudden and Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (2014) 41.

impugned law is not necessary in the relevant sense. There are also cases where the circumstances and the state of the evidence, or lack of it, leave the court unpersuaded that the degree of burden which the impugned law imposes on the implied freedom is necessary for the achievement of the legitimate purpose for which the law was enacted. *Australian Capital Television Pty Ltd v The Commonwealth*[272] and, more recently, *Unions NSW v New South Wales*[273] are examples. The test of necessity must allow for cases of those kinds and conceivably for other possibilities, and so needs to be more flexible than I allowed in *Brown*.

269 Even so, it remains that the test of necessity is not a prescription to engage in the assessment of the relative merits of competing legislative models. Legislation should not be adjudged unnecessary unless it is clear that Parliament's selection lies beyond the range of what could reasonably be regarded as necessary to achieve the legitimate purpose for which the law was enacted or unless the circumstances and state of evidence are such as to afford the court an insufficient basis to conclude whether the degree of burden is necessary.

270 As to adequacy in balance, I remain of the view expressed in *Brown*[274] that the test of adequacy should be one of an outer limit beyond which the extent of the burden on the implied freedom of political communication presents as manifestly excessive by comparison to the demands of legitimate purpose. That necessitates the court making an assessment of the importance of the purpose of the law as against the extent of the burden which it imposes on the implied freedom of political communication[275]; and in making that assessment it is necessary to keep in mind that it is principally for Parliament to decide whether a legitimate purpose is of sufficient importance to warrant the extent of its impingement on the implied freedom. As has been observed, the law is yet to yield a principled manner of determining the importance of a legitimate purpose[276], or how its importance should be weighted relative to burden[277]. A test of a manifestly excessive burden by comparison to the demands of legitimate

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272 (1992) 177 CLR 106 at 145 per Mason CJ, 239-240 per McHugh J.

273 (2019) 93 ALJR 166; 363 ALR 1; [2019] HCA 1.

274 (2017) 261 CLR 328 at 422-423 [290].

275 *McCloy* (2015) 257 CLR 178 at 219 [87] per French CJ, Kiefel, Bell and Keane JJ.

276 *Brown* (2017) 261 CLR 328 at 465-466 [432] per Gordon J.

277 *McCloy* (2015) 257 CLR 178 at 236-237 [146] per Gageler J; *Brown* (2017) 261 CLR 328 at 377 [160] per Gageler J.

purpose recognises and makes due allowance for the inherent difficulties of the process.

271 I recognise that the assessment of adequacy in balance has been criticised as the weighing of incommensurables[278]. But it is to be observed that the need to weigh incommensurables is hardly unprecedented in the law, and the process is not inutile. In one way or another, courts are not infrequently called upon to weigh competing values that could never plausibly be reduced to any single metric of evaluation – for example, in the identification of a common law duty of care[279] or in the sentencing of a criminal offender[280]. And despite the imprecision of those processes, they are the best available means of fulfilling essential functions. Conceptually, the weighing of the importance of the purpose of a law against its impingement upon the implied freedom of political communication is no different.

272 A court may be assisted in its assessment of adequacy in balance by reference to principles of the common law[281]. Several of those principles are the product of or reflected in competition between freedom of expression and other personal and social interests, including reputation[282], privacy[283], and the avoidance of psychological injury[284]. Where the protection of such an interest

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278 *Brown* (2017) 261 CLR 328 at 377 [160] per Gageler J. See also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 479 [110] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ; [2008] HCA 11.

279 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 597-598 [149] per Gummow and Hayne JJ; [2002] HCA 54; *New South Wales v Lepore* (2003) 212 CLR 511 at 587-588 [219]-[221] per Gummow and Hayne JJ; [2003] HCA 4.

280 *Markarian v The Queen* (2005) 228 CLR 357 at 386-387 [71]-[73] per McHugh J; [2005] HCA 25; *R v Kilic* (2016) 259 CLR 256 at 267 [22] per Bell, Gageler, Keane, Nettle and Gordon JJ; [2016] HCA 48.

281 See and compare *Australian Communist Party* (1951) 83 CLR 1 at 193 per Dixon J; *Theophanous* (1994) 182 CLR 104 at 141-142 per Brennan J; Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *Australian Law Journal* 240 at 240-241, 245.

282 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 73 [32] per Gleeson CJ and Crennan J, 88 [87] per Gummow and Hayne JJ, 95 [112] per Kirby J; [2006] HCA 46.

283 *Lenah Game Meats* (2001) 208 CLR 199 at 226 [41] per Gleeson CJ.

284 *Monis* (2013) 249 CLR 92 at 175 [223] per Hayne J.

has long been seen to justify the recognition of a cause of action or criminal offence notwithstanding an interference with free speech, coherence suggests that legislation protecting related interests to a comparable extent would not generally be struck down as excessive. At the same time, the court should be mindful not to "carry into constitutional discourse an undue romanticism about the common law"[285]. The recognition that Parliament may legitimately alter the balance struck at common law requires that the test of adequacy in balance be whether the legislative decision-maker's assessment is *grossly* disproportionate or *manifestly* excessive.

273 The test coheres to the assessment of infringement of express constitutional guarantees[286] and thereby provides a degree of precision which should be regarded as acceptable. At the same time, it alleviates the open-endedness of the court's comparison of importance of purpose with burden, and, to a considerable extent, it mitigates the difficulty of weighing incommensurables. Most importantly, it leaves Parliament unhindered within the broad range of what is reasonably open to be achieved.

274 It was suggested in the course of argument that the adequacy in balance test is largely unnecessary or rendered redundant by reason of the necessity test. That is not so. It is correct that the adequacy in balance test is only ever reached where an impugned law has first passed the necessity test, and thus that, generally speaking, whether a law is appropriate and adapted is more likely to turn on the question of its suitability or necessity than on whether it is adequate in its balance[287]. But that is not to say that adequacy in balance will never be decisive[288].

275 Consistently with the approach taken to express constitutional guarantees, it should be accepted that an impugned law that otherwise presents as suitable and necessary for the achievement of a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution* is not to be regarded as inadequate in its balance unless it so burdens the implied freedom of political communication as to present as grossly

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285 See Gummow, "The Constitution: Ultimate foundation of Australian law?" (2005) 79 *Australian Law Journal* 167 at 176.

286 See, eg, *Nationwide News* (1992) 177 CLR 1 at 78 per Deane and Toohey JJ, 101-102 per McHugh J; *Cunliffe* (1994) 182 CLR 272 at 324 per Brennan J, 340 per Deane J. See also *Davis* (1988) 166 CLR 79 at 99-100 per Mason CJ, Deane and Gaudron JJ (Wilson and Dawson JJ agreeing at 101).

287 *Brown* (2017) 261 CLR 328 at 417 [280] per Nettle J.

288 See, eg, *Brown* (2017) 261 CLR 328 at 417 [280] per Nettle J.

disproportionate to or as otherwise going far beyond what can reasonably be conceived of as justified in the pursuit of that purpose.

Suitability

276 Relevantly, the means which the PHW Act provides to achieve its purpose is the proscription of prohibited behaviour within a radius of 150 m of premises at which abortions are provided. Prohibited behaviour is precisely defined by s 185B(1) by proscription of the kinds of behaviour which, it appears, Parliament considered to constitute a real risk to the safety, wellbeing, privacy and dignity of persons accessing or attempting to access or leaving premises at which abortions are provided[289]. The proscription of prohibited behaviour of the kind referred to in para (b) of the definition is thus a means which is logically capable of achieving the purpose of s 185A: preventing the kind of molestation and haranguing which Parliament considered to constitute a real risk to the safety, wellbeing, privacy and dignity of persons accessing or attempting to access or leaving premises at which abortions are provided. Notably, there was evidence before the Magistrate that the experience of staff at the East Melbourne Fertility Control Clinic was that the introduction of the proscription of prohibited behaviour has had a positive effect for the wellbeing of patients and staff. It follows that the proscription of conduct of the kind referred to in para (b) of the definition of prohibited behaviour is rationally connected to the achievement of the purpose of securing the health and wellbeing of women accessing premises at which abortions are provided and is thus suitable in the relevant sense.

Necessity

277 As has been emphasised, the means chosen by Parliament to achieve a legitimate purpose consistent with the system of representative and responsible government are not to be considered unnecessary just because the court might think that there is another way of achieving the same objective with arguably less impact on the implied freedom of communication. A law may be adjudged unnecessary in the relevant sense if there is an obvious and compelling alternative of *significantly* lesser burden on the implied freedom that is equally practicable and available. But it is incumbent on a party challenging a law on the basis that it infringes the implied freedom of political communication to identify any obvious and compelling alternatives which that party contends would or might impose a lesser burden on the implied freedom[290]. In cases involving the determination of whether an impugned law is justified, notions of burden of proof and persuasion are largely misplaced. Where it appears that a law imposes

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289 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3973, 3975-3976.

290 See also *Levy* (1997) 189 CLR 579 at 626 per McHugh J.

a burden on the implied freedom, the court is bound to hold the law invalid unless persuaded that it is appropriate and adapted to the achievement of a legitimate purpose. But it does not follow from the need for the court to be persuaded that an impugned law is justified that the court must go in search of and be able to exclude as impracticable every possible alternative of conceivably lesser burden on the implied freedom, still less that a party seeking to uphold the impugned law is required to demonstrate that there are no such alternatives[291]. If an obvious and compelling alternative of significantly lesser burden on the implied freedom is presented, or presents itself, to the court, it is likely to prove determinative. Otherwise, the issue will not arise.

278 Mrs Clubb contended that there were a number of obvious and compelling alternatives. The first was to repeal para (b) of the definition of prohibited behaviour. Her argument was that, since para (a) of the definition of prohibited behaviour encompasses all of the types of conduct which characteristically interfere with the safety, wellbeing, privacy and dignity of persons entering or leaving premises, the only thing that para (b) adds to the proscription is conduct that does no more than cause mere "discomfort". It followed, in Mrs Clubb's submission, that, if Parliament had omitted para (b) from the definition of prohibited behaviour, the provision as so constituted would have been adequate to achieve the stated purposes of s 185A with a substantially lesser burden on the implied freedom of political communication.

279 That submission breaks down at a number of levels. To begin with, as can be seen from the Statement of Compatibility[292], Parliament enacted para (b) of the definition of prohibited behaviour conscious that proscriptions like para (a), being framed in terms of offences and misfeasances, cannot be enforced until after the harmful conduct has occurred, and because Parliament was persuaded that experience had shown that there are significant difficulties with their enforcement[293]. There is no reason to doubt that is so.

280 Secondly, although it is true that para (a) prohibits significant aspects of the conduct in which anti-abortion advocates have historically engaged, para (b) is ex facie designed to reach conduct that may not amount to any of the criminal offences or misfeasances listed in para (a). Examples of such conduct in evidence before the Magistrate included unsolicitedly drawing near to a woman as she accesses or attempts to access premises at which abortions are provided, forcing literature on her which recites lists of "Possible Physical Complications

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291 *Brown* (2017) 261 CLR 328 at 421-422 [288].

292 *Interpretation of Legislation Act*, s 35(b)(iii).

293 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3973.

of Abortion" and "Possible Psychological Post Abortion Complications", and advocating alternatives to abortion and "help", thereby to dissuade her from entering the premises. In some of the United States First Amendment cases regarding abortion protests, conduct of that kind is described with disarming American euphemism as "sidewalk counseling"[294]. In the Victorian legislation, and in the Tasmanian legislation which is in issue in the Preston appeal and which derives in part from Canadian precedent[295], some examples of such conduct are proscribed as "interfering with or impeding a footpath"[296] or "footpath interference"[297], though, again, that proscription does not seem apt to cover all instances of conduct that might fall within the scope of para (b).

281 In this matter, some instances of conduct that might fall within para (b) were more graphically elucidated in experiential evidence presented to this Court by the Castan Centre for Human Rights Law, appearing as amicus curiae:

> "(a) Protesters approaching, following or walking alongside people approaching clinic premises, distributing pamphlets, and distributing plastic models of foetuses.
>
> (b) Protesters equating foetuses with babies by imploring patients not to 'kill' their 'baby', and castigating patients as murderers.
>
> ...
>
> (e) Protesters displaying large and graphic posters depicting what purported to be foetuses post-abortion, foetuses in buckets, or skulls of foetuses.
>
> (f) Protesters distributing visually graphic literature containing medically inaccurate and misleading information warning that abortion results in infertility, failed relationships, mental illness and cancer." (footnotes omitted)

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294 See, eg, *Madsen v Women's Health Center Inc* (1994) 512 US 753 at 758; *Schenck v Pro-Choice Network of Western New York* (1997) 519 US 357 at 363; *McCullen v Coakley* (2014) 134 S Ct 2518 at 2527.

295 See and compare *Access to Abortion Services Act*, RSBC 1996, c 1, s 2(1), which provides, amongst other things, that a person must not engage in "sidewalk interference".

296 PHW Act, s 185B(1), para (c) of the definition of prohibited behaviour.

297 *Reproductive Health (Access to Terminations) Act 2013* (Tas), s 9(1), para (c) of the definition of prohibited behaviour.

282 Thirdly, para (b) of the definition makes no mention of "discomfort". In terms, it proscribes conduct which is "reasonably likely to cause distress or anxiety", no doubt with a view in part to the kind of conduct just recited. It is specious to contend, as in effect Mrs Clubb contended, that "distress or anxiety" in para (b) means nothing more than mere "discomfort".

283 Fourthly, it is apparent from the Statement of Compatibility that Parliament considered that there was good reason to conclude that the kind of conduct covered by para (b) is productive of distress or anxiety[298]:

> "Women and their support people have reported that they have found such conduct very distressing and in many cases psychologically harmful. This is compounded by the fact that many women seeking abortion services are highly vulnerable to psychological harm by reason of the circumstances that have contributed to their decision to undergo an abortion.
>
> ...
>
> Provisions that only prohibit intimidating, harassing or threatening conduct, or conduct which impedes access to premises are inadequate for a number of reasons".

Those concerns are borne out by evidence adduced by the Attorney-General for Victoria before the Magistrate, and which was before this Court, of Dr Susie Allanson, who worked as a sessional clinical psychologist at the East Melbourne Fertility Control Clinic for 26 years and who observed the activities and conduct of protesters and the effect that harassment had had on her and her patients.

284 Mrs Clubb suggested that another obvious but less burdensome alternative to the proscription of para (b) conduct would be to limit the proscription by means of one or more of the following exclusions:

(a) an exclusion for conduct apt to cause no more than discomfort;

(b) an exclusion for communications which are consented to;

(c) a requirement that the communications in fact be seen or heard;

(d) a "carve out" for political communications;

(e) a materially smaller safe access zone;

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298 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3973. See also at 3975-3976.

(f) a "carve out" during elections;

(g) a mens rea requirement for one or more of the actus reus elements of the offence.

285 Those suggestions are unconvincing. To the extent that "no more than discomfort" may be conceived of as a mental state of lesser seriousness than distress or anxiety, the legislative requirement that conduct be reasonably likely to cause distress or anxiety serves to exclude conduct apt to cause no more than discomfort.

286 The notion of excluding communications which are consensual is unrealistic. In reality, what is the likelihood of persons who are accessing or attempting to access premises at which abortion services are provided consenting to communications in relation to abortions with people like Mrs Clubb? And even if that were a realistic possibility, an exclusion of consensual communications would put major problems of proof in the way of a successful prosecution for breach of the proscription. In most cases it would require the Crown to call the person or persons affected by the communication in order to negative the possibility of consent. And as is apparent from the Statement of Compatibility, one of Parliament's concerns in enacting para (b) of the definition of prohibited behaviour was to avoid the necessity of calling persons affected by proscribed communications, because previous experience showed that such persons were generally unwilling to become involved in court proceedings and that involvement in court proceedings was likely to exacerbate the distress or anxiety to which they have already been subjected[299]. The absence of an exclusion of consensual communications thus presents as a rational choice of means to achieve the purpose of the proscription.

287 The suggestion of imposing a requirement that a communication in fact be seen or heard encounters similar difficulties. It would mean that, in order to mount a successful prosecution, the Crown would have either to call a person or persons affected by the subject communication or else to adduce circumstantial evidence sufficient to establish beyond reasonable doubt that a person accessing the premises saw or heard the conduct. Given the understandable reticence of affected persons to become involved in court proceedings and the likely harmful effects on them of doing so, Parliament's decision to set the standard at the lower level of what is able to be seen or heard presents, again, as a rational choice. It was necessary for the achievement of the purpose of the provision.

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299 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3973.

288 The idea of a "carve out" for political communications or during elections can be dismissed. A carve out for political communications would mean that anti-abortion and pro-abortion protagonists would be free to conduct protests anywhere in the 150 m radius area regardless of the distress or anxiety they would be likely to cause women and others accessing or attempting to access the premises. That would significantly frustrate the purpose of the proscription. And since there is no evidence or other reason to conclude that persons cannot engage in political communication about abortion beyond the 150 m radius to the same extent and as effectively as they can within it, a carve out for political communications or during election periods would do very little to alleviate the burden on the implied freedom of political communication. What it would mostly do is allow persons like Mrs Clubb to continue within the 150 m radius to engage in communications designed to deter women from undergoing abortions and to deter persons who support and treat them. That would be to undermine the purpose of the statute without any quantitative lessening of the burden on the implied freedom. The proposed carve outs are not obvious and compelling alternatives.

289 That is also the answer to the suggestion to reduce the 150 m radius. Since there is no evidence or other reason to imagine that persons cannot engage in political communication about abortion outside the 150 m radius as much and as effectively as they can within that radius, there is equally no reason to suppose that reduction of the radius to something less than 150 m would have a significant quantitative effect on the freedom of political communication. By contrast, as appears from the Statement of Compatibility, any reduction in the radius would be likely to compromise the effectiveness of the proscription[300]:

> "A safe access zone of 150 metres has been determined to be appropriate because it provides a reasonable area to enable women and their support people to access premises at which abortions are provided without being subjected to such communication. As I have explained, the conduct has included following women and their support persons to and from their private vehicles and public transport. There have also been many instances of staff being followed to local shops and services, and subjected to verbal abuse. Such conduct has often occurred well beyond 150 metres. However, I consider that 150 metres is a reasonable area that is necessary to enable women and their support persons to access premises, safely and in a manner that respects their privacy and dignity. While such conduct has occurred beyond 150 metres of some abortion services, having a clear safe access zone of 150 metres will enable abortion services to advise women of how they can best access the premises without the risk of such

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300 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3973-3974. See also at 3976.

> conduct, such as where they can park their vehicles or use public transport."

No reason has been advanced to doubt the accuracy of those observations.

290 That leaves for consideration the idea of including added mens rea requirements. Reference has already been made to the mental element of an offence contrary to s 185D comprised of conduct of the kind specified in para (b) of the definition of prohibited behaviour in s 185B(1), and to the reasons which informed Parliament's decision to make it an offence of general intent. Seen against that background, it is apparent that making specific intent an essential element of an offence would not be an obvious and compelling alternative. It would substantially emasculate the provision as a deterrent against persons engaging in that kind of prohibited behaviour within 150 m of premises at which abortions are provided. And it would also do very little to reduce the burden on the implied freedom of political communication. As has been explained, although the burden is qualitatively significant, it is quantitatively imperceptible. And logically, what is already so low as to be imperceptible cannot perceptibly be reduced by further reduction. All it would do is increase the incidence of apolitical, personal communications of the kind now prohibited by para (b) within the 150 m radius.

291 In the result, none of Mrs Clubb's suggestions is an obvious and compelling alternative.

Adequacy in balance

292 For the reasons earlier stated[301], an impugned law that otherwise presents as suitable and necessary for the achievement of a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution* should not be regarded as inadequate in its balance unless it so burdens the implied freedom of political communication as to present as grossly disproportionate to or as otherwise going far beyond what can reasonably be conceived of as justified in the pursuit of that legitimate purpose.

293 As has been explained, the proscription of conduct of the kind identified in para (b) of the definition of prohibited behaviour imposes a relatively limited burden on the implied freedom of political communication. It does so for a legitimate purpose of protecting the safety and wellbeing of women, support persons, and others such as staff, as they access premises at which abortions are provided, and that purpose is consistent with the system of representative and responsible government mandated by the *Constitution*. The effect of the proscription on the implied freedom, although qualitatively not insignificant, is

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301 See [270]-[275] above.

quantitatively minimal. The proscription is not grossly disproportionate to and does not go far beyond what is necessary for the achievement of the purposes identified in s 185A of the PHW Act. It should be concluded that proscription of conduct of the kind identified in para (b) is adequate in its balance.

Conclusion in the Clubb appeal

294 It follows that, although the proscription in s 185D of para (b) conduct has a perceptible, qualitative effect on the implied freedom of political communication, it is a justified burden and therefore a law enacted for a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution* which is appropriate and adapted to the achievement of that purpose.

The Preston appeal

295 The Preston appeal involves different considerations but the result is the same. Section 9 of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) ("the RHAT Act") creates an access zone within a radius of 150 m from premises at which terminations are provided and, within the access zone, proscribes "prohibited behaviour" of five kinds defined in s 9(1) of the RHAT Act as follows:

> "(a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or
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> (b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or
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> (c) footpath interference in relation to terminations; or
>
> (d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or
>
> (e) any other prescribed behaviour."

296 The principal argument of the appellant, Mr Preston, in support of the contention that s 9 of the RHAT Act is invalid as an unjustified burden on the implied freedom of political communication centres on the proscription in that provision of conduct of the kind specified in para (b) of the definition of prohibited behaviour. Mr Preston contended that "protest" in that context has what he submitted is its ordinary meaning of expressing a message in opposition

to something[302] – in this case to terminations – and that, because expressing opposition to a topic about which there is political debate (as there is about terminations) is a characteristic mode of political communication, it is clear that the proscription imposes a significant burden on the implied freedom of political communication. In Mr Preston's submission, it is also a particularly obnoxious and illegitimate burden on the implied freedom because it is in terms directed solely to protests which express an opinion in opposition to abortion; applies to protests whether or not they are consented to; applies to a protest even if the protester has a proprietary right to be on the premises where the protest is conducted; and is not limited to protests that cause or would be likely to cause anxiety or distress.

