IN THE HIGH COURT OF AUSTRALIA

HOBART REGISTRY **NO H2 OF 2018**

JOHN GRAHAM PRESTON

Appellant

and

ELIZABETH AVERY

First Respondent

SCOTT WILKIE

Second Respondent

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

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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Date of this document: **10 August 2018**

File ref: 18001902; 18001976

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PART I FORM OF SUBMISSIONS

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

PARTS II AND III INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the respondents.

PART IV ISSUES PRESENTED BY THE APPEAL

3. Section 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (**Reproductive Health Act**) provides that a person must not engage in "prohibited behaviour" in an area within a radius of 150m from premises at which terminations are provided (**access zone**). The categories of "prohibited behaviour" include "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".[1]

4. Is a prohibition in those terms (**protest prohibition**) contrary to the implied freedom of political communication? The Commonwealth submits that the answer to this question is "no". The protest prohibition may impose an effective burden on political communication, but that burden is not a substantial one – chiefly because the prohibition is properly viewed as a "time, place and manner" restriction. The law is suitable: it advances the legitimate (and compelling) purpose of facilitating effective access to health services of a particular kind, which are rendered lawful by the Reproductive Health Act. If necessary to decide, the law also satisfies the other proportionality tests under the *McCloy* approach. For these reasons, the protest prohibition is valid.

[1] Section 9(1) of the Reproductive Health Act, definition (b) of "prohibited behaviour".

Applicable principles

5. The Commonwealth relies upon its analysis of the applicable principles in its submissions in *Clubb v Edwards* (M46/2018) (**CS (*Clubb*)**) at [6]-[44]. In the discussion below, it applies those principles to the appellant's challenge to the protest prohibition.

6. The Commonwealth does not contend that the threshold point described in CS (*Clubb*) at [10]-[16] arises in this case. However, it notes the dispute between the parties concerning whether or not the appellant's protests amounted to political communication.[2] If the respondents are correct in contending that the appellant's communications were not in relation to political matters then, applying s 3 of the *Acts Interpretation Act 1931* (Tas) and the Commonwealth's analysis in CS (*Clubb*) at [10]-[16], the protest prohibition validly applied to the appellant's conduct, and this Court need not decide whether it would be invalid in other hypothetical operations. Alternatively, if the respondents are incorrect, then this Court should hold that the protest prohibition is valid for the reasons given below.

Question 1 – existence, nature and extent of the effective burden

7. In prohibiting conduct consisting of "a protest in relation to terminations", the impugned law may operate to impose an effective burden on political communication. This is because the term "protest" in this setting could encompass the dissemination of a message "in relation to terminations" that concerns "the policies of political parties and candidates for election",[3] or is otherwise "capable of bearing on electoral choice"[4] – for example, a demonstration against (or, conversely, against any change to) the decriminalisation of abortion effected by the Reproductive Health Act. Importantly, however, an analysis of various "calibrating factors" demonstrates that the extent or nature of this burden is not substantial. That is so for five reasons.

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[2] Appellant's submissions (**AS**) [35], cf respondents' submissions (**RS**) [48]-[50].

[3] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 560 (The Court).

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

8. ***First***, the protest prohibition is not relevantly "discriminatory" in either of the ways explained in CS (*Clubb*) at [29]-[30]. It does not target "communications which are inherently political or a necessary ingredient of political communication",[5] because not all "protest[s] in relation to terminations" are communications about government or political matters. Unlike the legislation impugned in *Brown*, which relevantly defined "protest activity" as an activity for the purposes of promoting awareness of or support for an opinion or belief in respect of a political, environmental, social, cultural or economic issue,[6] the Reproductive Health Act leaves "protest" undefined. On its ordinary meaning, this term would readily encompass a demonstration of any size outside a health facility directed solely towards discouraging the people who are seeking to access the facility from choosing to undergo a lawful medical procedure. Indeed, it is clear from the legislative context that this sort of "protest", aimed at influencing the private medical decisions of individuals attending health facilities rather than changing voting behaviour, is one of the forms of mischief addressed by the law. The protest prohibition does not apply unless the protest is able to be seen or heard by a person accessing or attempting to access the facility, and the separate prohibitions on recording[7] or publishing or distributing a recording[8] of such a person without the person's consent (which the appellant does not challenge) means that conduct caught by the protest prohibition is unlikely to be seen or heard by an audience beyond those persons outside the facility.[9]

9. A "protest" of the character just described is not political communication: see CS (*Clubb*) at [11]-[12]. Thus, whilst the protest prohibition has an operation that "extends to include communications of the kind protected by the freedom",[10] it "applies without distinction to communication of ideas about government or political matters and any

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[5] *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[6] See *Brown* (2017) 91 ALJR 1089 at 1099 [2] (Kiefel CJ, Bell and Keane JJ).