Facts and legislative provisions

297 As with the Clubb appeal, the facts and relevant legislation for the Preston appeal are set out in the judgment of Kiefel CJ, Bell and Keane JJ and need not be repeated. But it is necessary to say something more of the meaning of "protest".

298 Mr Preston submitted that "protest" would be apt to cover a private conversation between two individuals if one of those individuals were expressing a view in opposition to terminations. He also submitted that because protest in its ordinary meaning connotes objection or disapproval, "protest in relation to terminations" refers only to expressing a message *in opposition* to terminations.

299 Up to a point the first of those submissions may be accepted. It is apparent from its context, and, as will be seen, from the considerations which informed the enactment of s 9 of the RHAT Act, that "protest" is used in s 9 in the sense of expressing dissent from or support of terminations by means of a public demonstration in a manner able to be seen or heard by a person accessing or attempting to access premises at which terminations are provided. That would include both a public demonstration by one or more protesters and also one or more protesters engaging a person or persons accessing or attempting to access premises at which terminations are provided on the topic of terminations. There is, however, no basis in the text of the provision to limit its operation to expressions of opinion in opposition to terminations. The use of the general phrase "*in relation* to terminations" (emphasis added) indicates an intention to capture protests both for and against terminations.

300 It is also necessary to say something about the mental element of the subject offence. Like the offence created by s 185D of the PHW Act, the offence

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302 *Oxford English Dictionary*, online, "protest, n", sense 4c, available at <http://www.oed.com/view/Entry/153191>.

created by s 9 of the RHAT Act comprised of prohibited behaviour of the kind specified in para (b) is a regulatory statutory offence which, because it does not specify the mental element of the offence, may be taken to require a general intent to do the act charged[303]. In that respect, it stands in contrast to the specific intent required in the case of an offence constituted of conduct of the kind described in para (d) of "intentionally" recording a person accessing or attempting to access premises at which terminations are provided without that person's consent. Accordingly, in a prosecution for an offence of contravention of s 9 of the RHAT Act comprised of engaging in prohibited behaviour of the kind specified in para (b), it would be sufficient for the Crown to prove both that the accused did, and that the accused intended to, protest in relation to terminations within a 150 m radius of premises at which terminations are provided in a manner that was able to be seen or heard by a person accessing or attempting to access premises at which terminations are provided.

301 It would be open to the Crown to establish such a general intent by proving that the accused believed that he or she was within a radius of 150 m of premises at which terminations were provided and there protested in relation to terminations in a manner able to be seen or heard by a person accessing or attempting to access the premises. As under s 185D of the PHW Act[304], the use of the words "able to be seen or heard" as opposed to "is seen or heard" indicates that it would not be necessary for the Crown to prove that a person accessing or attempting to access the premises in fact saw or heard the protest. It would be enough for the Crown to prove that it was capable of being seen or heard by a person accessing or attempting to access the premises.

302 It would not be necessary for the Crown to prove that the accused believed that the protest would be seen or heard by a person accessing or attempting to access the premises. But in like fashion to the position under the PHW Act, it would be open to the accused to raise the possibility that he or she had an honest and reasonable belief that the protest would not be seen or heard by a person accessing or attempting to access the premises, in which event the Crown would be left with the persuasive if not evidential burden of excluding that possibility beyond reasonable doubt[305].

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303 *He Kaw Teh* (1985) 157 CLR 523 at 528-529 per Gibbs CJ (Mason J agreeing at 546), 566-567 per Brennan J.

304 See [245]-[246] above.

305 *He Kaw Teh* (1985) 157 CLR 523 at 534-535 per Gibbs CJ, 558-559 per Wilson J, 573 per Brennan J, 592-593 per Dawson J.

Burden on the implied freedom

303 Just as with s 185D of the PHW Act, so too here it may be accepted that s 9 of the RHAT Act imposes a qualitatively recognisable burden on the implied freedom of political communication – by proscribing political communication regarding terminations within the access zone. It may also be accepted that, at least in terms, s 9 of the RHAT Act goes further in its restrictive effect on the implied freedom of political communication than s 185D of the PHW Act, because, in contradistinction to para (b) of the definition of prohibited behaviour in s 185B(1) of the PHW Act, para (b) of the definition of prohibited behaviour in s 9(1) of the RHAT Act singles out protests as such and proscribes them within the access zone without an express limitation to communications which are reasonably likely to cause distress or anxiety. In practical reality, however, the two provisions have much the same effect. On the basis of the experiential and research evidence that was considered by Parliament and that is before this Court[306], and as a matter of common sense and ordinary experience, the reasonable likelihood is that virtually any form of protest about terminations within the access zone capable of being seen or heard by persons accessing the premises at which termination services are provided would cause distress or anxiety to persons accessing or attempting to access the premises.

304 Similarly, as in the Clubb appeal, although it must be recognised that the proscription of protests in relation to terminations in the access zone may have a qualitative effect on the implied freedom of political communication, there is no evidence or other reason to conclude that the proscription of a protest in relation to terminations in the access zone would have a significant quantitative effect on the free flow of political communication. As under s 185D of the PHW Act, under s 9 of the RHAT Act protesters are entirely free to conduct lawful protests regarding terminations anywhere except in the access zone, and, as in the Clubb appeal, there is nothing here to suggest that persons cannot protest in relation to terminations just as often and just as effectively outside the access zone as they can within it.

305 Certainly, as in the Clubb appeal, the proscription of protests in relation to terminations in the access zone reduces the capacity of protesters to harangue women seeking terminations of their pregnancies. Thus, it must be accepted that the proscription significantly reduces the capacity of persons like Mr Preston to influence women not to go through with a contemplated termination. But, for the reasons earlier given[307], a woman's decision whether to terminate her pregnancy is not a political decision and a communication directed to persuading her not to

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306 See [306] below.

307 See [249] above.

terminate her pregnancy is not a political communication. It is a communication concerning an apolitical, personal matter. It follows, as was explained in the Clubb appeal, that the proscription of conduct of the kind described in para (b) of the definition of prohibited behaviour does not impose a quantitatively significant burden on the implied freedom of political communication.

Legitimate purpose

306 As appears from the Second Reading Speech[308], the enactment of the proscription of conduct delineated in para (b) of the definition of prohibited behaviour proceeded from a recognition on the part of the legislature that women are entitled to a full range of safe, legal and accessible reproductive services necessary for improving their health and wellbeing, and, to that end, that women should be enabled to access lawful termination services privately, with dignity and without harassment, stigma or shame. In that respect, it is apparent that the legislature's resolve was informed by the experience in Victoria[309] and by research findings that abortion protests outside premises where terminations are provided deprive women seeking terminations of their pregnancies of their privacy and dignity, stigmatise and shame them in a manner likely to be productive of obvious signs of distress, and heighten their already high levels of psychological distress with significant risk of negative impact upon post-abortion psychological adjustment[310]. Thus, the legislative purpose of proscribing protests in relation to terminations in the access zone as it appears from the text of the proscription read in context presents as the advancement of women's health through the enablement of women's access to lawful termination services, privately, with dignity and without the adverse psychological impact of being subjected to the harangue of abortion protesters.

307 Although views differ as to the moral and ethical propriety of the intentional termination of human pregnancy, it is now a lawful medical procedure in Tasmania[311]. Accordingly, a purpose of improving the health and wellbeing of women by enabling their access to a lawful termination service,

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308 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 51.

309 See, eg, Tasmania, Department of Health and Human Services, *Information Paper relating to the Draft Reproductive Health (Access to Terminations) Bill*, March 2013 at 14.

310 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50, citing Humphries, "Abortion, Stigma & Anxiety", Clinical Masters, University of Melbourne, 2011.

311 See RHAT Act, Pts 2 and 3.

privately, with dignity and without harassment, stigma or shame, is a purpose which is consistent with the system of representative and responsible government mandated by the *Constitution*[312].

308 Mr Preston contended to the contrary. Based on an assemblage of isolated words and phrases gleaned from the Second Reading Speech, Mr Preston submitted in effect that the true purpose of the proscription is to handicap the anti-termination side of the debate – by deterring speech which the pro-termination side of the debate regards as "unacceptable" – and that a purpose of handicapping one side of a political debate is quite clearly not a legitimate purpose.

309 That contention elides the effect of the proscription with its purpose[313]. Granted, the effect of legislation is sometimes emblematic of its purpose[314], and here it may be accepted that the effect of the proscription of protests in relation to terminations in the access zone is to hamper or handicap anti-termination protests to that extent. But that does not mean that the effect of the legislation is the same as its purpose. Legislation restricting the availability of classified information serves to illustrate the point. A restriction of availability of classified information may have an effect on the defence debate. But, upon proper analysis of the terms of the legislation, it may appear that its purpose is to protect national security regardless of its effect on political communication. Here, for the reasons already stated, the proscription of conduct in para (b) of the definition of prohibited behaviour is not limited to anti-termination views. And it is apparent from the way in which para (b) confines the proscription to protests staged in the access zone that are able to be seen or heard by a person accessing or attempting to access the premises at which termination services are provided that the purpose is to protect the health and wellbeing of women seeking termination of their pregnancies by shielding them from the haranguing, shaming and stigmatising of anti-termination protesters in close proximity to the premises. By leaving anti-termination protesters free to protest wherever and by whatever means they choose outside the access zone, the terms of the proscription forcefully deny that the purpose of the proscription is to silence or handicap the anti-termination side of the debate.

310 In his written submissions, Mr Preston embraced the reality that the aim of anti-termination protests in close proximity to premises where termination services are provided is to "shame" women to forbear from terminating their

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312 See [258] above.

313 See [257] above.

314 See and compare *Leask v The Commonwealth* (1996) 187 CLR 579 at 590-591 per Brennan CJ, 602-603 per Dawson J; [1996] HCA 29.

pregnancies and he submitted that "shaming" women to that end is a legitimate aspect of political communication. He referred by way of analogy to the change in Australia's treatment of her indigenous peoples consequent upon the creation of a sense of shame as to the way in which indigenous peoples were treated in the past. Counsel for Mr Preston did not say so in terms but the argument that appears to be implicit in those submissions is that by "shaming" women to the point that they forbear from terminating their pregnancies, there might ultimately emerge such a generalised sense of "shame" regarding the intentional termination of human pregnancy as to lead to a change in the law to prohibit it, and that it cannot be a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution* to prevent that occurring.

311 There are two answers to that. The first is that, although the "shaming" of a woman who has gone to premises to obtain the termination of an unwanted pregnancy might result in her forbearing from terminating the pregnancy, or at least delaying it, there is no evidence that it would have the effect of converting her into a protagonist for the anti-termination cause. The second answer, which in effect repeats something earlier noticed in relation to the Clubb appeal[315], is that, even if the proscription of protests in relation to terminations in the access zone did result in a reduction in the number of hearts and minds converted to the anti-termination mission, it would be an adventitious consequence of the proscription, not the result of an improper purpose of limiting or restricting the free flow of political communication.

Appropriate and adapted

312 That leaves the question of whether the proscription of conduct of the kind identified in para (b) of the definition of prohibited behaviour is justified as a law that is appropriate and adapted to the achievement of a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*.

Suitability

313 The preceding discussion of the proscription of the conduct described in para (b) demonstrates that it is rationally connected to the purpose of advancing the health and wellbeing of women seeking terminations of their pregnancies and thus is suitable in the relevant sense.

314 Counsel for Mr Preston contended to the contrary that, because the proscription of protests in relation to terminations in the access zone singles out abortion protests as such and thereby targets a category of protest largely comprised of political communications – leaving other forms of protest

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315 See [253] above.

untouched – and because, in contrast to para (b) of the definition of prohibited behaviour in s 185B(1) of the PHW Act, the proscription is not expressly limited to protests "reasonably likely to cause distress or anxiety", the proscription is not rationally connected to the purpose of advancing women's health and so is not suitable in the relevant sense.

315 That contention is unpersuasive. The fact that the proscription is restricted to protests about terminations is consistent with and fortifies the conclusion that the proscription is aimed at giving effect to the purpose of sparing women seeking terminations from exposure to what are considered to be the deleterious effects on their health and wellbeing of subjection to haranguing by anti-abortion or pro-abortion protesters near to premises where terminations are provided. Since there is no suggestion that other kinds of protest – such as, for example, industrial protests – would have a similarly deleterious effect upon the health and wellbeing of such women, it makes sense that those other forms of protest are not mentioned. And as already noticed[316], the absence of a requirement that protests be reasonably likely to cause distress or anxiety, although a point of textual distinction to the proscription in para (b) of the definition of prohibited behaviour in s 185B(1) of the PHW Act, in effect makes little difference.

Necessity

316 Mr Preston contended that the proscription of protests in relation to terminations within the access zone was not necessary in the relevant sense because there were obvious and compelling alternatives productive of significantly lesser burden on the implied freedom of political communication. In his submission, they were:

(a) eliminating para (b) of the definition of prohibited behaviour, with the effect that a protest would not be proscribed unless it amounted to besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding a person within the meaning of para (a) of the definition of prohibited behaviour;

(b) incorporating a requirement in para (b) of the definition that a protest be reasonably likely to cause shame to a person accessing or attempting to access the premises at which termination services are provided;

(c) making it a defence that a person charged is able to establish that the protest "had no relevant adverse effect";

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316 See [303] above.

(d) making it a defence that a protest is engaged in with the consent of any person able to see or hear the protest;

(e) incorporating a "carve out" for political communications;

(f) incorporating a "carve out" for communications in or near Parliament (as is incorporated in comparable New South Wales legislation[317]);

(g) incorporating a "carve out" for communication by or with the authority of a candidate during an election or referendum (as is incorporated in comparable New South Wales legislation[318]);

(h) incorporating a "carve out" for protests made with the consent of the landowner.

317 None of those suggestions is an obvious and compelling alternative. As has been seen, Parliament enacted para (b) of the definition of prohibited behaviour in s 9(1) of the RHAT Act to protect the health, wellbeing, privacy and dignity of women accessing premises at which terminations are provided. Paragraphs (a) and (c) of the definition of prohibited behaviour go some way to achieving that objective. But a protest in relation to terminations could be conducted in the access zone in a manner that studiously avoided commission of any of the misfeasances described in paras (a) and (c) of the definition and yet be just as effective in depriving women accessing the premises of their privacy and dignity and stigmatising and shaming them to an extent productive of psychological infirmity. Elimination of para (b) would therefore substantially dilute the effectiveness of the proscription. It would not operate as an alternative of equal efficacy.

318 Incorporating a requirement in para (b) that a protest in relation to terminations be reasonably likely to cause shame to a person accessing or attempting to access premises at which termination services are provided would make little difference. For reasons earlier stated, any protest in relation to terminations conducted in the access zone would likely infringe the privacy[319] and dignity[320] of women accessing the premises at which termination services are

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317 *Public Health Act 2010* (NSW), s 98F(1)(b).

318 *Public Health Act*, s 98F(1)(c).

319 See and compare *Lenah Game Meats* (2001) 208 CLR 199 at 226 [42] per Gleeson CJ.

320 cf *Monis* (2013) 249 CLR 92 at 182-183 [247] per Heydon J.

provided and thereby risk engendering the psychological sequelae which the proscription is designed to prevent. Thus, to make reasonable likelihood of causing shame a specific element of the proscription would do little to change the practical effect of the proscription. And given that the proscription leaves protesters free to conduct protests in relation to terminations outside the access zone, and that there is no evidence or other reason to accept that political protest against terminations outside the access zone is any less effective as a tool of political persuasion than protest within, such difference as the proposed change would make to the burden on the implied freedom of political communication would appear to be negligible.

319 Similar considerations negate the suggestion that it would be an obvious and compelling alternative to provide for a defence of "no relevant adverse effect". It also suffers from the added difficulty that "relevant adverse effect" is a concept about which views are very likely to differ. Given the content of the experiential and research evidence already mentioned, it may be inferred that the majority of women accessing premises at which termination services are provided (or who have ever done so) would likely take the view that staging a protest in relation to terminations in the access zone has serious relevant adverse effects on such women and, more generally, relevant adverse systemic effects on the accessibility of legally available termination services. By contrast, it may be assumed that the majority of anti-abortion protesters genuinely believe that such protests are not productive of adverse effects and that the only *relevant* effect of them is a beneficial effect that they may result in at least one woman forgoing or delaying the termination of an unwanted pregnancy. Given that divide in opinion, a defence of relevant adverse effect would be impracticable.

320 A defence of consent would for all intents and purposes be meaningless. The possibility that women accessing premises at which termination services are provided would consent to the conduct of a protest in relation to terminations within 150 m of the premises is de minimis.

321 The idea of "carve outs" for certain kinds of communications has largely been dealt with[321]. For the reasons already given in respect of the Clubb appeal, such carve outs would compromise the efficacy of the proscription in achieving its purpose of protecting the health, wellbeing, privacy and dignity of women accessing premises where termination services are provided while having minimal beneficial effect on the implied freedom.

322 Finally, the suggested exception of protests staged on land with the consent of the owner is irrelevant. Whether or not a protest is conducted with the consent of the owner, it will, if it is able to be seen or heard by a person

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321 See [288] above.

accessing premises at which termination services are provided, have exactly the same effect on that person.

323 In sum, none of Mr Preston's contentions casts any doubt on the necessity of the proscription of the conduct in para (b) of the definition of prohibited behaviour in s 9(1).

Adequacy in balance

324 For the same reasons, none of Mr Preston's contentions provides a reason to accept that the proscription of protests in relation to terminations within the access zone so burdens the implied freedom of political communication as to present as grossly disproportionate to or as otherwise going far beyond what can reasonably be conceived of as justified in the pursuit of the law's legitimate purpose. It has not been demonstrated that the law is not adequate in its balance.

Conclusion in the Preston appeal

325 In the result, it should be concluded that the burden imposed on the implied freedom of political communication by the proscription of the conduct described in para (b) of the definition of prohibited behaviour in the access zone is minimal and is a justified burden as a law that is reasonably appropriate and adapted to the achievement of the legitimate purpose of advancing women's health through the enablement of women's access to lawful termination services without subjection to the harangue of abortion protesters.

326 GORDON J. Mrs Clubb and Mr Preston engaged in conduct, in separate States, which was found to contravene a law that prohibited behaviour within an "access zone" – a 150 m radius of premises at which terminations of pregnancies are provided. The laws, although in different terms, were directed at providing a safe passage for persons accessing or seeking to access those premises. Mrs Clubb and Mr Preston contend that the respective provisions under which they were convicted impermissibly burdened the implied freedom of political communication. Each challenge fails.

Clubb

327 Section 185D of the *Public Health and Wellbeing Act 2008* (Vic), read with para (b) of the definition of "prohibited behaviour" in s 185B(1), prohibits communicating by any means, in relation to abortions, in a "safe access zone" extending 150 m from premises at which abortions are provided, in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving those premises, where the communication is reasonably likely to cause distress or anxiety ("the Communication Prohibition").

328 The appellant, Mrs Clubb, contends that the Communication Prohibition infringes the implied freedom of political communication. But Mrs Clubb, her counsel said, was not in a position to mount, and did not mount, a positive case that she was engaged in political communication.

329 As this Court said in *Knight v Victoria*, the settled practice of this Court means that it is "ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid"[322].

330 In this appeal, it is appropriate to consider severance, in the form of reading down the Communication Prohibition, as a threshold question[323], for two reasons. First, the fact that Mrs Clubb does not contend that she was engaged in political communication means that Mrs Clubb has not demonstrated that there is in issue some "right, duty or liability"[324] that turns on the validity of the

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322 (2017) 261 CLR 306 at 324 [33]; [2017] HCA 29, citing *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 258; [1949] HCA 44 and *Tajjour v New South Wales* (2014) 254 CLR 508 at 585-589 [168]-[176]; [2014] HCA 35.

323 *Tajjour* (2014) 254 CLR 508 at 589 [176].

324 *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 362 [18]; [1998] HCA 73, quoting *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; [1921] HCA 20. See also *Tajjour* (2014) 254 CLR 508 at 589 [176].

Communication Prohibition in its application to communication on governmental or political matters. Second, as a matter of statutory construction, the Communication Prohibition would be severable if and to the extent that the provision might burden communication on governmental or political matters in a manner which infringes the implied constitutional freedom. In those circumstances, no further analysis is required, or appropriate, in order to dismiss the challenge to the constitutional validity of the Communication Prohibition.

331 It is necessary to say something further about each reason in its application to Mrs Clubb. The reasons are connected.

332 Not addressing the *Lange* questions[325] – in circumstances where Mrs Clubb does not contend that her conduct gives rise to some right, duty or liability that turns on the validity of the Communication Prohibition in its application to communication on governmental or political matters – reflects the settled practice of this Court. The precept is well-established: this Court declines to investigate and decide constitutional questions where there is lacking "a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties"[326].

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325 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561, 567; [1997] HCA 25, as modified by *Coleman v Power* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96]; [2004] HCA 39. cf *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2]; [2015] HCA 34, as modified by *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [104]; see also at 398 [236], 413 [271], 416-417 [277]-[278]; [2017] HCA 43.

326 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283, quoted in *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58]; [2000] HCA 53, *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 230 [202]; [2000] HCA 62, *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 372 [148]; [2013] HCA 53, *Tajjour* (2014) 254 CLR 508 at 587 [173], *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 613 [335]; [2015] HCA 1, *Duncan v New South Wales* (2015) 255 CLR 388 at 410 [52]; [2015] HCA 13 and *Knight* (2017) 261 CLR 306 at 324 [32]. See also *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 590; [1908] HCA 94; *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 347, 356; [1927] HCA 50; *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 773; [1939] HCA 27; *British Medical Association* (1949) 79 CLR 201 at 257-258; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [250]-[252]; [2001] HCA 51; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 326-327 [57]; [2004] HCA 44; *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 170-171 [27]-[28]; [2005] HCA 35; *Wurridjal v The Commonwealth* (2009) 237

(Footnote continues on next page)

333 But that first reason – that Mrs Clubb does not mount a positive case that she was engaged in political communication – does not complete the necessary inquiry. If a provision is invalid because it infringes the implied freedom and is *not* severable, then the provision is invalid[327] in its entirety. The invalid provision could not be enforced against *any* person, regardless of the conduct or circumstances which led to the alleged breach of that provision. Put another way, any such invalidity is not dependent on a person contending that they engaged in communication on governmental or political matters. The invalidity arises because the invalid aspects of the provision cannot be severed, including by reading down.

334 That is why it is necessary in the Clubb appeal to *start* the inquiry by assuming that the impugned provision is constitutionally invalid because it impermissibly burdens the implied freedom. The question then is whether, as a matter of statutory construction, the impugned provision, or part of it, is able to be severed, by excision or reading down, so as to give the provision a partial but constitutionally valid operation.

335 If the provision, or part of it, cannot be severed, then whether the conduct of the person alleged to have breached the provision involves communication on governmental or political matters is irrelevant. A person charged under a provision purportedly invalid in its entirety has standing to challenge that provision.

336 If, however, the provision *can* be read down, the direct consequence is to remove the need for the Court to consider any hypothetical or speculative application of the impugned provision[328]. That is judicially prudent[329].

CLR 309 at 437 [355]; [2009] HCA 2; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 199 [141]; [2009] HCA 51; *Kuczborski v Queensland* (2014) 254 CLR 51 at 129 [273]; [2014] HCA 46.

327 See, eg, *Bell Group NV (In liq) v Western Australia* (2016) 260 CLR 500 at 528 [74]; [2016] HCA 21. See also *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 291; [1990] HCA 29; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 357 [52]; [2005] HCA 44.

328 *Tajjour* (2014) 254 CLR 508 at 587 [172].

329 See, eg, *Tajjour* (2014) 254 CLR 508 at 588 [174], citing *Washington State Grange v Washington State Republican Party* (2008) 552 US 442 at 450 and Stern, "Separability and Separability Clauses in the Supreme Court" (1937) 51 *Harvard Law Review* 76. See also *Re Patterson* (2001) 207 CLR 391 at 473 [249].

The availability of severance means that no further analysis is required in order to dismiss a challenge to the constitutional validity of the impugned provision[330].

337 Accordingly, on the assumption that the Communication Prohibition is constitutionally invalid because it impermissibly burdens the implied freedom of political communication, is it severable? Adapting and adopting the words of Barwick CJ in *Harper v Victoria*[331]:

> "Where [a severance clause] is available, and the statute can be given a distributive operation, its commands or prohibitions will then be held inapplicable to the person whose [communication] would thus be impeded or burdened. Of course, the question of validity or applicability will only be dealt with at the instance of a person with a sufficient interest in the matter; and, in my opinion, in general, need only be dealt with to the extent necessary to dispose of the matter as far as the law affects that person."

338 Here, there is a severance clause[332]. Section 6(1) of the *Interpretation of Legislation Act 1984* (Vic)[333] provides:

> "*Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria*, to the intent that *where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power* and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected." (emphasis added)

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330 *Tajjour* (2014) 254 CLR 508 at 586-587 [172].

331 (1966) 114 CLR 361 at 371; [1966] HCA 26.

332 As to the operation of severance clauses, see *Carter v The Potato Marketing Board* (1951) 84 CLR 460 at 484-485; [1951] HCA 60; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 492-493, 503-506, 515-520; [1971] HCA 40; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 487-488; [1991] HCA 29; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502-503; [1996] HCA 56. And as to severance by reading down to give constitutional validity, see *Pidoto v Victoria* (1943) 68 CLR 87 at 111; [1943] HCA 37; *Bourke* (1990) 170 CLR 276 at 291; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 312 [89]; [2009] HCA 33.

333 cf *Acts Interpretation Act 1901* (Cth), s 15A.

339 Section 6(1) extends and applies to every Victorian Act "unless a contrary intention appears" in the *Interpretation of Legislation Act* or in the Act concerned[334]; s 6(1) is taken to be *part of* the Act concerned[335]. It is a severance clause intended to ensure that Victorian Acts are construed as being within constitutional power[336]. The effect of s 6(1) is to "reverse the presumption that an Act is to operate as a whole, so that the intention of the Parliament is to be taken *prima facie* to be that the Act should be divisible and that any parts found to be within constitutional power should be carried into effect independently of those which fail unless it is clear that the invalid provision forms part of an inseparable context"[337].

340 Where s 6(1) is not excluded by a contrary statutory intention, it has two interconnected effects – it operates as a rule of construction, not a rule of law[338], and the rule of construction is that "the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail"[339]. The effect of that rule of construction, where there are "general words or expressions which apply both to cases within power and to cases beyond power", is that if Parliament intended that "there should be a partial operation of the law based upon some particular standard criterion or test" and that intention can be discovered from the provision's terms or from the nature of the subject matter, then the provision can be read down so as to give it valid operation of a partial character[340]. Indeed, where a law "is intended to operate *in an area where Parliament's legislative power is subject to a clear limitation, it can be read as subject to that limitation*"[341] (emphasis added).

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334 *Interpretation of Legislation Act*, s 4(1)(a).

335 See generally *Strickland* (1971) 124 CLR 468 at 492-493.

336 Victoria, *Interpretation of Legislation Bill 1984*, Explanatory Notes at 2.

337 Victoria, *Interpretation of Legislation Bill 1984*, Explanatory Notes at 2.

338 *Tajjour* (2014) 254 CLR 508 at 586 [170], quoting *Pidoto* (1943) 68 CLR 87 at 110.

339 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371; [1948] HCA 7, quoted in *Tajjour* (2014) 254 CLR 508 at 585 [169].

340 *Pidoto* (1943) 68 CLR 87 at 110-111.

341 *Industrial Relations Act Case* (1996) 187 CLR 416 at 502-503.

341 In this appeal, the question therefore is whether there is a statutory intention contrary to the prima facie position that, by reason of s 6(1) of the *Interpretation of Legislation Act*, para (b) of the definition of "prohibited behaviour" in s 185B(1) of the *Public Health and Wellbeing Act* should be divisible and that any parts found to be within constitutional power should be carried into effect. The answer is that there is no contrary statutory intention and, *if necessary*, para (b) of the definition of "prohibited behaviour" in s 185B(1) could be read down as not extending to communication on governmental or political matters. That last statement needs some further explanation.

342 The phrase "communicating ... in relation to abortions" in para (b) of the definition of "prohibited behaviour" in s 185B(1) is not defined. The absence from s 185D of a defence applicable to communication on governmental or political matters is not a positive indication that the Victorian Parliament intended s 185D to have a full and complete operation or none at all[342]. And there is no other indication to be found in the *Public Health and Wellbeing Act* of an intention contrary to the prima facie application of the severance clause in s 6(1) of the *Interpretation of Legislation Act*.

343 The stated purpose of Pt 9A[343] of the *Public Health and Wellbeing Act*, of which s 185B forms part, as well as the various paragraphs of conduct which comprise "prohibited behaviour" within a safe access zone, are indications that the Communication Prohibition should be divisible and that any parts found to be within constitutional power should be carried into effect.

344 A stated purpose of Pt 9A was and remains to provide for safe access zones around premises at which abortions are provided so as to protect the safety and wellbeing, and respect the privacy and dignity, of both people accessing the services provided at those premises and employees and other persons who need to access those premises in the course of their duties and responsibilities[344].

345 The protections provided in Pt 9A to persons accessing premises where abortions are provided are broad. It cannot be the case that the Victorian Parliament intended that if the Communication Prohibition were invalid as a result of its application to communication concerning governmental or political matters, the Communication Prohibition was to be struck out in its entirety, leaving only protections against the remaining categories of "prohibited

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342 cf *Tajjour* (2014) 254 CLR 508 at 589 [177].

343 And the principles applying to that Part: see *Public Health and Wellbeing Act*, s 185C.

344 *Public Health and Wellbeing Act*, s 185A; see also s 185C.

behaviour", namely: interference with a footpath, road or vehicle[345]; recording persons without their consent[346]; and the much higher threshold of conduct that amounts to "besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding" a relevant person[347]. Such a result would stultify or undermine the statutory purpose of Pt 9A: it would leave persons accessing premises at which abortions are provided vulnerable to confronting and personal communications, including those targeted at their personal choice to attend a clinic and undergo an abortion. Put in different terms, the conclusion is not inconsistent with a fundamental feature[348] of Pt 9A.

346 It remains necessary to address Mrs Clubb's contention that if the Communication Prohibition could be read down so as to apply only to communication that is not political communication, the appeal should be allowed because the prosecutor did not prove beyond reasonable doubt that Mrs Clubb's communication was not political communication and the Magistrate did not address that issue. That contention should be rejected.

347 When read with a provision which might otherwise have an application in excess of State legislative power – here, s 185D of the *Public Health and Wellbeing Act* – s 6(1) of the *Interpretation of Legislation Act* operates in substance to carve out an exemption from the generality of the provision. Were it not concerned with "constitutional facts", the exception would cast the onus of proof on the party seeking to take advantage of it[349]. Constitutional facts, however, do not lend themselves to ordinary notions of onus and burden of proof[350].

348 It is for the Crown to prove the elements of an offence beyond reasonable doubt. Consistent with the construction just advanced, characterisation of a

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345 para (c) of the definition of "prohibited behaviour" in s 185B(1) of the *Public Health and Wellbeing Act*.

346 para (d) of the definition of "prohibited behaviour" in s 185B(1) of the *Public Health and Wellbeing Act*.

347 para (a) of the definition of "prohibited behaviour" in s 185B(1) of the *Public Health and Wellbeing Act*.

348 cf *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 572 [33]-[35], 601 [121], 602 [124], 603-604 [128].

349 See *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 258; [1990] HCA 41.

350 See *Maloney v The Queen* (2013) 252 CLR 168 at 298-300 [349]-[355], especially at [354]-[355]; [2013] HCA 28.

communication as political, or non-political, is not an element of the offence. Whether an accused engaged in political communication would be relevant if, and only if, the accused adduced evidence to seek to establish that fact. Only then would it be necessary for the Crown to seek to address that evidence.

349 So much of Mrs Clubb's appeal as has been removed into this Court should be dismissed with costs. The question of validity of the Communication Prohibition can be, and has been, dealt with to the extent necessary to dispose of the matter as far as the law affects Mrs Clubb.

Preston

350 The *Reproductive Health (Access to Terminations) Act 2013* (Tas) ("the Reproductive Health Act") regulates the termination of pregnancies by medical practitioners and decriminalises terminations[351]. Section 9(2) of the Reproductive Health Act prohibits a person from engaging in "prohibited behaviour" within an access zone, defined as an area within a radius of 150 m from premises at which terminations are provided[352].

351 "Prohibited behaviour"[353] is defined to mean:

> "(a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or
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> (b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or
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> (c) footpath interference in relation to terminations; or
>
> (d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or
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> (e) any other prescribed behaviour."

These protective measures were enacted following years of harassment of persons accessing premises at which terminations are provided. Their objective

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351 See the long title of the Reproductive Health Act.

352 Definition of "access zone" in s 9(1) of the Reproductive Health Act.

353 Definition of "prohibited behaviour" in s 9(1) of the Reproductive Health Act.

is to enable persons seeking these services to have unimpeded access[354]: without fear, without shame and without hesitation.

352 This appeal is concerned with the "Protest Prohibition" – para (b) of the definition of "prohibited behaviour"[355]. The appellant, Mr Preston, was charged on three separate occasions with an offence under s 9(2) of the Reproductive Health Act. The three charges were: "being within an access zone and engaging in prohibited behaviour by protesting in relation to terminations, that was able to be seen or heard by a person, accessing or attempting to access premises at which terminations are provided, located at 1A Victoria Street [Hobart]". The first and second charges related to Mr Preston holding placards and handing out leaflets near the entrance to a specialist medical centre ("the Centre"); the second charge included a conversation between Mr Preston and a woman intending to access the Centre; the third charge involved Mr Preston and two others holding placards outside the Centre. It was an agreed fact that Mr Preston was engaged in a protest in relation to terminations. And it was no part of the prosecutor's case before the Magistrate that the protest was not a communication in relation to governmental or political matters.

353 Mr Preston contended that the Protest Prohibition was beyond the legislative power of the State of Tasmania because it impermissibly burdened the implied freedom of political communication contrary to the *Constitution*. That contention, among others, was rejected by the Magistrate and Mr Preston was convicted. That part of Mr Preston's appeal to the Supreme Court of Tasmania concerning the constitutional validity of the Protest Prohibition was removed into this Court.

354 This part of the reasons will consider the implied freedom and the terms of the Reproductive Health Act, and then turn to consider the three *Lange* questions[356] in their application to the Protest Prohibition: (1) Does the Protest Prohibition effectively burden the freedom of political communication? (2) Is the purpose of the Protest Prohibition legitimate, in the sense that it is consistent with the maintenance of the constitutionally prescribed system of government? (3) Is the Protest Prohibition reasonably appropriate and adapted to

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354 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50-51.

355 Reproductive Health Act, s 9(2), read with para (b) of the definition of "prohibited behaviour" in s 9(1).

356 See *Lange* (1997) 189 CLR 520 at 561-562, 567, as modified by *Coleman* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96]. cf *McCloy* (2015) 257 CLR 178 at 193-195 [2], as modified by *Brown* (2017) 261 CLR 328 at 363-364 [104]; see also at 398 [236], 413 [271], 416-417 [277]-[278].

advance that purpose in a manner consistent with the maintenance of the constitutionally prescribed system of government?

355 So much of Mr Preston's appeal as has been removed into this Court should be dismissed. The Protest Prohibition effectively burdens the implied freedom of political communication but that burden is not substantial. The Protest Prohibition is a time, place and manner restriction[357]: it prohibits a person from engaging in a protest in relation to terminations within a 150 m radius of premises where terminations are provided if the protest is able to be seen or heard by a person accessing, or attempting to access, those premises. The Protest Prohibition is directed to a legitimate purpose or end – to create an access zone to enable women, medical practitioners and other people to have unobstructed and safe access to premises where terminations are provided. The means adopted to achieve that purpose or end (the Protest Prohibition) are not incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Implied freedom of political communication

356 The implied freedom of communication on matters of government and politics is readily identified and explained as follows[358]:

> "[It] is an indispensable incident of the system of representative and responsible government which the *Constitution* creates and requires[359]. The freedom is implied because ss 7, 24 and 128 of the *Constitution* (with Ch II, including ss 62 and 64) create a system of representative and responsible government[360]. It is an indispensable incident of that system because that system requires that electors be able to exercise a free and informed choice when choosing their representatives, and, for them to be able to do so, there must be a free flow of political communication within the federation[361]. For that choice to be

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357 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 234-235; [1992] HCA 45; *Levy v Victoria* (1997) 189 CLR 579 at 618; see also at 639; [1997] HCA 31; *Brown* (2017) 261 CLR 328 at 462 [420], 464 [426].

358 *Brown* (2017) 261 CLR 328 at 430 [312]-[313].

359 *ACTV* (1992) 177 CLR 106 at 138; *Lange* (1997) 189 CLR 520 at 559; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44]; [2010] HCA 42.

360 See *Lange* (1997) 189 CLR 520 at 557-562.

361 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [27], 571 [104]; [2013] HCA 58.

> exercised effectively, the free flow of political communication must be between electors and representatives and 'between all persons, groups and other bodies in the community'[362].
>
> The implied freedom operates as a constraint on legislative and executive power[363]. It is a freedom from government action, not a grant of individual rights[364]. The freedom that the *Constitution* protects is not absolute[365]. The limit on legislative and executive power is not absolute[366]. The implied freedom does not protect all forms of political communication at all times and in all circumstances. And the freedom is not freedom from all regulation or restraint. Because the freedom exists only as an incident of the system of representative and responsible government provided for by the *Constitution*, the freedom limits legislative and executive power only to the extent necessary for the effective operation of that system[367]."

357 In short, the freedom does not exist or operate in a vacuum. Yes, it is concerned with electors being able to exercise a free and informed choice when choosing their representatives and, in order for that to occur, there being a free flow of political communication within the federation. But while the freedom acts as a constraint on legislative and executive power when such power affects that free flow of political communication, the restraint is tempered when the conduct sought to be regulated has effects beyond the communication of ideas or information[368]. Put in different terms, a democracy has many different freedoms, some of which conflict with each other. To take just one example, the

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362 *ACTV* (1992) 177 CLR 106 at 139. See also *Unions NSW* (2013) 252 CLR 530 at 551-552 [28]-[30]; *Tajjour* (2014) 254 CLR 508 at 577 [140]-[141].

363 *Lange* (1997) 189 CLR 520 at 560; *Hogan v Hinch* (2011) 243 CLR 506 at 554 [92]; [2011] HCA 4; *Unions NSW* (2013) 252 CLR 530 at 554 [36]; *Tajjour* (2014) 254 CLR 508 at 558 [59], 577 [140]. See also *Brown* (2017) 261 CLR 328 at 359 [88], 407 [258], 430 [313].

364 See, eg, *Lange* (1997) 189 CLR 520 at 561, 567; *Unions NSW* (2013) 252 CLR 530 at 551 [30], 554 [36]; *McCloy* (2015) 257 CLR 178 at 202-203 [30], 228-229 [119]-[120], 258 [219], 280 [303].

365 *Lange* (1997) 189 CLR 520 at 561.

366 *Tajjour* (2014) 254 CLR 508 at 558 [59].

367 *Tajjour* (2014) 254 CLR 508 at 577 [140]-[141].

368 *Brown* (2017) 261 CLR 328 at 461-462 [416].

entitlement to protest, if exercised without restraint, can interfere with other people's privacy and expose them to abuse[369]. And that is what this appeal has to address: the intersection of the implied freedom of political communication with a person's privacy and protection of that person from abuse. That intersection was legislatively resolved here by the enactment of a provision (s 9(2)[370]) which regulates the time, place and manner of a particular communication – a protest in relation to terminations, in an area within a radius of 150 m from premises at which terminations are provided, that is able to be seen or heard by a person accessing, or attempting to access, those premises.

Reproductive Health Act – legal effect and practical operation

358 It is necessary to construe the Reproductive Health Act[371]. The Act contains just 17 sections, divided into five Parts. Parts 2 and 3 provide for a woman's right of access to terminations and the decriminalisation of terminations undertaken by a medical practitioner with a woman's consent[372].

359 Part 2 of the Reproductive Health Act, headed "Access to Terminations", contains ss 4 to 12. Sections 4 to 7 address terminations by medical practitioners, including a woman's right to access a termination by a medical practitioner. Section 8 decriminalises terminations. Women are not to be regarded as criminals for making decisions about their own bodies in relation to terminations.

360 Section 9 creates access zones that enable women, medical practitioners and other persons to have unobstructed, unharried and safe access to premises where terminations are provided[373]. Section 9(2), as seen earlier, makes it an

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369 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 51.

370 Read with the definitions in s 9(1).

371 See *Brown* (2017) 261 CLR 328 at 433-434 [326], citing *Coleman* (2004) 220 CLR 1 at 21 [3], 68 [158] and *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4.

372 Sections 13 and 14 in Pt 3 state that the amendments effected by Pt 3 of the Reproductive Health Act have been incorporated into the *Criminal Code Act 1924* (Tas).

373 See generally Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50-51; Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 20 November 2013 at 103.

offence for a person to engage in "prohibited behaviour" within an access zone[374]. An "access zone" is defined in s 9(1) to mean "an area within a radius of 150 metres from premises at which terminations are provided".

361 "Prohibited behaviour" is defined in s 9(1) by reference to the five classes of conduct identified earlier. Mr Preston challenged the constitutional validity of para (b) of the definition of "prohibited behaviour"; he did not challenge the constitutional validity of para (a), (c), (d) or (e) of that definition. Each category of conduct is important and the categories are not mutually exclusive. If conduct covered by para (a), (c), (d) or (e) of the definition is committed within a 150 m radius of premises at which terminations are provided, that conduct will give rise to an offence under s 9(2) of the Reproductive Health Act.

362 The Protest Prohibition is in different, and narrower, terms. It prohibits a "protest" where that protest is "in relation to terminations" and "able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided". The prohibition is limited to the access zone – within a 150 m radius of premises at which terminations are provided. Not every "protest" in an access zone is prohibited – the protest must be in relation to terminations and be able to be seen or heard by a person accessing or attempting to access premises at which terminations are provided.

363 "Protest" is not defined. In its ordinary meaning, a protest requires an extended effort and a certain degree of conflict – where the aim of the action is to influence the existing reality adopted by governmental institutions or actors belonging to the private sector[375]. There usually needs to be a "target". The protest may be "political" – it might concern "the policies of political parties and candidates for election"[376] or bear on electoral choice[377]. But then again, it might not. And that is not surprising: the phrase "government or political matters" is imprecise[378]. For a "protest" to be political, there needs to be a

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374 The penalty is a fine not exceeding 75 penalty units or imprisonment for a term not exceeding 12 months, or both. Sections 10 to 12 deal with proceedings for an offence, infringement notices and the regulation-making power.

375 See, eg, Quaranta, *Political Protest in Western Europe: Exploring the Role of Context in Political Action* (2015) at 24.

376 *Lange* (1997) 189 CLR 520 at 560.

377 *Brown* (2017) 261 CLR 328 at 386 [188].

378 *APLA* (2005) 224 CLR 322 at 350 [27], 361 [67], citing *Coleman* (2004) 220 CLR 1 at 30-31 [28]. See also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 123; [1994] HCA 46. As to the kinds of communication intended to be

(Footnote continues on next page)

nexus[379] between that protest (the communication) and "government or political matters". And even if the control of an activity is politically controversial, not every communication about that activity will be political communication[380] in the "constitutional sense".