[7] Reproductive Health Act, s 9(1), definition (d) of "prohibited behaviour".

[8] Reproductive Health Act, s 9(4).

[9] A point made by the Attorney General for New South Wales in his submissions in *Clubb v Edwards* at [7].

[10] *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at 570 [108] (Crennan, Kiefel and Bell JJ).

other communication".[11] It does not discriminate on the basis of "content" in a manner relevant to the implied freedom: see CS (*Clubb*) at [31], [47], cf the appellant's submissions in *Preston* at [45](k).

10. Nor does the protest prohibition favour some political viewpoints over others (cf AS [42], 44(b)). Even if the appellant's narrow construction of the term "protest" is correct (AS [42]),[12] the expression "in relation to" is one of broad import,[13] and a protest "in relation to terminations" need not be one expressing a message *in opposition to* terminations. A protest that opposes (eg) further restrictions on access to abortion, or the additional limitations applicable under s 5 of the Reproductive Health Act where the pregnant woman is more than 16 weeks pregnant, or the rights of persons such as the appellant to protest against abortions beyond the 150m access zone, would be a "protest in relation to terminations" even though none of those messages could be said to be expressing "opposition to terminations". The protest prohibition is not discriminatory merely because it may from time to time, and depending upon the prevailing circumstances, operate to affect one group wishing to express a particular viewpoint in a manner that engages the mischief which the law is designed to address: see CS (*Clubb*) at [32]-[35], [47]. The terms of that prohibition contrast with the prohibition on protesting in an access zone considered in *R v Spratt*, where "protest" was relevantly defined to include "any act of *disapproval* or attempted act of *disapproval*, with respect

[11] *Monis v The Queen* (2013) 249 CLR 92 at 130 [63] (French CJ).

[12] Cf, eg, Deutsche Welle, 7 July 2018, "Germans protest in support of migrant rescues in the Mediterranean", https://www.dw.com/en/germans-protest-in-support-of-migrant-rescues-in-the-mediterranean/g-44568720 ; BBC News, 20 February 2018, "Florida shooting: Students protest in support of gun reform, https://www.bbc.com/news/av/newsbeat-43128022/florida-shooting-students-protest-in-support-of-gun-reform; SBS News, 5 February 2017, "Australians protest in support of refugees", https://www.sbs.com.au/news/australians-protest-in-support-of-refugees; Reuters, 16 July 2018, "Finns rally against Trump, Putin ahead of Helsinki summit", https://www.reuters.com/article/us-usa-russia-summit-protests/finns-rally-against-trump-putin-ahead-of-helsinki-summit-idUSKBN1K50P8 ("About 2,500 protesters demonstrated in support of human rights, democracy and the environment"); The Guardian, 22 January 2017, "People around the world protest in support of Women's March on Washington – video", https://www.theguardian.com/world/video/2017/jan/21/people-around-the-world-protest-in-support-of-womens-march-on-washington-video. See, as to the use that may be made of that material in ascertaining the "scope" or construction of a law, *Thomas v Mowbray* (2007) 233 CLR 307 (***Mowbray***) at 519-520 [634]-[635] (Heydon J) and see also *Maloney v The Queen* (2013) 252 CLR 168 at 299 [353], [354] (Gageler J); *Re Day* (2017) 91 ALJR 262 at 269 [21]-[24] (Gordon J). The common law and statutory rules as to judicial notice do not apply to such material: *Mowbray* (2007) 233 CLR 307 at 516-517 [628]-[629] (Heydon J).