364 Mr Preston's contention that the phrase "protest in relation to terminations" is limited to protests which seek to oppose terminations is rejected. The phrase "protest in relation to terminations" does not discriminate based on viewpoint: it extends to protests in favour of terminations as well as protests in opposition to terminations. If the provision were limited to anti-termination protests within the access zone, the requirement that the protest be "able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided" would be likely to be superfluous: anti-termination protesters, by the very nature and purpose of their protests, would in most, if not all, cases endeavour to be seen or heard by such persons.

365 What, then, are the elements of the offence? The accused must be engaged in a *protest* and intend[381] to engage in a protest *in relation to terminations*. Next, the accused must have an intention to engage in a protest in a manner that is *able to be seen or heard* by a person accessing, or attempting to access, premises at which terminations are provided. Although the Crown must establish that the protest was *capable* of being seen or heard by persons accessing, or attempting to access, premises at which terminations are provided, the Crown need not prove the protest was *in fact* seen or heard by such a person. And, finally, the protest must have occurred within a 150 m radius of premises at which terminations are provided.

366 Before leaving s 9, other aspects of the definition of "prohibited behaviour" in s 9(1) when read with the offence created by s 9(2) should be noted. As seen earlier, the other paragraphs of the definition of "prohibited behaviour" in s 9(1) are not challenged by Mr Preston. They constitute separate prohibitions including a prohibition on intentionally recording a person accessing

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protected by the implied freedom, see *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 329; [1994] HCA 44; *Lange* (1997) 189 CLR 520 at 560; *Levy* (1997) 189 CLR 579 at 594-595, 608, 622, 625-626.

379 See *Hogan* (2011) 243 CLR 506 at 554-555 [93], quoting *APLA* (2005) 224 CLR 322 at 361 [65]. See generally *Lange* (1997) 189 CLR 520 at 567, 571.

380 *APLA* (2005) 224 CLR 322 at 403-404 [219]-[220], 451 [380], citing *Cunliffe* (1994) 182 CLR 272 at 329.

381 *Criminal Code* (Tas), s 13(1). See also *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 564-565; [1985] HCA 43.

or attempting to access premises at which terminations are provided, without that person's consent[382]. In addition, s 9(4) creates a separate offence for *publishing or distributing* a recording of another person accessing or attempting to access premises at which terminations are provided, without that person's consent. Those elements of the legislative scheme are not unimportant because, by their legal effect and practical operation, a protest by a person that might be caught by the Protest Prohibition is unlikely to be seen or heard by any person not within the access zone regardless of the Protest Prohibition: it cannot be disseminated without breaching the Reproductive Health Act.

367 Paragraph (c) of the definition includes an offence of "footpath interference in relation to terminations" within the access zone. "Footpath interference in relation to terminations" is not defined in the Reproductive Health Act. But on the ordinary meaning of the words, the elements of the offence are simply that: the accused must engage in a voluntary and intentional act[383]; that act must be done *in relation to terminations*; and, in so acting, the accused must interfere with passing and re-passing on a footpath within an access zone. One can imagine that the prohibition in para (c) might capture conduct that is more subtle than the kind of conduct addressed in para (a) ("besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding" a person).

Existence of the burden

368 The Protest Prohibition does what it says – it prohibits engagement in "a protest in relation to terminations". As explained earlier, "protest" is undefined[384]; it is not directed at, or targeted to, political communication. But in prohibiting "a protest in relation to terminations", the Protest Prohibition *may* operate to impose a burden on *political* communication.

369 The validity of the Protest Prohibition therefore depends on whether that burden on *political* communication can be justified. The level of justification that is required depends on the nature and extent of the burden that the impugned provision imposes on political communication[385].

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382 para (d) of the definition of "prohibited behaviour" in s 9(1) of the Reproductive Health Act.

383 *He Kaw Teh* (1985) 157 CLR 523 at 564-565.

384 cf *Brown* (2017) 261 CLR 328 at 339-340 [2]-[3].

385 *Brown* (2017) 261 CLR 328 at 367 [118], 369 [128], 378-379 [164]-[165], 389-390 [200]-[201], 460 [411], 477-478 [478].

370 In this appeal, that inquiry – the nature and extent of the burden – can be, and should be, undertaken at this stage of the analysis.

Nature and extent of the burden

371 The extent of the burden of the Protest Prohibition on *political* communication is insubstantial. The legal effect and practical operation of the Protest Prohibition have been considered.

372 The terms of the prohibition, and its legal effect and practical operation in its application to political communication, show that it is not discriminatory. The Protest Prohibition is of general application; it is not specifically directed at, or targeted to, political communications, or the content of them[386], or "communications which are inherently political or a necessary ingredient of political communication"[387]. And it is not specifically directed at, or targeted to, the – or even *a* – source of political communication[388].

373 That the Protest Prohibition does not target the content or the source of political communication is important. The Protest Prohibition "affects those whom the law affects"[389]; it operates in a uniform manner on any person protesting in relation to terminations within a 150 m radius of premises at which terminations are provided. It applies regardless of whether the protest is political or non-political. It applies whether the person is for, or against, terminations. And it applies only where the protest is capable of being seen or heard by a person accessing or attempting to access the facility.

374 A law is not discriminatory, in a constitutional sense[390], because its practical effect might be – from time to time and depending upon the actions of a

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386 *Brown* (2017) 261 CLR 328 at 367-368 [120], citing *ACTV* (1992) 177 CLR 106 at 143.

387 *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30]; [2012] HCA 2. See also *Hogan* (2011) 243 CLR 506 at 555-556 [95]; *Monis v The Queen* (2013) 249 CLR 92 at 130 [64], 212 [342]; [2013] HCA 4; *McCloy* (2015) 257 CLR 178 at 238-239 [152]. See generally *Cunliffe* (1994) 182 CLR 272 at 339.

388 See *Unions NSW* (2013) 252 CLR 530 at 578-579 [137]-[140]; *McCloy* (2015) 257 CLR 178 at 233 [136]; *Brown* (2017) 261 CLR 328 at 361-362 [92]-[95]. See also *ACTV* (1992) 177 CLR 106 at 132, 172, 175, 221, 235, 237.

389 *McCloy* (2015) 257 CLR 178 at 287 [334].

390 cf *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 240; [1985] HCA 56; *Cole v Whitfield* (1988) 165 CLR 360 at 409-410; [1988]

(Footnote continues on next page)

person – to restrict a person from expressing a particular point of view on a particular subject matter, which may or may not be political, at a time and place and in a particular manner. Thus, the Protest Prohibition is not discriminatory because it might – from time to time, depending upon the actions of a person – restrict a person from expressing a particular political point of view at a time and place and in a manner where those actions are the very actions that s 9(2), read with para (b) of the definition of "prohibited behaviour" in s 9(1), seeks to address – actions that prevent persons seeking services at premises at which terminations are provided from having unimpeded access: without fear, without shame and without hesitation.

375 Next, the Protest Prohibition is content and viewpoint neutral. It operates in a limited geographic area – within a 150 m radius of premises at which terminations are provided. It does not prevent a protest in relation to terminations that is *151 m* from the premises even if that protest is capable of being seen or heard by a person accessing or attempting to access the premises. It does not prevent a protest in relation to terminations *within* the access zone so long as the protest is not capable of being seen or heard by a person accessing or attempting to access premises at which terminations are provided. It does not prevent a protest in relation to terminations outside the access zone but at a point, or points, which must be passed for a person to enter the access zone and then the premises at which terminations are provided.

376 The alleged importance of on-site protests in *Brown v Tasmania*[391] can be put aside: not only has there not been established, by evidence, any fact that would support a contention that a protest on-site at premises where terminations are provided is the "most effective" form of *political* communication, but the practical effect of the other prohibitions in the Reproductive Health Act, which are not challenged, would be, in any event, to limit the reach of any such protest within the access zone.

377 The focus of the inquiry about validity is, and remains, the terms, legal effect and practical operation of the impugned provision in its application to political communication generally[392]. Here, the terms, legal effect and practical operation of the Protest Prohibition "extend[] to include communications of the kind protected by the freedom"[393] but the Protest Prohibition is not directed at

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HCA 18; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 464, 471-474; [1990] HCA 1.

391 (2017) 261 CLR 328 at 400 [240].

392 cf *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 268 [46]; [2012] HCA 12.

393 *Tajjour* (2014) 254 CLR 508 at 570 [108].

them, and does not discriminate against them on the basis of content or source. The Protest Prohibition applies without distinction between different kinds of protest in relation to terminations. It is, as has been said, a time, place and manner restriction[394] causing an insubstantial and indirect burden on political communication. That conclusion is reinforced by the identified target, or purpose, of the Reproductive Health Act and the Protest Prohibition.

Purpose of the Protest Prohibition

378 The short title of the Reproductive Health Act, as well as the heading to Pt 2, records that it is an Act concerned with "Access to Terminations". Part 2 ensures that access is provided in two specific, and connected, ways. Sections 4 to 7 address terminations by medical practitioners including a woman's right to access a termination by a medical practitioner. Section 8 decriminalises terminations.

379 Consistent with, and in order to pursue, that stated objective of providing access to terminations, s 9 then creates access zones for premises at which terminations are provided, to facilitate access to that health service rendered lawful by the other provisions and to prohibit certain behaviour in that access zone. The four categories of conduct in paras (a) to (d) of the definition of "prohibited behaviour" in s 9(1) identify or target conduct that would prevent, or deter, a person from seeking services at premises at which terminations are provided. The Protest Prohibition is one category of conduct. The categories are not mutually exclusive. Put in different terms, the Protest Prohibition is one element – albeit an important element – in a legislative scheme introduced in Tasmania in 2013 designed to afford effective access to pregnancy termination services in Tasmania.

380 Thus, the Protest Prohibition is a law directed at providing a safe passage for persons lawfully accessing or attempting to access premises for health services rendered lawful by other provisions in Pts 2 and 3 of the Reproductive Health Act. The purpose of s 9 is unrelated to political communication, although it may incidentally burden[395] the implied freedom. That conclusion is reinforced

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394 *ACTV* (1992) 177 CLR 106 at 234-235; *Levy* (1997) 189 CLR 579 at 618; see also at 639; *Brown* (2017) 261 CLR 328 at 462 [420], 464 [426].

395 *ACTV* (1992) 177 CLR 106 at 143, 169, 234-235. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77; [1992] HCA 46; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40]; [2004] HCA 41; *Hogan* (2011) 243 CLR 506 at 555-556 [95]; *McCloy* (2015) 257 CLR 178 at 268-269 [252]-[253].

by the extrinsic materials[396] and, further, by reference to the publicly available reports and other materials cited in those extrinsic materials[397]. "Women are entitled to access termination services in a confidential manner without the threat of harassment"[398] particularly because, as the Minister for Health recognised, women experience poorer health outcomes without the provision of "safe, legal and accessible reproductive services"[399].

381 Mr Preston's contention that the purpose or object of the Protest Prohibition is to "deter speech" of a certain character is contrary to the text of the Reproductive Health Act and the evident purpose of the Protest Prohibition. The purpose of the Protest Prohibition is not to deter speech but to enable women, medical practitioners and other people to have unobstructed and safe access to premises where terminations are provided. The Protest Prohibition removes one of the barriers that deterred people from accessing lawfully available medical services in relation to terminations. That is a legitimate and permissible purpose; a purpose not incompatible with the system of representative and responsible government prescribed by the *Constitution*.

Appropriate and adapted

382 The Protest Prohibition is an important element of the scheme introduced in 2013 directed at providing effective access to pregnancy termination services in Tasmania. It was and remains "part of a broader strategy [of the Tasmanian Government] to improve the sexual and reproductive health of all Tasmanians, especially ... vulnerable populations"[400].

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396 See Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 44-87.

397 See Humphries, "Abortion, Stigma & Anxiety", Clinical Masters, University of Melbourne, 2011; Tasmania, Department of Health and Human Services, *Information Paper relating to the Draft Reproductive Health (Access to Terminations) Bill: Revised pregnancy termination laws proposed for Tasmania* (2013) at 6-12.

398 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 51.

399 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 44.

400 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 51.

383 The intersection of the implied freedom of political communication with a person's privacy and protection from abuse was legislatively resolved in Tasmania by the enactment of a provision (s 9(2)) which regulates the time, place and manner of a particular kind of communication. In reaching that resolution, the Tasmanian Parliament described the access zone as providing the "appropriate balance between the right to protest and protecting women from being exposed to those who seek to shame and stigmatise them"[401].

384 "The balancing of the protection of other interests against the freedom to discuss governments and political matters is, under our Constitution, a matter for the Parliament to *determine* and for the Courts to *supervise*"[402] (emphasis added). The judicial role ensures that the system of representative and responsible government which the *Constitution* creates and requires is not undermined by laws burdening political communication.

385 Here, the Protest Prohibition has a rational connection to the stated purpose of the Reproductive Health Act – facilitating unobstructed and safe access to pregnancy termination services in Tasmania. It is one of the distinct types of conduct prohibited by s 9(2): categories of conduct identified by the Parliament as deterring people from seeking access to termination services[403].

386 The Protest Prohibition, in its legal effect and practical operation, effects an insubstantial and indirect burden on political communication; it regulates the time, place and manner of protest in relation to a particular subject matter (terminations) and of a particular amplitude ("able to be seen or heard ..."); and it does so for an identified and legitimate end, an end which was and remains the principal, if not sole, reason why the provision was enacted – to provide unobstructed and safe access to pregnancy termination services in Tasmania.

387 No other conclusion can be drawn than that the Protest Prohibition is reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government.

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401 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 51.

402 *Nationwide News* (1992) 177 CLR 1 at 50, quoted in *Brown* (2017) 261 CLR 328 at 467 [436]. See also *Mulholland* (2004) 220 CLR 181 at 197 [32]; *McCloy* (2015) 257 CLR 178 at 229-230 [122]-[123].

403 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50, citing Humphries, "Abortion, Stigma & Anxiety", Clinical Masters, University of Melbourne, 2011.

388 Mr Preston's conduct contravened the Protest Prohibition: a law directed at providing an unobstructed and safe passage for persons lawfully accessing or seeking to access premises at which terminations are provided. There is nothing protectable about seeking to shame strangers about private, lawful decisions they make.

Structured proportionality

389 In the circumstances of this appeal, like those in *Brown*[404], it is neither necessary nor appropriate to say anything further about suitability, necessity or adequacy of balance. Once it is accepted, as it has been, that the burden is insubstantial and indirect and that the Protest Prohibition is rationally connected to the legitimate purpose it seeks to serve, no further analysis is required. It is these factors which show why the burden is not "undue"[405].

390 Structured proportionality testing[406] is *a* means of expressing a chain of reasoning undertaken to arrive at a conclusion about the validity of a provision said to be beyond power because it burdens the implied freedom of political communication. It is *a* means of setting out steps to a conclusion – *a* tool of analysis[407]. It is not a constitutional doctrine[408] or a method of construing the *Constitution*. The contention that, in the Australian context, structured proportionality – even if not deployed in a rigid or sequenced way – may provide a better account of judicial reasoning and thereby promote more consistency and clarity in judgment[409] is to be approached with caution.

391 Not every law which effectively burdens the freedom of political communication poses the same degree of risk to the efficacy of the system of representative and responsible government which the *Constitution* creates and

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404 (2017) 261 CLR 328 at 464-468 [427]-[438].

405 *Lange* (1997) 189 CLR 520 at 569, 575.

406 See *McCloy* (2015) 257 CLR 178 at 194-196 [2]-[4], 213-220 [69]-[92]; *Brown* (2017) 261 CLR 328 at 363-364 [104], 368-370 [123]-[131].

407 *McCloy* (2015) 257 CLR 178 at 213 [68], 215-216 [74]; *Brown* (2017) 261 CLR 328 at 369 [125], 370 [131], 376 [158]-[159], 417 [279]-[280], 476-477 [473].

408 *McCloy* (2015) 257 CLR 178 at 213 [68]; *Brown* (2017) 261 CLR 328 at 476-477 [473].

409 See Jackson, "Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality" (2017) 130 *Harvard Law Review* 2348 at 2375.

requires[410]. Not every law which effectively burdens the freedom of political communication, but which is directed to a legitimate end, demands the same degree of justification. Not every law which effectively burdens the freedom of political communication needs to be subjected to the same level of scrutiny. Not every law which effectively burdens the freedom of political communication is able to be, or should be, analysed by a rigid, "one size fits all", approach[411]. The detailed structure of proportionality does not reflect the common law method of legal reasoning. The application of any tool of analysis requires consideration of the context within which the tool is to operate[412]; structured proportionality reflects its civil law origins and purposes[413]. Whether the origins of structured proportionality lie outside Australia is not the relevant question. The relevant question is what is structured proportionality, and is that suited to, and compatible with, the Australian context.

392 Proportionality as a tool of analysis often takes as its starting point the concept of a prima facie infringement of a right and inquires as to whether the goal being achieved warrants the extent of intrusion on that right[414]. According to Schauer, it is only when *rights* are in issue that the language of proportionality is in play[415]. And when rights are "on one side of the equation", there is a presumption in favour of the right or a burden of proof imposed on those who would restrict the right. In that context, Schauer contends that the idea of "balancing" – which would ignore the presumption and burden – is misleading[416].

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410 *Brown* (2017) 261 CLR 328 at 378 [164].

411 *Brown* (2017) 261 CLR 328 at 477 [476]. See generally Kaplow, "On the Design of Legal Rules: Balancing Versus Structured Decision Procedures" (2019) 132 *Harvard Law Review* 992.

412 Jackson, "Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality" (2017) 130 *Harvard Law Review* 2348 at 2393.

413 As to its origins, see Currie, *The Constitution of the Federal Republic of Germany* (1994) at 19-20.

414 Jackson, "Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality" (2017) 130 *Harvard Law Review* 2348 at 2361-2364.

415 Schauer, "Proportionality and the Question of Weight", in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) 173 at 176-177.

416 Schauer, "Proportionality and the Question of Weight", in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) 173 at 178.

Indeed, it has been said that what "lurk[s]" beneath this presumption and burden of proof, and is implicit in any rights-based proportionality analysis, is a "structural" matter – a "rule of weight" – or, really, a rule of disproportionate weight: a rule giving *more* weight to the right than to competing non-right interests. The structure (and the rule) exists because there is a right. And it is said that it is that structure that explains the difference between proportionality analysis and the balancing methodology that underpins policy decisions[417].

393 If the analysis stopped there, the need for a cautious approach to proportionality would be evident: not only is the implied freedom of political communication not a right, but the conceptual origins of structured proportionality find no readily identifiable equivalents in the Australian constitutional structure or jurisprudence.

394 But there are other reasons for caution.

395 Structured proportionality, as a tool of analysis, is contested conceptually, geographically and in its sphere of application and influence[418]. In some countries, the detailed structure of proportionality has been displaced by a concept of reasonableness[419]. In other countries that had previously adopted a form of structured proportionality analysis, it now does not reflect the *only* or even the *preferred* method of legal reasoning. The United States has not adopted proportionality[420] as a form of analysis.

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417 Schauer, "Proportionality and the Question of Weight", in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) 173 at 178, 180-181.

418 See generally Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (2017); Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999).

419 Young, "Proportionality, Reasonableness, and Economic and Social Rights", in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (2017) 248.

420 See Cohen-Eliya and Porat, "American balancing and German proportionality: The historical origins" (2010) 8 *International Journal of Constitutional Law* 263; Möller, "US Constitutional Law, Proportionality, and the Global Model", in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (2017) 130.

396 And that is not surprising. Competing views of what have been described as the "paradigms of proportionality"[421] abound. And they are just some aspects of the current, and ardent, debate about proportionality generally[422].

397 For example, Alexy distinguishes between "rules" and "principles" and contends that "[r]ules aside, the legal possibilities are determined essentially by opposing principles"; and that a principle is merely a prima facie requirement where the determination of one principle relative to the requirements of other principles is brought about by balancing with an objective of Pareto optimisation – that something be realised "to the greatest extent possible given the legal and factual possibilities"[423]. Alexy contends that the three sub-principles of proportionality express this idea of optimisation – the first and second, suitability and necessity, refer to optimisation relative to the factual possibilities and the third, the law of balancing, concerns optimisation of the legal possibilities[424]. Alexy sees and uses proportionality as a method of interpretation.

398 Barak has a different starting point as well as a fourth element in structured proportionality. Barak's starting point is what he describes as a

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421 Jackson and Tushnet, "Introduction", in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (2017) 1 at 2.

422 See, eg, Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (2017); Jackson, "Pockets of proportionality: choice and necessity, doctrine and principle", in Delaney and Dixon (eds), *Comparative Judicial Review* (2018) 357. See also Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 *University of Toronto Law Journal* 383 at 383-384, 387-395.

423 Alexy, "Proportionality and Rationality", in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (2017) 13 at 14. For a discussion as to the analytical difference between "proportionality as principle" and "proportionality as structured doctrine", see Jackson, "Pockets of proportionality: choice and necessity, doctrine and principle", in Delaney and Dixon (eds), *Comparative Judicial Review* (2018) 357 at 368-376. In jurisdictions where the latter approach is adopted, the steps in proportionality testing are seen as sequential; Canada is an example: see generally *R v Oakes* [1986] 1 SCR 103, reformulated in *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 381 at 404-405.

424 Alexy, "Proportionality and Rationality", in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (2017) 13 at 14.

limitation on the constitutional right as a prima facie *violation*[425]. By way of contrast, Alexy's starting point is a *principle* as a prima facie *requirement*. Barak then contends that the requirement of a proper purpose defines the first step of the proportionality test[426]. By way of contrast, Alexy's position is that such a first step is superfluous and may even pose a danger for the rationality of the test[427].

399 Although that list of disputes is not exhaustive, it is illustrative of the difficulties of seeking to import structured proportionality as a "one size fits all" approach.

400 Any contention that a legal rule, of itself, creates transparency must identify the need for, or usefulness of, that rule. For example, some of the steps in structured proportionality analysis are unnecessary; it is hard to imagine how a law would fail the first stage and not also the second[428], and the third stage to some degree overlaps with the prior analysis of whether the law's purpose is legitimate[429]. And, in that context, whilst structured decision-making is sometimes advocated as a replacement for an unconstrained balancing test, if used it is necessary to ascertain whether *outcomes differ as between the two methods*, and if so, why, and which is the preferred legal outcome[430].

401 A court, in seeking to exercise judgment about laws enacted by members of Parliament – who exercise legislative power as "representatives of the people"

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425 See Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 101-102.

426 See Alexy, "Proportionality and Rationality", in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (2017) 13 at 19-20, citing Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 530; see also at 245-302, 529-539.

427 Alexy, "Proportionality and Rationality", in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (2017) 13 at 14.

428 Bendor and Sela, "How proportional is proportionality?" (2015) 13 *International Journal of Constitutional Law* 530 at 538.

429 Choudhry, "Proportionality: Comparative Perspectives on Israeli Debates", in Sapir, Barak-Erez and Barak (eds), *Israeli Constitutional Law in the Making* (2013) 255 at 256-257.

430 Kaplow, "On the Design of Legal Rules: Balancing Versus Structured Decision Procedures" (2019) 132 *Harvard Law Review* 992 at 994.

and who are "accountable to the people for what they do"[431] – must explain how and why a particular decision has been reached, and why particular orders were made. Judges must strive for transparency and clarity in their reasoning. This is not a new concept. However, there is and can be no standardised formula for judicial reasoning. Acknowledging that a goal of proportionality analysis is clarity does not dictate, and, in the context of the Australian common law tradition, tends against, the adoption of one rigid method of analysis.

402 That last statement requires some unpacking. The development of the common law occurs in a unique and restricted way[432]. The common law can only be developed logically and analogically from existing legal principles[433]. This analogical quality of common law reasoning differentiates it from other kinds of legal reasoning[434].

403 As Gageler J said in *McCloy*, the difficulty with structured proportionality is that it adopts "standardised criteria"[435] to be applied uniformly across all kinds of laws imposing a restriction on political communication. And it is this aspect of structured proportionality that makes it incongruent with the common law judicial method. Each case is fact-specific; each analysis is necessarily case-specific[436]. The analyses in *Unions NSW v New South Wales* are illustrative of that approach[437].

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431 *Brown* (2017) 261 CLR 328 at 466 [434], quoting *ACTV* (1992) 177 CLR 106 at 138.

432 See *Momcilovic v The Queen* (2011) 245 CLR 1 at 156 [392]-[393]; [2011] HCA 34, citing Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 472, 475.

433 *Breen v Williams* (1996) 186 CLR 71 at 115; [1996] HCA 57. See also *Momcilovic* (2011) 245 CLR 1 at 155-156 [391]-[393].

434 Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93 at 93.

435 (2015) 257 CLR 178 at 235 [142].

436 See *McCloy* (2015) 257 CLR 178 at 235 [142]; *Brown* (2017) 261 CLR 328 at 477 [475]-[477].

437 (2019) 93 ALJR 166 at 175-179 [35]-[57], 181-188 [69]-[102], 189-192 [108]-[118], 195-198 [137]-[153], 202-211 [177]-[222]; 363 ALR 1 at 12-17, 20-28, 30-33, 37-41, 48-59; [2019] HCA 1.

404 The *Lange* questions provide a *standard*. The more "rule-like" elements that are introduced into that standard, the further you are taken away from that standard's purpose if the "rules" are applied in a rigid and formalistic way. The rules may impede the development – the filling out – of the content of the standard through the common law method: a case-by-case process of crystallising the meaning of the standard. The benefit of standards, rather than rules, is that standards "leave matters open for renewed consideration in subsequent cases, furnishing future decisionmakers with continued, unrestricted space in which to pursue further refinements of the law"[438]. The corollary is that standards can generate uncertainty in their application. But the rigid adoption of an analysis like structured proportionality will not always be the answer to that uncertainty.

Conclusion and orders

405 For those reasons, so much of Mr Preston's appeal as has been removed into this Court should be dismissed with costs.

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438 Coenen, "Rules Against Rulification" (2014) 124 *Yale Law Journal* 644 at 694-695.

EDELMAN J.

Consistency and structured proportionality

406 In 2013 and 2014, the Parliament of Tasmania enacted two statutes concerned with on-site protests. One of those statutes, the "Workplace Protesters Act"[439], contained provisions seeking to protect businesses from consequences of on-site protests. The other, the "Reproductive Health Act"[440], contains provisions seeking to protect women accessing or attempting to access services at termination clinics from consequences of on-site protests. Both Acts were challenged as being contrary to the implied constitutional freedom of political communication. In *Brown v Tasmania*[441], a majority of this Court held that the relevant provisions of the Workplace Protesters Act were invalid. Today, in the Preston appeal, this Court unanimously rejects the submission that the relevant provisions of the Reproductive Health Act are invalid.

407 A clear and principled approach is required in order to distinguish between the decision in *Brown v Tasmania*, upon which Mr Preston relied heavily, and the outcome in the Preston appeal. Clarity and principle are needed to ensure that the implied freedom of political communication does not become an unlicensed vehicle for a court to remodel public policy by engaging in "an assessment of the relative merits of competing legislative models"[442]. At best, without a reasoning process requiring precision of thought and expression in the application of the implied freedom of political communication, the result could be a "codeless myriad of precedent, [t]hat wilderness of single instances"[443], a direction against which this Court has "from its establishment resolutely set its face"[444].

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439 *Workplaces (Protection from Protesters) Act 2014* (Tas).

440 *Reproductive Health (Access to Terminations) Act 2013* (Tas).

441 (2017) 261 CLR 328; [2017] HCA 43.

442 *Brown v Tasmania* (2017) 261 CLR 328 at 418 [282].

443 Tennyson, *Aylmer's Field* (1891) at 14. See *Prior v Sherwood* (1906) 3 CLR 1054 at 1070; [1906] HCA 29; *Fraser v Victorian Railways Commissioners* (1909) 8 CLR 54 at 58; [1909] HCA 5; *SOS (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529 at 573; [1972] HCA 18; *Mallet v Mallet* (1984) 156 CLR 605 at 641; [1984] HCA 21.

444 *Fraser v Victorian Railways Commissioners* (1909) 8 CLR 54 at 58.

408 Clarity about, and reconciliation of, the reasoning and outcome in *Brown v Tasmania* and in the Preston appeal is furthered by the application of a three-stage structured proportionality test. Structured proportionality testing provides an analytical, staged structure by which judicial reasoning can be made transparent. The extent of its value will depend upon the content of each stage. However, despite the presence of proportionality testing in many countries, there is no fixed approach within each stage. In Australia, a restrained approach to each stage is required because the freedom of political communication is a limited implication from the *Constitution* that applies only where it is necessary to ensure the existence and effective operation of the scheme of representative and responsible government protected by the terms of the *Constitution*. The approach at each stage must also reflect the terms and structure of the *Constitution* and the operation of the system of government that it instantiates. Those terms and that structure also contain a divide between legislative power and judicial power, which, whilst not clearly delineated, is now deeply embedded[445].

409 In the Preston appeal the requirements of the three stages of proportionality testing are satisfied. The legislation is valid. However, although the other appeal before this Court, the Clubb appeal, concerns similar provisions in Victorian legislation[446], the issue of justification, and the associated proportionality testing, need not be considered in that appeal.

410 The Attorney-General of the Commonwealth submitted that it is not necessary to determine whether the Victorian provisions are invalid because, even if they were invalid, their application to political communication could be "severed". The result, it was submitted, was that in the event of either validity or invalidity the provisions would still apply to Mrs Clubb. That submission should be accepted, although the commonly used expression "severance" is inapt to describe accurately the different process undertaken, which does not involve severing some or all of the words of a provision. The process is one by which the essential meaning of provisions can, if necessary, be disapplied from certain facts or circumstances to which that meaning would otherwise apply. In the Clubb appeal, the relevant provisions could be disapplied from circumstances of political communication if that were necessary to ensure validity.

411 This approach of avoiding giving an answer to a constitutional question is based in part upon a principle of restraint from judicial overreach, which is also

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445 See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 272; [1956] HCA 10.

446 *Public Health and Wellbeing Act 2008* (Vic) as amended by the *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic).

one influence upon the principles of reading down, severance, and disapplication[447]. The first task of any court in a case where a provision is alleged to be constitutionally invalid is to interpret and to construe the provision[448]. Interpretation and construction require the court, before invalidating a provision, to consider whether the provision could be read down, severed, or disapplied in part. The potential applicability of those techniques could mean that constitutional questions of validity need not be considered. If so, then, in the absence of a good reason to do so, the constitutional issue should not be resolved. The constitutional issue need not be resolved in the Clubb appeal.

The Clubb appeal

The threshold issue

412 The facts and legislation are set out in detail in the joint judgment and, since this appeal can be resolved on what was described by the parties and interveners as the "threshold issue", the facts can be summarised briefly. Mrs Clubb was convicted of contravening s 185D, read with para (b) of the definition of "prohibited behaviour" in s 185B(1) (together, "the communication prohibition"), of the *Public Health and Wellbeing Act 2008* (Vic) ("the Public Health Act"). With exceptions for employees and persons providing services at the premises[449], the communication prohibition proscribes communicating, in an area within a radius of 150 m from premises at which abortions are provided,

> "by any means in relation to abortions 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 and is reasonably likely to cause distress or anxiety".

413 Mrs Clubb submitted that she did not have sufficient findings of fact to make a positive case that her contravention involved political communication. In light of this, the Attorney-General of the Commonwealth and the

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447 Fish, "Constitutional Avoidance as Interpretation and as Remedy" (2016) 114 *Michigan Law Review* 1275 at 1289.

448 *Brown v Tasmania* (2017) 261 CLR 328 at 479-481 [485]-[487]. See also *Coleman v Power* (2004) 220 CLR 1 at 21 [3], 68 [158], 84 [219], 115 [306]; [2004] HCA 39; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4; *Monis v The Queen* (2013) 249 CLR 92 at 154 [147]; [2013] HCA 4.

449 Public Health Act, s 185B(2).

Attorney-General of the State of Queensland submitted that a threshold question was whether the operation of the communication prohibition could be "severed" in relation to political communications if it were invalid. If so, there would be no need to determine the constitutional question of the validity of the law because the legislation would be either valid entirely, or valid after severance, and in either case it would apply to Mrs Clubb. In contrast, this submission was opposed by the Attorney-General for the State of Victoria and the Attorney-General for the State of New South Wales.

414 The ultimate conclusion urged by the Attorney-General of the Commonwealth should be accepted. However, there is a need for clear nomenclature in this area. The contrasting positions taken by different parties and interveners were caused, in part, by overlapping and inconsistent terminology. At different times the submission was described as one that was concerned with "reading down", "severance", or "construction".

Distinguishing "reading down", "severance", and "partial disapplication"

415 In order to explain the nature of the submission by the Attorney-General of the Commonwealth, it is necessary to distinguish three different concepts. The labels that can be used, which most closely fit the underlying principles, are "reading down", "severance", and "partial disapplication". The labels of "severance" and "reading down" have, on different occasions, been used to describe each of the three different concepts. A clear vocabulary is needed because, despite the overlap in the concepts, the principles underlying each are different and the consequences can be different.

416 "Reading down" is a long-recognised part of the process of interpretation at common law, sometimes justified in cases of potential invalidity by the Latin maxim *ut res magis valeat quam pereat*[450]. The process of reading down in such cases involves the court preferring an interpretation of a statutory provision that renders a provision constitutionally valid over one which would render it

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450 "It is better for a thing to have effect than to be made invalid". See, eg, *Davies and Jones v Western Australia* (1904) 2 CLR 29 at 43; [1904] HCA 46; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; [1925] HCA 53; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180; [1926] HCA 58; *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 371-372; [1930] HCA 52; *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 562; [1980] HCA 30; *Coleman v Power* (2004) 220 CLR 1 at 88 [227].

invalid[451]. This is part of the process of ascertaining the essential meaning of the words of the provision[452].

417 The "reading down" approach applies ordinary language techniques by which the essential meaning of the words of a statutory clause is understood based upon past experience and expectations[453] and is not limited to a literal, semantic meaning of the individual words. In *Ex parte Walsh and Johnson; In re Yates*[454], Isaacs J expressed the technique as part of the process of ascertaining parliamentary intention based on a presumption that Parliament would be expected to respect recognised legal rules. It may be that the expectation of consistency with the *Constitution* could also permit "reading up", to a higher level of generality, the essential meaning that a provision would otherwise have had if the provision would be invalid unless it operated in an extended range of circumstances[455]. It is unnecessary to decide that point. In any event, a provision can only be given a "read down" or "read up" meaning if that meaning is consistent with the legislative intent as manifested in the text[456].

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451 *Macleod v Attorney-General for New South Wales* [1891] AC 455 at 458-459; *D'Emden v Pedder* (1904) 1 CLR 91 at 119-120; [1904] HCA 1; *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 364; [1908] HCA 95; *Osborne v The Commonwealth* (1911) 12 CLR 321 at 337; [1911] HCA 19; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267; [1945] HCA 30; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 14; [1992] HCA 64; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28]; [2000] HCA 33; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 161 [355]; [2006] HCA 52; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 519 [46]; [2009] HCA 4.

452 See *Davies and Jones v Western Australia* (1904) 2 CLR 29 at 43.

453 See *Federal Commissioner of Taxation v Tomaras* (2018) 93 ALJR 118 at 137 [100]; 362 ALR 253 at 276; [2018] HCA 62.

454 (1925) 37 CLR 36 at 93; see also at 127.

455 Compare *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 547-548 [36]-[37]; [2014] HCA 9.

456 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 883 [30], 894 [59], 901 [81].

418 Where reading down is not possible, the common law also recognises a different doctrine commonly described as "severance". The doctrine of severance, where it applies, permits a court to strike down part of a statute that is beyond power, leaving the remainder of the statute operative[457]. An entire section or sections of a statute can be struck out under the doctrine of severance. Even part of a section can be struck out, commonly where it can be "blue pencilled"[458]. The common law doctrine of severance can only be applied if the part of the statute to be severed is independent of the remainder of the statute[459]. Further, severance is not possible where "the Statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it"[460].

419 A good illustration of the limits of the common law doctrine of severance is the decision of this Court in *Owners of SS Kalibia v Wilson*[461]. In that case, there was a challenge to the validity of part of the *Seamen's Compensation Act 1909* (Cth) concerning intra-State trade by ships engaged in the coasting trade. This Court unanimously held that the expression "coasting trade" could not be

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457 Sedgwick and Pomeroy, *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed (1874) at 413-415. See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 27, 35-36, 45, 54-55; [1910] HCA 33; *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 698, 701, 715; [1910] HCA 77; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267; *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 258; [1949] HCA 44.

458 *Attwood v Lamont* [1920] 3 KB 571 at 578. See *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 at 804; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 348; [1995] HCA 16; *Harrington v Lowe* (1996) 190 CLR 311 at 328; [1996] HCA 8.

459 *Davies and Jones v Western Australia* (1904) 2 CLR 29 at 38; *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employes Association* (1906) 4 CLR 488 at 546-547; [1906] HCA 94; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 27, 35, 45, 54-55; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 470; [1918] HCA 56.

460 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 27.

461 (1910) 11 CLR 689.

read down to mean only inter-State coasting trade because Parliament had intended to use the term to mean all trade between different Australian ports[462]. As the expression could not be read down, the Court considered whether severance was possible. A majority of the Court held that it was not possible to sever the intra-State elements of the provisions from their inter-State elements because the provisions used the "indivisible" and "collective expression" of "coasting trade"[463], which necessarily encompassed inter-State and intra-State trade. Griffith CJ said that to sever the statute "would be in effect making a new law"[464]. Barton J considered that severance would cause the law to be "substantially or radically different"[465]. O'Connor J said that the Court would "take upon itself the power of making a new law"[466]. And Isaacs J said that to sever in such circumstances "would therefore be exceeding our functions as interpreters of the law"[467]. The doctrine of severance was clearly summarised by Barton J[468]:

> "[I]f Parliament had enacted that certain specified things, say A, B, and so on down to Z, might lawfully be done, the first half-dozen being within its legislative power and the remainder outside it ... [then] the bad can be separated from the good and excised, and if there be left a law not substantially or radically different, dealing effectively with so much of the subject matter as is within the legislative power, the Act will be good, minus the invalid provisions eliminated."

420 This same approach to severance in contract law, in the context of covenants in unreasonable restraint of trade, has been described as involving the application of a blue pencil to allow severance "where the covenant is not really a single covenant but is in effect a combination of several distinct covenants"[469].

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462 (1910) 11 CLR 689 at 697-698, 702-703, 708, 712, 718.

463 (1910) 11 CLR 689 at 701-702; see also at 698-699, 709, 715.

464 (1910) 11 CLR 689 at 699.

465 (1910) 11 CLR 689 at 701.

466 (1910) 11 CLR 689 at 709.

467 (1910) 11 CLR 689 at 715.

468 (1910) 11 CLR 689 at 701.

469 *Attwood v Lamont* [1920] 3 KB 571 at 593; see also *S V Nevanas & Co v Walker and Foreman* [1914] 1 Ch 413 at 423, both quoted in Heydon, *The Restraint of Trade Doctrine*, 4th ed (2018) at 303.

Also reflecting a similar constraint to that existing in statutory severance, in contract law the severance must not alter the nature of the contract[470]. It is a different and much more controversial issue, at least in the absence of a contractual term permitting it, to disapply a contractual clause that would otherwise be void to an extent that would ensure its validity[471].

421 After the decision in *Owners of SS Kalibia v Wilson*, the issue arose again in *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth*[472]. In that case the relevant provisions of the *Navigation Act 1912* (Cth) also purported to apply to all ships engaged in the coasting trade. This Court unanimously held that it was beyond Commonwealth power to legislate in relation to ships engaged solely in the domestic trade and commerce of a State[473]. However, unlike the *Seamen's Compensation Act* considered in *Owners of SS Kalibia v Wilson*, the *Navigation Act* provided, in s 2(2), that the Act be "read and construed ... [as] a valid enactment to the extent to which it is not in excess of that power". The Court did not confine the "read and construe"[474] command in s 2(2) to the common law techniques of reading down and severance. Instead, the Court upheld the remainder of the Act, treating s 2(2) as requiring the Court to uphold that part of the subject matter that would be valid, "however interwoven" it is with the invalid part[475], provided that, as the Court later explained, it does not "manufacture a new web"[476]. That legislative command had the effect that the provisions of the Act operated "in respect of all ships to which they might lawfully be applied"[477]. The provisions were

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470 *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at 531 [46]; [2006] HCA 31; Heydon, *The Restraint of Trade Doctrine*, 4th ed (2018) at 304, citing *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 745 and *Attwood v Lamont* [1920] 3 KB 571 at 580.

471 See, eg, *Baines v Geary* (1887) 35 Ch D 154 at 159; *Foltz v Struxness* (1950) 215 P 2d 133 at 138. See also Heydon, *The Restraint of Trade Doctrine*, 4th ed (2018) at 309 fn 127, 314 fn 146 and the cases cited therein; cf at 314-315.

472 (1921) 29 CLR 357; [1921] HCA 31.

473 (1921) 29 CLR 357 at 368-369.

474 Compare *Human Rights Act 1998* (UK), s 3(1): "read and given effect".

475 (1921) 29 CLR 357 at 369.

476 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386.

477 (1921) 29 CLR 357 at 370.

effectively disapplied to the type of trading to which they could not validly be applied.

422 The distinction between this partial disapplication, on the one hand, and reading down and severance, on the other, is significant. Reading down is the exercise of an interpretative power to expound meaning. Severance is the exercise of a power to recognise the invalidity of, and to sever, a substantially independent part of a statute or provision. In the process of severance, it is not relevant that the legislature might have preferred partial operation of the statute in place of no operation "if [it] had applied [its notional] mind to the subject"[478]. As Griffith CJ explained[479], what a legislature "would have done in a state of facts which never existed is a matter of mere speculation". In both cases of reading down and cases of severance, the essential meaning of the statutory text as read down or as severed is applied to the facts.

423 Unlike reading down or severance, the partial disapplication technique under s 2(2) of the *Navigation Act*, as recognised in *Newcastle and Hunter River Steamship Co Ltd*, does not apply the essential meaning to all of the facts or circumstances before the court. The essential meaning of "the coasting trade" in that case could not be read down to mean "the inter-State coasting trade"[480]. Nor could any part of the "one collective expression"[481] used in the relevant provisions be severed from a valid remainder. Instead, the provisions concerning ships engaged in the coasting trade were disapplied to ships engaged in the intra-State coasting trade[482].

424 The underlying premise of the partial disapplication approach in *Newcastle and Hunter River Steamship Co Ltd* was the statutory command in s 2(2) that, in order to preserve constitutional validity, the essential meaning of statutory words which cannot be read down or severed is not applied generally to all facts and circumstances that would otherwise have been encompassed. Without a statutory command, evidencing a statutory intention for partial disapplication, that approach would not have been possible.

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478 *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 699; cf at 722.

479 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 27; see also at 35, 45 and *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 at 813.

480 (1921) 29 CLR 357 at 367-368.

481 (1921) 29 CLR 357 at 369.

482 (1921) 29 CLR 357 at 369-370.

425 The partial disapplication approach requires a distinction, which commonly (but not entirely accurately) is described as one between meaning and application[483]. In United States constitutional and administrative law, the legal approach to each concept has been described as involving a difference, respectively, between interpretation and construction[484], although it is the distinction that is important rather than the labels. A similar point has been made in relation to statutes[485], wills[486] and, although "underappreciated"[487], contracts[488].

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483 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537; [1989] HCA 53; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 551-552 [42]; [1999] HCA 27; *Birmingham City Council v Oakley* [2001] 1 AC 617 at 631; *R v G* [2004] 1 AC 1034 at 1054 [29]. See also *Peterswald v Bartley* (1904) 1 CLR 497 at 508; [1904] HCA 21. Or connotation and denotation: *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267; [1959] HCA 47; *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327 at 331; [1970] HCA 32; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 297; [1982] HCA 72; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 302-303; [1983] HCA 21; *Davis v The Commonwealth* (1988) 166 CLR 79 at 96; [1988] HCA 63; *McGinty v Western Australia* (1996) 186 CLR 140 at 200; [1996] HCA 48; *Eastman v The Queen* (2000) 203 CLR 1 at 45 [142]; [2000] HCA 29; *Singh v The Commonwealth* (2004) 222 CLR 322 at 343-344 [37]-[38]; [2004] HCA 43.