[13] See, eg, *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374 (Toohey and Gaudron JJ), 376 (McHugh J).

to issues related to abortion services"[14] – although, notably, the Court of Appeal for British Columbia there concluded that the law's infringement of freedom of expression was justified by the importance of its purpose.[15]

11. ***Secondly***, the protest prohibition is properly viewed as a "time, place and manner" restriction (see CS (*Clubb*) at [39]-[44]). It restricts protests in relation to terminations *only* where they occur within the 150m access zone around premises at which terminations are provided and can be seen or heard by persons accessing or attempting to access those premises. For the reasons explained at [17]-[20] below, it serves a regulatory purpose unrelated to political communication – facilitating access to a health service (pregnancy termination) rendered lawful by other provisions of the same Act – and only incidentally burdens protests concerning government or political matters in the course of pursuing that purpose (see CS (*Clubb*) at [37]). It leaves open ample means for protestors to communicate their messages on abortion to the public. Outside the access zone, protestors are free to disseminate their message. They may also do so *inside* that zone, so long as their protest cannot be seen or heard by persons attempting to access the facility.

12. There is no factual foundation for the proposition that *political* protests in relation to abortion are "most effective … near the premises at which abortions are provided" (cf AS [2]) – particularly given that the combination of trespass laws and the unchallenged recording prohibitions in ss 9(2) and 9(4) would likely operate to prevent the dissemination of images of the conduct the subject of the protest (women accessing abortion services). This stands in stark contrast with *Brown*, where the plaintiffs argued, supported by the special case, that they needed to make "onsite" protests "in those parts of the natural environment which are considered to be under threat of damage or destruction" in order to obtain "images of forest operations together with protests concerning them" and then communicate those images to the public at large.[16]

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[14] See *R v Spratt* (2008) 298 DLR (4th) 317 (***Spratt***) at 4-5 [8]-[9] (emphasis added).

[15] *Spratt* (2008) 298 DLR (4th) 317 at 34 [91]. See similarly *R v Lewis* (1996) 139 DLR (4th) 480 (***Lewis***) at 78 [149].

[16] *Brown* (2017) 91 ALJR 1089 at 1112 [106] (Kiefel CJ, Bell and Keane JJ); see also at 1126 [191] (Gageler J), 1133 [240] (Nettle J).

13. ***Thirdly***, the 150m access zone within which the protest prohibition applies is spatially precise. As is the case for the provision impugned in *Clubb*, there is no reason to apprehend that it will burden political communication outside access zones (see CS (*Clubb*) [46]).

14. ***Fourthly,*** at least some conduct caught by the protest prohibition could amount to prohibited language or behaviour,[17] public annoyance[18] or common nuisance[19] under other Tasmanian laws, or constitute the offence of observing or visually recording another person without their consent in circumstances where a reasonable person would expect to be afforded privacy and the person is engaging in a "private act".[20] Thus, the protest prohibition's burden on political communication is only "incremental", as it overlaps in part with extant laws (see CS (*Clubb*) at [21], [46]).

15. ***Fifthly***, it is relevant to observe that the type of political communication caught by the protest prohibition is abortion-related protest that, in practice, a woman attempting to access an abortion facility cannot avoid – except by "shun[ning] the medical service sought".[21] As the Canadian case law has recognised, where a person cannot avoid the message conveyed by a protest "much of the value of freedom of expression is lost".[22] The extent of the law's burden on political communication should be assessed against that backdrop.

16. In summary, then: the protest prohibition burdens political communication, but it does so in a non-discriminatory way and through a "time, place and manner" restriction that is spatially precise. It supplements existing laws proscribing (inter alia) observing or visually recording people engaging in private acts, and, in practice, it affects protests which cannot be avoided by their immediate audience. The nature and extent of the

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[17] *Police Offences Act 1935* (Tas), s 12.

[18] *Police Offences Act 1935* (Tas), s 13.

[19] *Criminal Code Act 1924* (Tas), ss 140-141.

[20] *Police Offences Act 1935* (Tas), s 13A.

[21] *Lewis* (1996) 139 DLR (4th) 480 at 58 [106].

[22] *Lewis* (1996) 139 DLR (4th) 480 at 74 [139]; see also *Spratt* (2008) 298 DLR (4th) 317 at 31-32 [83]-[84].

burden is not substantial, and the prohibition can be justified by demonstrating that it has a rational connection to its identified purpose (see CS (*Clubb*) at [40]).