484 Solum, "The Interpretation-Construction Distinction" (2010) 27 *Constitutional Commentary* 95 at 100-103; Solum and Sunstein, "*Chevron* as Construction", paper, December 2018, available at <https://ssrn.com/abstract=3300626>. See also Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999) at 6-8; Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, rev ed (2014) at 102; Balkin, *Living Originalism* (2011) at 4-5.

485 Lieber, *Legal and Political Hermeneutics*, enlarged ed (1839) at 23, 56. Compare Sedgwick and Pomeroy, *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed (1874) at 191-192.

486 See Atkinson, *Handbook of the Law of Wills*, 2nd ed (1953), §146 at 809-810, 814, 816. See also American Law Institute, *Restatement (Third) of the Law of Property: Wills and Other Donative Transfers* (2003), §10.1 at 276, §11.3 at 333.

487 Cunningham, "Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin" (1995) 16 *Cardozo Law Review* 2225 at 2246.

488 Corbin, "Conditions in the Law of Contract" (1919) 28 *Yale Law Journal* 739 at 740-741. See also Corbin, *Corbin on Contracts*, rev ed (1960) §534 at 9, 12-13; Patterson, "The Interpretation and Construction of Contracts" (1964) 64 *Columbia*

(Footnote continues on next page)

Statutory commands to read down, to sever, and for partial disapplication

426 The powers of reading down, severance, and partial disapplication were all given a generalised application in 1930 when the Commonwealth Parliament enacted s 15A of the *Acts Interpretation Act 1901* (Cth)[489]. Section 15A has been described as a "direction to every Court"[490] to exercise those powers unless a contrary intention appears in the impugned legislation.

427 As explained in the Second Reading Speech for the *Acts Interpretation Act 1930* (Cth), s 15A replicated s 2(2) of the *Navigation Act*. In the Second Reading Speech, the Vice-President of the Executive Council noted that this Court had held that, at common law, "where the valid and invalid provisions of an act are inseparable or 'wrapped up in the same word or expression' the whole must fail"[491]. He said that this result could be avoided by the proposed s 15A, which would make a provision like s 2(2) of the *Navigation Act* "common to Commonwealth legislation"[492]. The Leader of the Opposition, who had introduced a relevantly identical Bill in the previous Parliament[493], described the effect of the proposed s 15A as to "deprive [a litigant] of an argument" that an

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Law Review 833 at 833, 835; American Law Institute, *Restatement (Second) of the Law of Contracts* (1981), §200 at 82; Rowley, "Contract Construction and Interpretation: From the 'Four Corners' to Parol Evidence (and Everything in Between)" (1999) 69 *Mississippi Law Journal* 73 at 79-80.

489 By s 3 of the *Acts Interpretation Act 1930* (Cth); repealed and substituted in effectively the same terms by the *Acts Interpretation Act 1937* (Cth).

490 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 374; see also at 373 and *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652; [1939] HCA 19.

491 Australia, Senate, *Parliamentary Debates* (Hansard), 7 August 1930 at 5545, referring to *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 54, 55 and *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 713.

492 Australia, Senate, *Parliamentary Debates* (Hansard), 7 August 1930 at 5545, referring to *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357.

493 Australia, Senate, *Parliamentary Debates* (Hansard), 7 August 1930 at 5545.

Act is invalid in its entirety because some of its provisions would be constitutionally invalid[494].

428 Equivalent provisions were subsequently enacted, and remain in existence, in each State and Territory[495]. The relevant provision in the Clubb appeal is s 6(1) of the *Interpretation of Legislation Act 1984* (Vic), which provides as follows:

> "Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected."

429 In addition to the duty to "read down", the terms of s 6(1) contemplate a further "two distinct situations"[496]. The first is the principle of severance ("the remainder of the Act ... shall not be affected"). Unlike the common law, where an Act would generally be expected to operate as a whole so that severance was treated as unlikely to have been intended, the legislative approach to the principle of severance was held to create a "presumption"[497] that Parliament intended that a provision be severable from the remainder of the statute or from the remainder of its valid parts. The second situation, which did not exist at common law but confusingly was also described sometimes as severance and sometimes as reading down, is the principle of partial disapplication ("the application of that provision to other persons, subject-matters or circumstances shall not be affected"). In *Bank of NSW v The Commonwealth*[498], Rich and Williams JJ

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494 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 August 1930 at 5649.

495 *Interpretation Act 1987* (NSW), s 31; *Interpretation of Legislation Act 1984* (Vic), s 6; *Acts Interpretation Act 1915* (SA), s 22A; *Acts Interpretation Act 1954* (Qld), s 9; *Interpretation Act 1984* (WA), s 7; *Acts Interpretation Act 1931* (Tas), s 3; *Interpretation Act* (NT), s 59; *Legislation Act 2001* (ACT), s 120.

496 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502; [1996] HCA 56. See also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 516-517; [1971] HCA 40.

497 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 163, 313, 371; [1948] HCA 7; *Re F; Ex parte F* (1986) 161 CLR 376 at 384; [1986] HCA 41.

498 (1948) 76 CLR 1 at 252.

described these two principles of severance and disapplication in the context of s 6 of the *Banking Act 1947* (Cth). Their Honours said that s 6 was capable of giving effect to a provision that would otherwise be inconsistent with the *Constitution* in two situations:

> "where [(i)] the provision contains independent portions within power which are severable, or [(ii)] the provision is capable of operating in a distributive manner in respect of each and every part of the subject matter and its operation can be confined to those parts which are within power".

430 Similarly, Dixon J spoke of the difference between (i) severing or "separating clauses or expressions", and (ii) confining a provision "in its operation to so much of the subject it is capable of covering as is constitutionally competent to the legislature, or, as it is sometimes said, whether the general words are to be read and applied distributively"[499].

431 The technique of partial disapplication cannot be used if it would alter a statute's general policy or scheme or the specific policy or purpose of the relevant provision. To do so would cross the line between adjudication and legislation. One way in which the general policy or scheme of a statute or a provision could be altered is where the partial disapplication would lead to a result that contradicts or alters any policy of the statute. An obvious instance of contradiction is where the statute or provision evinces a "contrary intention"[500] that it "have either a full and complete operation or none at all"[501]. An instance where the policy of the statute or provision could be altered might be if there were various equally available methods of partial disapplication, so that the provision could "be reduced to validity by adopting any one or more of a number of several possible limitations"[502].

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499 (1948) 76 CLR 1 at 369. See also *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 76; [1947] HCA 26, speaking of "severance" and "restriction".

500 *Interpretation of Legislation Act*, s 4(1)(a).

501 *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454; [1951] HCA 59. See also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652; *Pidoto v Victoria* (1943) 68 CLR 87 at 108; [1943] HCA 37; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502.

502 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502. Compare *Pidoto v Victoria* (1943) 68 CLR 87 at 111; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485; [1991] HCA 29; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 61; [1992] HCA 46; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339, 349, 354-355, 372.

432 A second instance where a general policy or scheme will be altered is where the statute or provision, after partial disapplication, would operate differently upon the remaining subject matter from how it would have operated without partial disapplication[503]. For this reason, "the enactment, when read distributively, must operate upon the persons and things affected by it in the same way as it would have operated if it had been entirely valid"[504].

433 Although partial disapplication cannot occur in these instances where a policy or scheme would be contradicted or altered, no party or intervener submitted that the power of partial disapplication that is sanctioned by statute would otherwise be contrary to the exercise of judicial power[505]. In summary, if it is not "fairly open" to read the provision down so that it is consistent with the *Constitution*[506] then, provided that partial disapplication does not alter the policy or scheme of the legislation so that the court does not exceed judicial power, there is almost no limit on the extent to which the effect of a provision can be disapplied. Thus, the operation of the essential meaning of the coasting trade was disapplied from the intra-State coasting trade[507] and other provisions have been held capable of disapplication from inter-State trade[508]. Similarly, although described in the language of "reading down", the operation of the essential meaning of "person" has been disapplied to exclude a judge of a court exercising

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503 *Vacuum Oil Co Pty Ltd v Queensland [No 2]* (1935) 51 CLR 677 at 692; [1935] HCA 9; *Pidoto v Victoria* (1943) 68 CLR 87 at 111; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 369-370; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 493; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 486; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502.

504 *Re F; Ex parte F* (1986) 161 CLR 376 at 385. See also *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.

505 cf *Pidoto v Victoria* (1943) 68 CLR 87 at 108-109.

506 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 284; [1990] HCA 29.

507 *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357 at 370.

508 *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454, 456; *Carter v The Potato Marketing Board* (1951) 84 CLR 460 at 477; [1951] HCA 60; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 73; [1955] HCA 6; *Nominal Defendant v Dunstan* (1963) 109 CLR 143 at 151-152; [1963] HCA 5.

the judicial power of the Commonwealth[509]. Finally, in an example closer to the circumstances of this appeal, the operation of the essential meaning of using insulting words in a public place was disapplied by one Justice of this Court to exclude "words uttered in discussing or raising matters concerning politics and government"[510].

The Public Health Act cannot be read down or severed

434 The relevant provision of the Public Health Act is s 185D, which provides that a person "must not engage in prohibited behaviour within a safe access zone". "Prohibited behaviour" is defined in s 185B(1), with exceptions for employees and service providers, to include "communicating by any means in relation to abortions 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 and is reasonably likely to cause distress or anxiety".

435 If it were necessary to read down the communication prohibition in the Public Health Act to avoid any invalidity then s 185D, when read with s 185B, would need to be given a meaning as though it contained the words "communicating by any means in relation to abortions *other than in the course of political communication*". On that meaning, if the words were read into the provision as intended elements of the offence, rather than exceptions intended to be proved by the defence[511], then the prosecution would have been required to prove that Mrs Clubb's communication was not political. It did not do so. However, s 185D of the Public Health Act cannot be read down in this manner.

436 The meaning of the words of Parliament, in this respect, is clear. When interpreting the essential meaning of the words, Parliament's "choice should be respected even if the consequence is constitutional invalidity"[512]. To give s 185D a different meaning by reading down the communication prohibition to exclude political communication would be to make "an insertion which is 'too big, or too much at variance with the language in fact used by the

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509 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 20, 26; [1996] HCA 18. See also *Knight v Victoria* (2017) 261 CLR 306 at 325 [34]; [2017] HCA 29.

510 *Coleman v Power* (2004) 220 CLR 1 at 56 [110].

511 *Criminal Procedure Act 2009* (Vic), s 72. See also *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520; [1955] HCA 19; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257-259; [1990] HCA 41.

512 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 349 [42]; [2009] HCA 49.

legislature'"[513]. That variance would also have the effect of drastically reducing the intelligibility of the law to those who administer it, here prosecutors, and those who are subject to it.

437 Nor would it be possible, if s 185D of the Public Health Act contravened the implied freedom of political communication, for any contravening parts to be severed from the remainder of the statute. Even with the benefit of the presumption that Parliament intended that otherwise invalid parts of the Public Health Act could be severed from the remainder of the Act, there is no part of s 185B or s 185D that can be severed from any other part of the communication prohibition.

The Public Health Act could be partially disapplied if necessary

438 In contrast with reading down and severance, s 185D of the Public Health Act could be partially disapplied to reduce the sphere of operation of the communication prohibition. The command to courts in s 6(1) of the *Interpretation of Legislation Act* requires partial disapplication, if necessary to avoid invalidity, provided that the partial disapplication does not alter the policy or scheme of the legislation.

439 Section 185D is not exclusively concerned with political communication. As the Attorney-General for the State of Victoria submitted, not all communications about termination are political, giving examples of a medical professional speaking about termination at a health conference or a woman discussing termination procedures with her doctor. So too, there might be non-political communications about termination that fall within the considerable breadth of the communication prohibition.

440 If the communication prohibition were disapplied to instances of communication on government and political matters then its operation in the remaining sphere of communications would be unaltered. Although this disapplication could eviscerate the operation of the statute if the majority of communications were political, the statutory policy would operate upon the vastly reduced content of non-political communication in the same way as it did before disapplication. And there is no express or implied suggestion in the Public Health Act that the need to protect the safety, privacy, and dignity of clinic workers and visitors should be all-or-nothing.

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513 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548 [38], quoting *Western Bank Ltd v Schindler* [1977] Ch 1 at 18.

The possibility of disapplication is sufficient to dispose of the appeal

441 There can be no doubt that Mrs Clubb is directly and immediately interested in whether the communication prohibition, under which she was convicted, infringes the implied freedom of political communication, and thus has standing to bring her challenge. However, even if s 185D of the Public Health Act were found to lack compliance with the implied freedom of political communication and require disapplication, the communication prohibition would still have a valid sphere of operation in relation to Mrs Clubb because of the lack of evidence from which it could be concluded that her communications were political. Even Mrs Clubb conceded that if disapplication were possible there were insufficient facts from which the magistrate could have concluded that the legislation did not apply to her.

442 Mrs Clubb's submission that it was for the prosecution to prove that her speech was not political should not be accepted. Interpretative issues, including reading down or severance of provisions imposing criminal liability, establish the elements that the prosecution must prove. But the process of determining the essential meaning of a provision, or its partial disapplication, is an issue for the court and not a matter upon which any party bears an onus. If a provision is to be disapplied from particular facts or circumstances then unless the court is satisfied of the presence of those facts or circumstances its duty is to apply the legislation.

443 The effect of possible disapplication by s 6(1) of the *Interpretation of Legislation Act*, as with s 15A of the *Acts Interpretation Act*, is that on any view adjudication upon the constitutional issue could not affect Mrs Clubb. Consistently with the legislative purpose of s 15A and its successors, the recognition of the possibility of disapplication operates to "deprive [Mrs Clubb] of an argument"[514] that the communication prohibition is invalid. Therefore, there is no good reason to adjudicate upon the validity of s 185D of the Public Health Act.

The Preston appeal

Background and legislation

444 On three occasions during 2014 and 2015, Mr Preston was on the footpath of a street that was within 150 m from premises at which terminations[515] are

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514 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 August 1930 at 5649.

515 The Tasmanian legislation uses the more dignified language of termination, avoiding "abortion", a word used "throughout history in a derogatory manner to demean and stigmatise women": Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 47.

provided. On each occasion, Mr Preston engaged in a protest against the termination of pregnancies that could be seen and heard by persons who were accessing or attempting to access the premises. He held signs and placards with statements including "EVERY ONE HAS THE RIGHT TO LIFE, Article 3, Universal Declaration of Human Rights" and "EVERY CHILD HAS THE RIGHT TO LIFE, Article 6, UN Convention on the Rights of the Child", and images depicting a foetus at eight weeks, including one image of a foetus bearing the description "8 week pre-born baby". On one occasion, Mr Preston spoke to a woman who intended to access the premises. The woman gave evidence that she had felt intimidated and uncomfortable after seeing his placards and had reconsidered entry to the premises.

445 Mr Preston was charged with three offences under s 9(2) of the Reproductive Health Act corresponding with each of the occasions described above. The offence in s 9(2), which carried a maximum penalty of one year's imprisonment or a fine of 75 penalty units or both, is engaging in "prohibited behaviour within an access zone".

446 An "access zone" is an area within a radius of 150 m from the premises at which terminations are provided[516]. The better interpretation of this definition is that the radius commences at either the entrance to the premises or, perhaps more accurately, the perimeter of the building rather than, as was suggested during debate in Victoria concerning the Public Health Act, from the perimeter of the land on which the premises are situated[517]. Nevertheless, even the more limited interpretation creates a very large access zone amounting to the circular equivalent of more than 70,000 m^2.

447 "Prohibited behaviour" includes interference with a person as well as besetting, harassing, intimidating, threatening, hindering, obstructing or impeding a person[518]. It includes, without consent, "intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided"[519]. It also includes footpath interference in relation to terminations[520], which in certain circumstances may encompass even passively standing in a person's path while wearing a t-shirt with an offensive message

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516 Reproductive Health Act, s 9(1).

517 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 24 November 2015 at 4790.

518 Reproductive Health Act, s 9(1) (definition of "prohibited behaviour", para (a)).

519 Reproductive Health Act, s 9(1) (definition of "prohibited behaviour", para (d)).

520 Reproductive Health Act, s 9(1) (definition of "prohibited behaviour", para (c)).

about terminations[521]. And, relevantly to this case, prohibited behaviour includes, by para (b) of the definition in s 9(1):

> "a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided".

448 Unlike the British Columbia model[522], which was considered in cases to which the parties and interveners referred, "protest" is not defined in the Reproductive Health Act. However, its context[523] reinforces its ordinary meaning, similar to the definition in the British Columbia legislation[524], of communication of objection or disapproval in a public place. On its face, that ordinary meaning does not discriminate between objection or disapproval "in relation to terminations" that conveys disapproval of terminations and objection or disapproval "in relation to terminations" that conveys disapproval of those who oppose terminations.

449 "Accessing" and "attempting to access" bear their ordinary meaning of a person who is intentionally en route to premises at which terminations are provided. That ordinary meaning is supported by the usual requirement that there be an intentional act in order for an attempt to be made out.

450 It is at least arguable that there are implied requirements in para (b) of the definition of "prohibited behaviour" in s 9(1) that the protest must be intended to be in relation to terminations and that an accused person must intend to communicate within the access zone[525]. It suffices to proceed on this assumption because even if there were no mental element requiring a person to know that he or she was within a 150 m radius of the premises at which terminations are provided, or even if there were an excuse of honest and reasonable mistake[526], for

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521 Tasmania, Legislative Council, *Parliamentary Debates* (Hansard), 20 November 2013 at 105.

522 *Access to Abortion Services Act*, RSBC 1996, c 1, ss 1, 2(1).

523 See also Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50.

524 *Access to Abortion Services Act*, RSBC 1996, c 1, s 1.

525 See also *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528-529, 546, 565-567; [1985] HCA 43.

526 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 534-535, 550, 573-574, 591-592.

reasons that I explain below the constitutional validity of the provision would be unaffected.

451 Magistrate Rheinberger convicted Mr Preston of each of the three offences under s 9(2) of the Reproductive Health Act, as well as a further offence of failing to comply with a direction of a police officer. He was fined $3,000 in total for all the offences. The magistrate also rejected Mr Preston's submission that s 9(2) was contrary to the implied freedom of political communication and was therefore invalid.

452 Mr Preston sought review in the Supreme Court of Tasmania of the decision of the magistrate. Six of his grounds of review were removed into this Court. Each of the six grounds of his amended notice of appeal in this Court concern whether the "protest prohibition", in s 9(2) of the Reproductive Health Act read with para (b) of the definition of "prohibited behaviour" in s 9(1), is invalid because it is contrary to the implied constitutional freedom of political communication.

The implied freedom of political communication

453 The freedom of political communication that is implied in the *Constitution* is a constraint upon the exercise of power. The constraint is against the imposition of undue burdens on political communication. In broad terms, the conditions for when a law will impose an undue burden have been accepted for over two decades since the decision of this Court in *Lange v Australian Broadcasting Corporation*[527]. Those broad terms involve twin concerns about (i) the purpose of imposing a burden upon political communication, and (ii) the effect of imposing that burden upon political communication.

454 The test that has developed to address the twin concerns of the purpose and the effect of a burden upon political communication involves asking the following: (i) whether there is a burden upon political communication, since freedom of political communication requires an anterior liberty to act; (ii) whether the law that imposes the burden has a legitimate purpose, in other words whether the law illegitimately has the very purpose of imposing the burden rather than merely doing so as a consequence of pursuing some other purpose; and (iii) whether the effect of the burden upon political communication is undue or unjustified by reference to the legitimate purpose.

The burden upon freedom of political communication

455 The implied freedom of political communication is not confined to communication by way of oral words. It includes political communication by

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527 (1997) 189 CLR 520 at 561-562; [1997] HCA 25.

"[s]igns, symbols, gestures and images"[528]. Protest – that is, the public communication of objection or disapproval – by signs, symbols, gestures, and images is one of the loudest forms of political communication.

456 Protest is almost inextricably linked with matters of political and governmental content. And protest, as a public expression of objection in relation to terminations, has a particularly powerful association with communication on political matters. It was not in dispute that the protest prohibition in the Reproductive Health Act is a burden upon the implied freedom of political communication. In the context of Australia's history of political debate about terminations, Mr Preston's communications, including his references to the Universal Declaration of Human Rights and the United Nations Convention on the Rights of the Child, were political. There is, therefore, no utility in considering as a threshold issue before the constitutional issue, whether the protest prohibition can be disapplied. The issue of disapplication only falls to be considered if the protest prohibition is contrary to the implied freedom of political communication.

The legitimacy of the law's purpose

457 The Reproductive Health Act does not contain any express statement of its purposes, either generally or of any of the forms of prohibited behaviour in s 9(1). The purpose falls to be discerned, at the appropriate level of generality, by reference to the meaning or range of meanings of the words of the provision, the meanings of other provisions in the statute, historical background, and any social objective of the law[529].

458 The short title (the "*Reproductive Health (Access to Terminations) Act*") and the principal Part (Pt 2, "Access to Terminations") provide a clear indication of the general purposes of the Act. The information paper which was part of the extrinsic materials preceding the Act explained that "reproductive health" was concerned with "a state of complete physical, mental and social wellbeing" in association with the "reproductive processes, functions and system"[530]. It was said that the previous law, derived from nineteenth century laws in the United Kingdom and Ireland, needed to change to recognise that unplanned pregnancies will occur, to remove criminal regulation of access to terminations,

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528 *Levy v Victoria* (1997) 189 CLR 579 at 622-623; see also at 595, 613, 638; [1997] HCA 31.

529 *Unions NSW v New South Wales* (2019) 93 ALJR 166 at 201 [171]; 363 ALR 1 at 46; [2019] HCA 1.