Question 2 – Compatibility testing

17. The protest prohibition is one component of a broader legislative scheme designed to afford effective access to pregnancy termination services in Tasmania. That is reflected in the short title of the Act[23] and in the heading to the particular Part of the statute in which that prohibition is located[24] (Part 2), each of which refers to "Access to Terminations". Part 2, read with the Criminal Code amendments in Part 3, relevantly affords that access in two complementary ways.

18. ***First***, Part 2 renders terminations lawful in a much wider range of circumstances than was previously permissible. A medical practitioner may lawfully terminate a pregnancy if the pregnant woman has consented – and, where the woman is more than 16 weeks pregnant, if the practitioner and another practitioner reasonably believe that the continuation of the pregnancy would involve greater risk of injury to the woman's physical or mental health than if the pregnancy were terminated (ss 4-5). A woman who assists in or performs a termination on herself is not guilty of a crime (s 8). And various offences involving terminations are no longer crimes under Tasmanian law (by force of the amendments made to the *Criminal Code Act 1924* (Tas) by s 14 of the Act).

19. ***Secondly***, the Part creates "access zones" of 150 metres from premises at which terminations are provided (s 9(1)), and proscribes various types of behaviour taking place within that zone (ss 9(1)-9(2)) or otherwise in the vicinity of the premises (s 9(4)). Each of the four categories of "prohibited behaviour"[25] referred to in the definition in s 9(1) is a type of conduct that could prevent pregnant women from accessing premises at which abortions are provided – whether by physically impeding

[23] See *Silverwood & Beck v Secretary for Labour* [1980] Tas R 253 at 255 (Neasey J); *Sydney Local Health Network v QY* (2011) 83 NSWLR 321 at 332 [63] (Campbell JA); *Re Boaler* [1915] 1 KB 21 (CA) at 40-41; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (8th ed, 2014) at [4.49]. See also *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 468 [60] (The Court).

[24] Note s 6(2) of the *Acts Interpretation Act 1931* (Tas).

[25] Noting that no conduct has yet been prescribed by the regulations: see para (e) of the definition of "prohibited behaviour".

them from reaching the facility, or by discouraging them from approaching due to the presence within the access zone of a specified form of protest (those that they are able to see or hear) or the threat of being recorded.

20. Thus, when the protest prohibition is read in its proper context, its purpose is clear: to facilitate effective access to the reproductive health services rendered lawful by other provisions of the same statute. That characterisation finds support in the extrinsic material.[26] To describe this law's objective as (eg) to "deter speech" of a certain character (AS [51]-[53], [56]) is to "elide the purpose [of the prohibition] with its operation and effect".[27] That characterisation also ignores the ample statutory indicators that the "mischief to which" the prohibition is directed[28] (in common with the other proscriptions of "prohibited behaviour") is the barriers, whether overt or covert, that may operate to prevent pregnant women from seeking out and obtaining abortions.

21. For the reasons explained in CS (*Clubb*) at [51], the purpose of the protest prohibition identified above is legitimate.[29]

Question 3 - Justification

22. ***Suitability:*** The protest prohibition has a rational connection to the purpose of facilitating effective access to pregnancy termination services. It was reasonable for the legislature to conclude that, where pregnancy termination-related protests can be seen or heard by persons attempting to access premises providing that health service, those protests could prevent pregnant women from having unfettered access to the premises.

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[26] See, eg, Clause Notes to the Reproductive Health (Access to Terminations) Bill 2013, cl 9 ("Prohibiting protests in relation to terminations is distinguishable from protests in relation to other matters as protestors outside termination services interfere with a person's right to privacy *and access to legal medical services*", emphasis added); Second Reading Speech for the Reproductive Health (Access to Terminations) Bill 2013, Parliament of Tasmania, Legislative Assembly, *Hansard* (16 April 2013), at 44 ("This Bill acknowledges that access to pregnancy termination services is first and foremost a health matter"), 51 ("Women are entitled to access termination services in a confidential manner without the threat of harassment").

[27] *Brown* (2017) 91 ALJR 1089 at 1111 [100] (Kiefel CJ, Bell and Keane JJ).

[28] *Brown* (2017) 91 ALJR 1089 at 1112 [101] (Kiefel CJ, Bell and Keane JJ).