530 Tasmania, Department of Health and Human Services, *Information Paper relating to the Draft Reproductive Health (Access to Terminations) Bill* (2013) at 3.

to remove a barrier to health care services, to acknowledge women as capable decision makers, to recognise that termination is a safe medical procedure, and to recognise community standards[531]. At its core, the purpose of the Reproductive Health Act is, perhaps unsurprisingly, women's reproductive health in the widest sense.

459 The terms of the protest prohibition form part of a series of prohibited behaviours in s 9(1) that are all concerned with protection of women within the access zone of a premises at which terminations are provided. This protection is an integral aspect of Pt 2 of the Act, "Access to Terminations", by which certain medical terminations are made lawful. In that context, the purpose of the protest prohibition is to ensure that women of any age[532] seeking access to medical termination services can do so in safety and without further fear, intimidation, or distress. As the Minister said in the Second Reading Speech, "[w]omen are entitled to access termination services in a confidential manner without the threat of harassment"[533]. At the higher level of generality of the Act as a whole, the purpose is avowedly concerned with health. At any level of generality the purpose is legitimate.

460 Mr Preston identified a number of putative purposes of the protest prohibition which he said were illegitimate, including the following: (i) to deter speech that aims to dissuade or delay women from accessing terminations; (ii) to deter speech that the Minister considered to be "unacceptable"; (iii) to handicap one side of the termination debate; (iv) to prevent persons from being confronted with a protest in relation to terminations; and (v) to deter speech that causes shame. Each of these submissions might describe a possible effect of the law. None describes its purpose.

Justification of the burden by reference to the purpose: proportionality testing

461 In *Lange*[534], the expression "reasonably appropriate and adapted" was adopted[535] as a test of whether a law's burden upon the implied freedom of

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531 Tasmania, Department of Health and Human Services, *Information Paper relating to the Draft Reproductive Health (Access to Terminations) Bill* (2013) at 6-12.

532 Reproductive Health Act, s 3(1).

533 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 51.

534 (1997) 189 CLR 520 at 562, 567.

535 See, earlier, *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300, 324, 388; [1994] HCA 44; cf *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289, 300, 311-312, 324, 336, 345; [1988] HCA 10.

political communication is justified. That phrase has been criticised. It has been described as an "ungainly and unedifying phrase" which is "inappropriate and ill-adapted to perform the constitutional function repeatedly assigned to it by members of this Court"[536]. It is a hendiadys. As Heydon J observed in *Monis v The Queen*[537], "appropriate" adds nothing to "adapted". And, as Heydon J also observed in the same case[538], "reasonably" adds nothing to whether the law is appropriate or adapted. It could hardly be said that a law is unreasonably appropriate. And it would be a mistake to understand "reasonably appropriate" as shorthand for "reasonably capable of being regarded as appropriate and adapted"[539], because a law that is not "appropriate" is not valid because it is reasonably capable of being regarded as appropriate by some.

462 In each of (i) *McCloy v New South Wales*[540]; (ii) *Brown v Tasmania*[541]; (iii) *Unions NSW v New South Wales*[542]; and (iv) this appeal, a majority of this Court has articulated an approach to justification of a burden upon the implied freedom that has avoided directly deploying the phrase "reasonably appropriate and adapted". The focus is instead upon a three-stage test described as "proportionality". Although, at a high level of generality, the framework for proportionality testing is broadly similar in most jurisdictions, the detail can vary across jurisdictions and even within jurisdictions[543]. However, the test for proportionality has sometimes been criticised without explanation of the precise concept that is being criticised. It is necessary to explain how the concept differs

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536 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 266 [247]; [2004] HCA 41. See also *Coleman v Power* (2004) 220 CLR 1 at 90 [234]; *Thomas v Mowbray* (2007) 233 CLR 307 at 417 [316]; [2007] HCA 33.

537 (2013) 249 CLR 92 at 182 [246].

538 (2013) 249 CLR 92 at 182 [246].

539 See *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 339; *Langer v The Commonwealth* (1996) 186 CLR 302 at 318, 334; [1996] HCA 43; cf *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 388; *Coleman v Power* (2004) 220 CLR 1 at 48 [87].

540 (2015) 257 CLR 178 at 194-195 [2]-[3]; [2015] HCA 34.

541 (2017) 261 CLR 328 at 368-369 [123]-[127], 416-417 [278].

542 (2019) 93 ALJR 166 at 177 [42], 190 [110]; 363 ALR 1 at 13-14, 31.

543 Ramshaw, "The case for replicable structured full proportionality analysis in all cases concerning fundamental rights" (2019) 39 *Legal Studies* 120 at 121-123.

in Australia from other approaches that might be criticised as lacking direct relevance to this jurisdiction.

463 The three-stage test of proportionality adapted in this area of Australian legal discourse requires the law to be: (i) suitable, in other words rationally connected to its purpose; (ii) necessary, in the sense that there were not reasonably practicable alternatives of equal efficacy that would have been expected to be substantially less burdensome upon the freedom of political communication; and (iii) adequate in the balance between the purpose to be achieved by the law and the burden imposed upon the freedom. The three stages of proportionality testing elucidate and structure the thinking process, which may otherwise be opaque. Duplication is avoided because if a case fails at one stage it is unnecessary to consider whether subsequent stages are satisfied.

464 The concept of "proportionality" has been described as foreign in origin. That description is correct. It would also be correct to describe much of our inherited "common" law, in its true character as law that is common, as foreign in origin. As Pound said[544], the "[h]istory of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law. ... For except as an act of omnipotence, creation is not the making of something out of nothing."

465 That a legal doctrine originated in a foreign legal system does not render it unsuitable or inapplicable if it is adapted to local circumstances. But the adoption of a foreign concept that is ill-suited to resolving conflicting rights or freedoms will not benefit local jurisprudence. A focus upon whether a law is "reasonably appropriate and adapted" is itself such an ill-suited foreign concept. It was imported into Australia from the United States[545]. But even in the United States it is not used as a test for balancing the First Amendment freedom with other freedoms and rights. Instead, the balancing technique adopted in the United States, which might itself be a concealed form of proportionality[546], is said to have entered American legal jurisprudence through the writing of

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544 Pound, *The Formative Era of American Law* (1938) at 94-95.

545 *McCulloch v Maryland* (1819) 17 US 316 at 421. See *Coleman v Power* (2004) 220 CLR 1 at 90 [234]; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 131 [427], 133 [431]; [2010] HCA 46; *Monis v The Queen* (2013) 249 CLR 92 at 213 [345].

546 *District of Columbia v Heller* (2008) 554 US 570 at 689-690; *United States v Alvarez* (2012) 567 US 709 at 730: see below at [503].

Holmes[547] in response to Langdell's writings in private law, which had been influenced by the "radical antiformalistic movement in German law science – the *Freirechtschule*"[548].

466 Foreign doctrines can become part of the local jurisprudence, consciously or unconsciously, where they have a force that transcends jurisdictional boundaries. This is true of the concept of proportionality. As Lord Reed observed in *Bank Mellat v Her Majesty's Treasury [No 2]*[549], proportionality, or *Verhältnismäßigkeit* in German law, had a long history even before it was adopted into German public law. The force of the connecting links vary but, as Lord Reed identified, its parentage in some parts of English law might be loosely traced from Aristotle, through Aquinas, to the eighteenth century Enlightenment including the writings of Blackstone[550]. Prior to the relatively recent adoption of proportionality by a majority of this Court in *McCloy v New South Wales*[551], its main tenets were said to have been adopted by "virtually every effective system of constitutional justice in the world, with the partial exception of the United States"[552].

467 The differences, sometimes subtle and sometimes significant, in the approach taken at each stage of proportionality testing in different jurisdictions are unsurprising given that proportionality testing is applied within different constitutional traditions. But the broad outline of the approach, and the manner by which it structures and exposes judicial reasoning, is common to every jurisdiction that has adopted proportionality testing. Even the United States "exceptionalism", which does not explicitly recognise proportionality testing, has been said to "rely on an unarticulated combination" of the second and third stages

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547 Cohen-Eliya and Porat, "American balancing and German proportionality: The historical origins" (2010) 8 *International Journal of Constitutional Law* 263 at 276-277.

548 Cohen-Eliya and Porat, "American balancing and German proportionality: The historical origins" (2010) 8 *International Journal of Constitutional Law* 263 at 275.

549 [2014] AC 700 at 788 [68].

550 [2014] AC 700 at 788 [68].

551 (2015) 257 CLR 178 at 194-196 [2]-[4].

552 Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 72 at 74. See also Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 181-210.

of proportionality analysis (reasonable necessity and adequacy in the balance)[553]. So too, as Professor Stone observed of the approach of this Court very shortly after *Lange*, in this country proportionality testing makes explicit "essentially the process in which [the Court already] engages"[554]. At each stage the application of proportionality testing in Australia must be tied to the purpose for which it is employed, namely to ensure only that which is necessary for the effective functioning of representative and responsible government manifested in the structure and text of the *Constitution*, particularly ss 7, 24 and 128, and ss 62 and 64.

468 Proportionality testing has been described in Australia[555] and elsewhere[556] as a "tool". It is, indeed, a tool. But its nature as a tool does not make it dispensable. It is a tool in the same sense that the *Shirt* factors[557] are a tool for a judge sitting without a jury who is required to justify a conclusion of breach of a duty of care. As a tool, it provides a framework that promotes transparency of reasoning, although it does not purport to supply a mechanical or mathematical approach to the answer. Just as Learned Hand J's "algebraic" formula, B < PL[558], has never been applied in a mechanical way to determine breach of a duty of care in Australia, so too Professor Alexy's "Weight Formula"[559], which seeks to

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553 Jackson, "Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality" (2017) 130 *Harvard Law Review* 2348 at 2372.

554 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 *Melbourne University Law Review* 668 at 681.

555 *McCloy v New South Wales* (2015) 257 CLR 178 at 215 [72]-[73].

556 *McCloy v New South Wales* (2015) 257 CLR 178 at 216 [77], referring to *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 at 1622 [96]; [2015] 3 All ER 1015 at 1044, and Lübbe-Wolff, "The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court" (2014) 34 *Human Rights Law Journal* 12 at 16.

557 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48; [1980] HCA 12.

558 *United States v Carroll Towing Co* (1947) 159 F 2d 169 at 173: Burden of adequate precautions < Probability of injury multiplied by magnitude of injury.

559 The "most elementary version" of the Weight Formula is Wi,j=Ii / Ij: Alexy, "On Balancing and Subsumption: A Structural Comparison" (2003) 16 *Ratio Juris* 433 at 444. The "elaborated" formula is Wi,j=Ii*Wi*Ri / Ij*Wj*Rj: Alexy, "Proportionality, constitutional law, and sub-constitutional law: A reply to Aharon Barak" (2018) 16 *International Journal of Constitutional Law* 871 at 873.

ascribe a numerical figure to incommensurate principles in a particular case to enable an arithmetic comparison of those principles, would not be so applied in an analysis of proportionality in Australia and was not designed to do so.

469 The recognition of proportionality as a structure for decision making is not antithetical to the common law process. The common law development of categories is another significant example of the common law using a tool or framework as a means of structuring and making transparent the process of decision making. The common law categories of contract and torts themselves emerged by "squeezing English rules into models developed elsewhere"[560]. Like structured proportionality, those categories promote transparent reasoning and identify like cases that are to be treated alike. And, also like structured proportionality, the categories, and development within them, are not immune from further development. As Lord Devlin said in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[561], "[a]n existing category grows as instances of its application multiply until the time comes when the cell divides".

470 Incremental development within each stage of proportionality testing has occurred and will continue to occur. In different countries, different approaches might reasonably be taken, and are reasonably taken, at each stage of the qualitative proportionality enquiry. But proportionality testing forces judges to confront the issues in a structured way and to explain and justify the approach that is taken. Proportionality testing in Australia provides a graduated lens with increased focus at each stage upon whether a burden upon the implied freedom of political communication is justified. The "suitability" stage asks whether the effect of the law has a rational connection to its purpose. The "reasonable necessity" stage then focuses upon whether the likelihood and expected magnitude of the burden imposed upon the freedom of political communication by the means chosen by Parliament is reasonably necessary to achieve that rationally connected purpose. And the "adequacy in the balance" stage then asks whether the burden upon the freedom of political communication which was imposed by those reasonably necessary means is justified by the purpose of the law. There is a difficult issue, raised but not answered during oral submissions on this appeal, concerning the relevance of changes in facts and circumstances at each stage of proportionality testing. There is no doubt that at each stage of proportionality testing, a court can consider as constitutional facts and circumstances those matters confronting Parliament at the time the challenged law was enacted. Hence, matters such as the likelihood of an effect upon

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560 Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) at 153.

561 [1964] AC 465 at 525. See also *Hill v Van Erp* (1997) 188 CLR 159 at 189; [1997] HCA 9.

freedom of political communication or the likely magnitude of the effect can, and should, be considered based on the circumstances at the time that the law was enacted. But it is far more controversial for the enquiry to assess suitability, reasonable necessity, or adequacy in the balance by taking into account unforeseeable subsequent, potentially radical, changes in facts and circumstances.

471 If such subsequent changes could be taken into account then it might mean that any suitability, reasonable necessity, or adequacy in the balance that once existed could cease to exist. The legislation may be invalid only from a future point in time rather than being void ab initio. Although that approach is not an entirely novel suggestion[562], and although some parallels might be drawn with State legislation that is rendered inoperative due to s 109 of the *Constitution*, strong opposition has been expressed, including quite recently, against the possibility of the validity of legislation waxing and waning with subsequent changes in constitutional facts and circumstances[563]. Whether subsequent facts and circumstances should be confined to use as evidence only of matters that might have been foreseeable at the time that Parliament legislated need not be resolved in this case. There was no suggestion that the material subsequent to the enactment of the Reproductive Health Act relied upon by various of the parties and interveners reflected any change in underlying facts or circumstances. It suffices in these reasons to consider each stage of proportionality testing by reference to the facts and circumstances, including foreseeable effects, that existed at the time that the legislation was enacted.

(1) Suitability

472 The suitability stage of proportionality testing, which asks whether the operation of a law has a rational connection with its purpose, is almost always satisfied since the construct of legislative purpose is based upon a legislature that is assumed to act rationally[564]. If the expected operation of a law has no rational connection to a hypothesised purpose then that hypothesis could hardly be the purpose of the law passed by a rational legislature. Hence, as has been observed

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562 *Armstrong v Victoria [No 2]* (1957) 99 CLR 28 at 48-49, 73-74; [1957] HCA 55. See also Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 312-315, 331.

563 *XYZ v The Commonwealth* (2006) 227 CLR 532 at 608 [218]; [2006] HCA 25; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 55 [42], 92-93 [196]-[199]; [2016] HCA 36.

564 *Unions NSW v New South Wales* (2019) 93 ALJR 166 at 198-199 [158]; 363 ALR 1 at 42-43.

of the similar requirement in Canada[565] and Israel[566], and by one author in the United Kingdom[567], this stage has very little work to do in most cases. An extreme instance where a legislature acted irrationally is given by Professor Alexy: a German law that required falconers, persons who hunt with falcons not guns, to undertake the same shooting examination as persons who applied for a general hunting licence[568].

473 In addition to identifying extreme cases of irrationality, the suitability stage performs two functions. First, if a law has an illegitimate purpose that is not recognised by the court when considering whether the law pursues a legitimate purpose or purposes, or if the court erroneously accepts a general legislative statement of objects as the purpose of a particular provision that is not related to those objects, then the suitability stage requires the court to confront the lack of any legitimate purpose for the law. Secondly, the suitability stage leads into the second stage, of reasonable necessity, which assesses the means by which the law achieves its rationally connected purposes or objects.

474 Mr Preston submitted that s 9(2) was not rationally connected to a legitimate purpose for similar reasons to those contained in his submissions about the absence of a legitimate purpose. Again, those submissions should not be accepted. Once the legitimate purposes of the protest prohibition in s 9(2) are identified, the effect of the protest prohibition can easily be seen as rationally connected with those purposes.

475 The only concrete example said to illustrate the unsuitability of the operation of the protest prohibition was a submission before the magistrate that there "is no rational reason to stop a silent protest 100 metres from the premises"[569]. The magistrate rejected this submission on the basis that para (b) of the definition of "prohibited behaviour" in s 9(1) would not extend to silent prayer by two or three people[570]. However, silent prayer is capable of falling

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565 Hogg, *Constitutional Law of Canada*, 5th ed (2007), vol 2 at 143.

566 Barak, "Proportional Effect: The Israeli Experience" (2007) 57 *University of Toronto Law Journal* 369 at 372.

567 Yowell, *Constitutional Rights and Constitutional Design* (2018) at 31.

568 Alexy, "Constitutional Rights and Proportionality" (2014) 22 *Revus* 51 at 53.

569 *Police v Preston and Stallard* (unreported, Magistrates Court of Tasmania, 27 July 2016) at [42].

570 *Police v Preston and Stallard* (unreported, Magistrates Court of Tasmania, 27 July 2016) at [42].

within the prohibition even if it would not always amount to a protest within para (b). Silent or quiet action can be a powerful form of protest and political communication. In *Levy v Victoria*[571], Kirby J referred to the communicative power of silent action, including: "[l]ifting a flag in battle, raising a hand against advancing tanks, wearing symbols of dissent, participating in a silent vigil, public prayer and meditation". The protest prohibition was intended to "stop the silent protests outside termination clinics that purport to be a vigil of sorts ... but which, by their very location, are undoubtedly an expression of disapproval"[572]. The protest prohibition is suitable for its purposes.

(2) Reasonably necessary means

476 The second stage of proportionality testing is commonly described as "necessity", but necessity is used here in a loose sense. The question at the second stage is whether there were "alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect on the freedom"[573].

477 The strength of a reasonableness standard will always depend upon the context in which the standard is being imposed[574]. Here, the context of "reasonably practicable" means of achieving, to the same degree, the legislative objects is that the implied freedom of political communication is limited not merely to matters that will secure the effective operation of the constitutional system of representative and responsible government, but to matters that are also necessary for that operation[575].

478 It is also necessary for an effective operation of the constitutional system of representative and responsible government for Parliament to be able to make choices about the best policies to pursue for the implementation of legislation. Parliament is generally in a better position than the courts to assess whether alternative means that have a less restrictive effect on the freedom might not

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571 (1997) 189 CLR 579 at 638.

572 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50.

573 *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [44]; [2013] HCA 58; *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2].

574 *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at 739 [133]; 357 ALR 408 at 437; [2018] HCA 30.

575 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

achieve the legislative purpose as significantly or effectively. As O'Regan J and Cameron A-J powerfully expressed this point in the Constitutional Court of South Africa, "[w]hen a [c]ourt seeks to attribute weight to the factor of 'less restrictive means' it should take care to avoid a result that annihilates the range of choice available to the Legislature"[576]. This has as much resonance in our constitutional context. Hence, in assessing whether the means adopted was reasonably necessary, it is necessary to ask whether an alternative is "obvious and compelling"[577].

479 There are two dimensions involved when considering whether an alternative means of achieving the same object was obvious and compelling. The first is whether the alternative means could reasonably have been expected to have imposed a significantly lesser burden upon the implied freedom of political communication. The second is whether the alternative means could achieve Parliament's purpose to the same or a similar extent. A law will only fail the stage of reasonable necessity if there are alternative means that could reasonably have been expected to have imposed a significantly lesser burden upon the freedom and yet achieved Parliament's purpose to the same or a similar extent.

480 A comparison of the expected burdens upon the implied freedom between the chosen means and the alternative means will require assessing the likelihood and expected magnitude of the burden upon the freedom of political communication imposed by the means chosen by Parliament compared with the alternative postulated means. The likelihood and expected magnitude of the burden can be assessed by reference to the "depth" and "width" of the burden. A burden will be deeper, in the sense of more intensely focused upon the conduct it captures, the more that the law: (i) targets political communication or communication that is closely associated with political communication[578]; (ii) impairs communication of the message of one side of a debate more than the other; and (iii) punishes or sanctions the conduct. And a burden will be wider, in the sense of capturing more conduct, the less that the restriction on political communication effected by the law is constrained, including by constraints of time, location, or subject matter.

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576 *S v Manamela* 2000 (3) SA 1 (CC) at 41 [95], not dissenting on this point: see at 20-21 [34].

577 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2], 211 [58], 217 [81]; *Brown v Tasmania* (2017) 261 CLR 328 at 372 [139], 418-419 [282].

578 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169; [1992] HCA 45; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 339; *Levy v Victoria* (1997) 189 CLR 579 at 618-619; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]; [2011] HCA 4; *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30]; [2012] HCA 2.

481 The burden imposed by the protest prohibition is deep. It targets protest that has a powerful association with political communication. It does so by imposing criminal consequences of a fine up to 75 penalty units or imprisonment for 12 months or both[579]. Further, although it is facially neutral in its effect on protest, the human experience described in the Second Reading Speech is one of anti-termination protests outside premises at which terminations are provided: "standing on the street outside a medical facility with the express purpose of dissuading or delaying a woman from accessing a legitimate reproductive health service"[580]. As the legislative materials rightly assume, history is not replete with examples, in this jurisdiction or others, of non-responsive, pro-termination protests at premises where terminations are provided. The legislative effect will be, and is intended to be, most deeply felt by anti-termination protesters.

482 The burden imposed by the protest prohibition is also wide. The radius of 150 m covers more than 70,000 m^2. As the Minister observed in the Second Reading Speech, the access zone might include churches, restaurants and public houses[581]. The magistrate concluded that the 150 m radius in the Preston appeal extended to a park and a car park[582]. However, the width of the burden is reduced by the requirement that the protest must be able to be seen or heard by a person accessing, or attempting to access, the premises.

483 One obvious manner in which the width of the burden upon the freedom of political communication could have been significantly lessened would have been by a law that imposed an access zone that was smaller than a 150 m radius (70,000 m^2) such as, for example, the approximately 11 m radius (380 m^2) used in the Massachusetts law considered in *McCullen v Coakley*[583]. However, the reduction of the zone would likely have protected far fewer of those accessing the premises. Even with the area chosen of 70,000 m^2, and the likelihood that almost all women would be protected, the findings of fact by Magistrate Rheinberger indicate that some women could be targeted. Her Honour concluded that "[p]rotesters wanting to communicate their political beliefs in relation to terminations of pregnancies in a manner that may target

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579 Reproductive Health Act, s 9(2).

580 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 51.

581 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 50.

582 *Police v Preston and Stallard* (unreported, Magistrates Court of Tasmania, 27 July 2016) at [10].

583 (2014) 134 S Ct 2518.

women who may be accessing or attempting to access the premises" can still protest outside the access zone, but close enough to allow meaningful opportunity for communication[584].

484 In any event, it cannot be said to be obvious or compelling that the purposes of the legislation would be able to be served to the same extent by an access zone with, for example, a radius of 120 m or 130 m. At that degree of specificity such a judgment is peculiarly within the province of Parliament as advised by stakeholders, experts, and committees. As the Minister said in the Second Reading Speech of the Victorian legislation[585], which adopted the same radius, that particular distance was chosen "after consultation with a wide range of stakeholders", including health services who had asked for a "much larger zone"[586].

485 A second manner in which it might be said that the burden upon the freedom of political communication could have been reduced is by altering the focus of the protest prohibition so that rather than targeting all protests, with their strong association with political communication, the prohibition targeted only communications that are reasonably likely to cause distress or anxiety[587]. A burden upon political communication will generally be deeper where political communication is specifically targeted, so replacing the broader requirement of protest with a requirement for distress and anxiety might be said to reduce the burden. However, in the course of submissions no example was given of a circumstance in which protest outside premises where terminations are provided would not cause distress or anxiety to a person within the class of vulnerable persons accessing the clinic. The Solicitor-General for the State of South Australia acknowledged in oral submissions that he could not conceive of any such circumstance. No other party or intervener provided one.

486 In summary, a law with the same purpose as the protest prohibition, but that imposed a significantly lesser burden upon the freedom of political communication, could have been enacted. However, despite the depth and width of the burden, it is unlikely that the purposes of the Reproductive Health Act could have been served to the same or a similar extent without imposing a burden

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584 *Police v Preston and Stallard* (unreported, Magistrates Court of Tasmania, 27 July 2016) at [53].

585 Public Health Act, s 185B(1) (definition of "safe access zone").

586 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3976.

587 See Public Health Act, s 185B(1) (definition of "prohibited behaviour", para (b)).

that was similarly deep and wide. At the least, the possibility that the purposes could be so served by alternative means is neither obvious nor compelling.

487 At first blush, the conclusion that the protest prohibition was reasonably necessary does not sit comfortably with the conclusion reached by the joint judgment in the majority in *Brown v Tasmania* that the protest prohibition in that case was not reasonably necessary for its purpose[588]. The Reproductive Health Act denies any meaningful "on-site" protest by excluding a putative protester from a 70,000 m^2 area around the relevant premises, and potentially considerably more for protesters who travel without tape measures, in a built-up urban area. Although there was found to be some, undoubtedly limited, scope for a protester to "target" off-site a woman seeking to access premises at which terminations are provided, the same scope existed under the Workplace Protesters Act for a protest to be conducted near forest operations at places that were away from business premises or business access areas[589].

488 One potential difference between the cases is the agreed fact in the special case in *Brown v Tasmania* that "[r]ecent protest activity in Tasmania … has made use of photographs and film to enable dissemination of the activity in the media and the internet, particularly on YouTube, Facebook and Twitter"[590]. However, it is hard to see how the absence of this evidence of recent media use in the Preston appeal could favour validity when that evidence could only have been obtained in the last five years by contravening a prohibition on recording in the access zone a person accessing or attempting to access the premises[591] and a prohibition on publishing or distributing recordings[592]. In any event, even if some weight were to be put on the absence of online media communication in the more distant period prior to the enactment of the Reproductive Health Act, the exclusion of on-site protest, coupled with the recording prohibition, has the effect of neutering a communicative tool that could have been foreseen in 2013 to become powerful.

489 A reconciliation of the decision in *Brown v Tasmania* and the decision in the Preston appeal at this stage of proportionality testing lies in the conclusion reached in the joint judgment in *Brown v Tasmania* about the scope of application of the Workplace Protesters Act. In contrast with my interpretation

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588 (2017) 261 CLR 328 at 373 [146].

589 (2017) 261 CLR 328 at 356-357 [77], 367 [117].

590 See (2017) 261 CLR 328 at 387 [191], 400 [240].

591 Reproductive Health Act, s 9(1) (definition of "prohibited behaviour", para (d)).

592 Reproductive Health Act, s 9(4).

of the Workplace Protesters Act[593], the joint judgment did not interpret the restriction on protest to be confined to the areas of unchallenged operation of the *Forest Management Act 2013* (Tas), which would have eliminated any burden upon the freedom of political communication. Instead, the joint judgment concluded that the restriction went "far beyond" that which was reasonably necessary for the purposes of application of the relevant provisions "to prevent damage and disruption to forest operations", unlike the "substantially less restrictive" measures of the *Forest Management Act*[594]. Indeed, if the terms of the Workplace Protesters Act were read literally then they would have restricted protests anywhere within 800,000 ha (8 billion m^2) of permanent timber production zone land if any forest operations, such as the clipping of the branches of a tree, took place anywhere within that zone[595].

490 The area covered by the Reproductive Health Act is reasonably necessary to fulfil its purposes to the desired extent. By contrast, the interpretation adopted in the joint judgment in *Brown v Tasmania* of the Workplace Protesters Act, which treated it as applying well beyond those areas where the Forest Manager had denied access to the public in the exercise of powers under s 21, s 22, or s 23 of the *Forest Management Act*, was considered to impose a substantial burden upon the implied freedom of political communication without any substantial additional furtherance of the statutory purposes.

(3) Adequacy in the balance

491 Professor King's monograph on social rights begins by asking: "What is more important, having the ability to preach politics on Hyde Park Corner, or ensuring that we have a fighting chance to live past heart disease or breast cancer?"[596] An assessment of whether a law is adequate in the balance involves the metaphor of balancing "the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom"[597].

492 As Professor King's rhetorical question indicates, a decision by a court that a law is inadequate in the balance, despite the legitimacy of its purpose, could have large consequences. In instances where there are limited means to give effect to the statutory purpose, a conclusion of inadequacy in the balance

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593 (2017) 261 CLR 328 at 502-506 [556]-[563].

594 (2017) 261 CLR 328 at 373 [146]; cf at 423 [291].

595 (2017) 261 CLR 328 at 481 [489], 494 [533].

596 King, *Judging Social Rights* (2012) at 1.

597 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2].

could mean that Parliament could not legislate at all to achieve a legitimate purpose since even the means that are found, at the second stage, to be reasonably necessary to implement that policy will be invalid. In other words, a decision by a court that a law is inadequate in the balance could, in some instances, mean that implementation of *any* measure to respond to that public policy concern is prohibited because of the burden it places upon the freedom of political communication.

493 Perhaps due to the significance of this possible consequence, it has been said that some other jurisdictions have effectively abandoned the stage of whether a law is adequate in the balance. This third stage has been treated by some courts as superfluous to the stage of whether the means adopted by the law was reasonably necessary for its purposes. Dr Yowell has observed that the European Court of Human Rights has treated the two as equivalent[598], and that over a ten-year period in Canada there was no case in which this limb made any difference to the conclusion reached on the application of the necessity limb[599].

494 In Germany, by contrast, the third stage of proportionality testing has been said to have "high relevance"[600] because "balancing is constantly practised by the judiciary"[601]. Professor Grimm, a former Justice of the Federal Constitutional Court of Germany, has argued that a court "risks self-deception when all the value-oriented considerations have been made under the guise of a seemingly value-neutral category"[602]. However, these value judgments can be highly contested. It is no coincidence that the widely accepted hypothetical example that Professor Grimm gives of balancing rights is extreme. That example is a hypothetical law that permits a thief to be shot to death by police if that is the

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598 Yowell, *Constitutional Rights and Constitutional Design* (2018) at 31, referring to *Lithgow v United Kingdom* (1986) 8 EHRR 329 at 372 [120].

599 Yowell, *Constitutional Rights and Constitutional Design* (2018) at 31, referring to Trakman, Cole-Hamilton and Gatien, "*R* v *Oakes* 1986-1997: Back to the Drawing Board" (1998) 36 *Osgoode Hall Law Journal* 83 at 95, 105. See also Hogg, *Constitutional Law of Canada*, 5th ed (2007), vol 2 at 152.

600 Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 *University of Toronto Law Journal* 383 at 393.

601 Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 *University of Toronto Law Journal* 383 at 395.

602 Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 *University of Toronto Law Journal* 383 at 395.

only way to protect property[603]. When balancing rights and freedoms, such a law is suitable in the sense that it has a rational connection with the purpose of protecting property rights. The reasonable necessity stage is satisfied because shooting is allowed only if no other means are available to protect the property rights. But the right to life would not be adequately protected in the balance struck by the law between a person's right to life and the liberty of the police to act so as to protect property[604].

495 The Australian foundations of the implied freedom of political communication are inconsistent with an open-ended value assessment at the adequacy in the balance stage. The approach to adequacy in the balance must be highly constrained. This is, in part, because the freedom of political communication arises only as an implication to secure the effective operation of the constitutional system of representative and responsible government. The very representative and responsible government that it secures involves legislative implementation of policy decisions. Thus, it has been said that the stage of adequacy in the balance in Australia requires the judgment to be made "consistently with the limits of the judicial function"[605]. There are two significant constraints consistent with the permissible constitutional limits of the judicial function that exist to prevent an approach at this stage from operating as a judicial reassessment of the importance of the public policy priorities of the legislature.

496 The first constraint is that the courts cannot "substitute their own assessment for that of the legislative decision-maker"[606]. This means that the value judgment must respect "the role of the legislature to determine which policies and social benefits ought to be pursued"[607]. The assessment of the importance of purpose is not the judge's idiosyncratic policy preference. Instead, the first constraint directs attention to the importance that Parliament has given to the purpose. The weight that Parliament has given to legislative purpose is ascertained in the same way that legislative purpose itself is discerned. One factor will be the place of the particular law within the relevant statute and its importance to the furtherance of the statute's purposes. Other factors will be

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603 Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 *University of Toronto Law Journal* 383 at 396.

604 Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 *University of Toronto Law Journal* 383 at 396.

605 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2].

606 *McCloy v New South Wales* (2015) 257 CLR 178 at 219 [89].

607 *McCloy v New South Wales* (2015) 257 CLR 178 at 220 [90].

the context in which the law was enacted; the legislative facts including the mischief to which Parliament was responding; and the importance expressly assigned to that response in the statute or in extrinsic materials. And it may also be relevant to consider the systemic context in which the law was enacted, including, if Parliament has legislated to protect some right, the importance of the right within the legal system and the extent to which it is embedded in the fabric of the legal system within which Parliament legislates[608].

497 The second constraint is that a law will only be inadequate in the balance if it involves gross or manifest lack of balance[609] between, on the one hand, the foreseeable magnitude and likelihood of the burden upon freedom of political communication and, on the other hand, the importance of the purpose. That constraint recognises that, in a representative democracy, freedom of political communication is only one facet of formal representative and responsible government. Another facet is the ability of Parliament to make laws for peace, order and good government, including those laws that provide substantive aspects of a free and democratic society and laws that guarantee social human rights[610], such as "respect for the inherent dignity of the human person"[611].

498 The balancing exercise, constrained in the manner discussed, should not involve rigid categories of review based on either the nature or the extent of the burden upon freedom of political communication. Rather, in each case, when considering the extent to which the freedom of political communication is burdened, the balancing exercise should be "properly attuned to" the nature of the freedom and should reflect "the gravity of the threat" in the particular case to the systemic integrity of the constitutional system of representative and responsible government[612].

499 As I have explained in relation to the reasonable necessity stage, when the protest prohibition was enacted, the foreseeable burden on freedom of political communication was both deep and wide. However, the purpose of the protest prohibition was of great importance to Parliament. The protest prohibition served the Reproductive Health Act's integral purposes of, at a lower level of

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608 *Federal Commissioner of Taxation v Tomaras* (2018) 93 ALJR 118 at 137 [101]; 362 ALR 253 at 276-277.

609 *Brown v Tasmania* (2017) 261 CLR 328 at 422-423 [290].

610 King, *Judging Social Rights* (2012) at 187.

611 *R v Oakes* [1986] 1 SCR 103 at 136.

612 Allan, *The Sovereignty of Law* (2013) at 247.

generality, ensuring that women have access to termination services in a confidential manner without the threat of harassment. At the higher level of generality, the Reproductive Health Act is concerned with basic issues of public health. These social human rights goals involving respect for the dignity of the human person involve deep-seated issues of public policy within the legal system generally.

500 The extreme importance of the protest prohibition is also apparent from the extrinsic materials preceding the Reproductive Health Act. In those materials it was observed that the previous law had been based on nineteenth century United Kingdom and Irish laws that did not recognise "safe medical practices; community standards; and women as competent and conscientious decision makers"[613]. The proposed changes were "part of a broader strategy to improve the sexual and reproductive health of all Tasmanians, especially vulnerable populations"[614]. In the Second Reading Speech for the Reproductive Health Act, the Minister concluded by saying that[615]:

> "Today members are, quite simply, being asked to vote for or against women's autonomy, to vote for or against a bill that respects all views on terminations, and to vote for or against a bill that acknowledges women as competent and conscientious decision-makers and recognises that a woman is in the best position to make decisions affecting her future and her health."

501 The burden upon freedom of political communication cannot be said to be in gross and manifest disproportion to the importance of the purpose.

Proportionality testing and different constitutional traditions

502 The parties to and interveners in this appeal helpfully referred to a number of cases from overseas jurisdictions. The reasoning in other jurisdictions can sometimes be useful in application of the tests at each of the three stages of proportionality reasoning. But it is necessary, at the very least, to treat those

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613 Tasmania, Department of Health and Human Services, *Information Paper relating to the Draft Reproductive Health (Access to Terminations) Bill* (2013) at 4.

614 Tasmania, Department of Health and Human Services, *Information Paper relating to the Draft Reproductive Health (Access to Terminations) Bill* (2013) at 17.

615 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 16 April 2013 at 52.

decisions "with some caution"[616]. Even in relation to very similar circumstances the result might appropriately be different in other countries because of their different legal contexts and traditions. For instance, one contextual difference between Australia and countries such as the United States[617], Canada[618], and Germany[619] is that important law reform in respect of terminations in Australia has occurred by legislation without the driving force of constitutional decisions. But perhaps the most significant difference between different jurisdictions is the different weight that is afforded to particular constitutionally protected values. A good illustration of this is the way that the circumstances in this appeal would have been approached in the United States.

503 The Supreme Court of the United States does not explicitly adopt a proportionality analysis. Instead, its First Amendment jurisprudence has been characterised by one writer, now Justice, as involving "increasingly technical, complex classificatory schemes"[620]. It has been argued that United States constitutional law developed its "complicated, variegated approach to rights, in part because of its deep ambivalence toward balancing"[621]. But balancing cannot be avoided, even if freedom of speech is thought generally to be a constitutional trump card over other, incommensurate values: "[e]ven when we are most adamant in our principles, we find ourselves – as rational beings – doing the sort of reasoning and weighing of contrary considerations that a belief in incommensurability is commonly thought to preclude"[622]. Indeed, Breyer J has said that where "important interests lie on both sides of the constitutional

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616 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125; [1994] HCA 46. See also *Coleman v Power* (2004) 220 CLR 1 at 48 [88], 75-76 [187]-[188].

617 *Roe v Wade* (1973) 410 US 113; *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992) 505 US 833.

618 *R v Morgentaler* [1988] 1 SCR 30.

619 Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed (2012) at 373-394.

620 Kagan, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine" (1996) 63 *University of Chicago Law Review* 413 at 515.

621 Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 72 at 164.

622 Waldron, "Fake Incommensurability: A Response to Professor Schauer" (1994) 45 *Hastings Law Journal* 813 at 824.

equation" then "the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests"[623]. This approach, which Breyer J said had been applied in various constitutional contexts including freedom of speech cases, is functionally identical to proportionality although it conflates reasonable necessity and adequacy in the balance by taking into account, in one step, "both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative"[624].

504 Even if the approach taken by the Supreme Court of the United States were not able to be characterised as akin to structured proportionality, the balancing process that it undertakes involves affording far greater weight to the constitutional guarantee of freedom of speech in the First Amendment[625] than Australian law would afford to the implied freedom of political communication. The circumstances of the Preston appeal are an excellent illustration of the different weighting that is afforded in Australia to the freedom of political communication, which is limited to what is necessary for the effective operation of the constitutional system of representative and responsible government[626]. In contrast with the result in this case, it is almost beyond argument that the relevant provisions of the Reproductive Health Act would be invalid on the present approach taken by the United States Supreme Court.

505 Prior to 2014 in the United States, judicial injunctions that responded to particular physical circumstances and were capable of judicial expansion or contraction when those circumstances changed had been upheld by the Supreme Court of the United States[627]. None of those cases is comparable with the circumstances of a general legislative provision that extends to peaceful protests. In one Supreme Court decision, a limited injunction had been amended after it did not adequately respond to specific instances at one clinic of blocking public access and physical abuse[628]. In another the injunction responded to

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623 *District of Columbia v Heller* (2008) 554 US 570 at 689-690. See also *United States v Alvarez* (2012) 567 US 709 at 730.

624 *District of Columbia v Heller* (2008) 554 US 570 at 690.

625 Which reads, relevantly: "Congress shall make no law ... abridging the freedom of speech".

626 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

627 *Madsen v Women's Health Center Inc* (1994) 512 US 753; *Schenck v Pro-Choice Network of Western New York* (1997) 519 US 357.

628 *Madsen v Women's Health Center Inc* (1994) 512 US 753 at 758-759.

particular large-scale blockades impairing access to four medical clinics. The police were unable to prevent those blockades. The conduct included grabbing, pushing, shoving, yelling, and spitting at women who tried to access the clinic's services[629]. In both cases, a majority of the Supreme Court upheld part of the injunctions but struck down certain aspects of them[630].

506 Also prior to 2014, a law had been upheld by a slim majority of the United States Supreme Court[631], where the law had only imposed particular restrictions upon knowingly approaching within 8 ft (2.5 m) of people for the purpose of engaging in sidewalk counselling without their consent, inside an area of 100 ft (30 m) of the entrance to a health care facility[632]. Even that decision to uphold the very limited restriction on freedom of speech, which imposed no fixed no-access zone, was said by some commentators to be "inexplicable on standard free-speech grounds"[633] and a "candidate[] for most blatantly erroneous [decision] … slam-dunk wrong"[634]. It was also said that if the majority had treated the law as content-based and applied strict scrutiny to it, the law would have been invalid[635].

507 The only truly comparable decision of the Supreme Court of the United States concerning access zones around premises at which terminations are provided involved a Massachusetts law that was held to be invalid. In that case, *McCullen v Coakley*[636], the law imposed an access zone with a 35 ft (11 m) radius

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629 *Schenck v Pro-Choice Network of Western New York* (1997) 519 US 357 at 362-364.

630 *Madsen v Women's Health Center Inc* (1994) 512 US 753 at 776; *Schenck v Pro-Choice Network of Western New York* (1997) 519 US 357 at 377, 380.

631 *Hill v Colorado* (2000) 530 US 703 at 725-726, 730.

632 *Hill v Colorado* (2000) 530 US 703 at 707-708.

633 McConnell, in Sullivan, "Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term" (2001) 28 *Pepperdine Law Review* 723 at 747, quoted in *McCullen v Coakley* (2014) 134 S Ct 2518 at 2545 fn 4.

634 Tribe, in Sullivan, "Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term" (2001) 28 *Pepperdine Law Review* 723 at 750, quoted in *McCullen v Coakley* (2014) 134 S Ct 2518 at 2545-2546 fn 4.

635 Sullivan, "Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term" (2001) 28 *Pepperdine Law Review* 723 at 736.

636 (2014) 134 S Ct 2518.

covering public ways or sidewalks around the entrances and driveways of the clinics. The area was required to be clearly marked[637]. The restriction applied only during business hours of the clinic. The restriction was, according to a majority of the Court, content neutral[638]. Nevertheless, the legislation was unanimously held to be contrary to the First Amendment. Although the access zone involved only an 11 m radius, there was evidence that the petitioner was able to speak to "far fewer people" because she was unable to "distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone"[639].

508 The contrast between the invalid Massachusetts law and the vastly broader, but valid, Reproductive Health Act in Tasmania demonstrates the stark difference between the manner in which freedom of speech is approached in the United States and the approach to the implied freedom of political communication in Australia. The access zone under the Reproductive Health Act covers 70,000 m^2 of area. By contrast, the Massachusetts law covered 380 m^2. The 70,000 m^2 access zone created by the Reproductive Health Act is not required to be marked, with the effect that its boundaries would not be clearly known to a protester. By contrast, the Massachusetts law required marking. The content of the prohibited communication in the protest prohibition is specifically targeted towards protests in relation to termination. It is not content neutral in the sense in which that concept was applied by the majority of the Supreme Court in *McCullen v Coakley*; it is concerned with "listeners' reactions to speech" so it would be subject to strict scrutiny in the United States[640]. By contrast, a majority of the Supreme Court held that the Massachusetts law was content neutral. And yet, whilst the Massachusetts law was unanimously held by the Supreme Court of the United States to be inconsistent with the First Amendment and invalid, the Reproductive Health Act is unanimously held by this Court to be consistent with our constitutional tradition and valid.

Conclusion: the orders on each appeal

509 Each of the appeals, so far as they have been removed into this Court, must be dismissed.

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637 (2014) 134 S Ct 2518 at 2526.

638 (2014) 134 S Ct 2518 at 2534.

639 (2014) 134 S Ct 2518 at 2535.

640 (2014) 134 S Ct 2518 at 2531-2532.