[29] See also *Lewis* (1996) 139 DLR (4th) 480 at 52 [92] ("[e]quitability and facilitation of access to health services is a valid legislative objective", and in circumstances where abortion has been recognised as a medical service, "the government has an obligation to provide generally equal access" to it).

23. That concern was described by the Victorian Law Reform Commission in its 2008 final report at [8.257]-[8.260] (Clubb CAB 437-438), and the Tasmanian government considered the "views, research and recommendations" contained in that report in developing the Bill that ultimately became the Reproductive Health Act.[30] The concern was also articulated in the Final Consultation Report for the Bill, [31] and in the research described in the Respondents' submissions at [36]-[40]. The concern is directly related to the protest activity of the appellant, who gave evidence at trial that his intention in protesting within hearing and sight of persons attempting to access the premises was "to dissuade or delay a woman who was seeking to terminate her pregnancy" (Preston CAB 36 at [38]) and to "deter women [from] going into the clinic" (Preston CAB 42 at [62]).

24. It is not to the point that the impugned law singles out "protest" (AS [61](a)). "Protest in relation to terminations" is one of four distinct types of behaviour proscribed by s 9(2) that could be seen to have an adverse impact on people seeking to access termination services. Read in its statutory context, the protest prohibition is not under-inclusive, because other harmful conduct is caught by the other prohibitions (cf what is seemingly suggested by AS [61](a)).

25. For these reasons, the protest prohibition can be considered to advance the legitimate purpose described. As is the case for the provision impugned in *Clubb*, the prohibition is sufficiently justified in these circumstances (see CS (*Clubb*) at [52]).

26. Alternatively, the remaining questions under the *McCloy* approach would be answered as follows.

27. ***Necessity***: The protest prohibition captures conduct which does not rise to the level of "besetting, harassing, intimidating" (etc), "footpath interference" or intentional recording (paras (a)-(c) of the definition of "prohibited behaviour"), but which nonetheless constitutes forms of pressure and discouragement outside a health facility.

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[30] 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* (March 2013) at 6.

[31] Department of Health and Human Services, *Final Consultation Report relating to consultation on the Draft Reproductive Health (Access to Terminations) Bill: Containing revised pregnancy termination laws proposed for Tasmania* (6 June 2013) (**Final Consultation Report**).

None of the options proffered by the appellant at AS [65]-[69] would likely be as effective as the protest prohibition in safeguarding a pregnant woman's access to termination services. Similar arguments were considered and rejected in *Spratt*, where the Court accepted that "the line between peaceful protest and virulent or even violent expression against abortion is easily and quickly crossed", that "[t]o try to characterize every 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".[32] The Court quoted with approval from *Hill v Colorado*, where the US Supreme Court found that the "prophylactic aspect" of the statute challenged in that case was "justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behaviour".[33]

28. It follows that the appellant has identified no obvious and compelling alternative measures effecting a significantly lesser burden on the freedom,[34] which are as effective in and as capable of achieving the legislative purpose as the protest prohibition.[35] This Court is not concerned with the "relative merits of competing legislative models",[36] including the various carve outs or defences proposed by the appellant. It is enough to conclude that the protest prohibition was within the "domain of selections"[37] open to the legislature. As noted in CS (*Clubb*) at [42], that follows from fundamental considerations concerning the proper roles of the legislative and judicial branches in the constitutionally prescribed system of government which the freedom protects.

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[32] *Spratt* (2008) 298 DLR (4th) 317 at 29-30 [80]-[81].

[33] *Hill v Colorado*, 530 US 703 at 729 (Stevens J for the Court) (2000).

[34] *Brown* (2017) 91 ALJR 1089 at 1117 [139] (Kiefel CJ, Bell and Keane JJ).

[35] *Tajjour* (2014) 254 CLR 508 at 571 [114] (Crennan, Kiefel and Bell JJ); see also *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at 217 [81] (French CJ, Kiefel, Bell and Keane JJ).

[36] *Brown* (2017) 91 ALJR 1089 at 1144 [286] (Nettle J).

[37] *McCloy* (2015) 257 CLR 178 at 217 [82] (French CJ, Kiefel, Bell and Keane JJ).

29. ***Adequacy in balance***: There is no "gross disproportion"[38] between the burden on political communication effected by the protest prohibition (which is not substantial) and the (compelling) importance of the law's purpose.[39]

PART V ESTIMATED HOURS

30. It is estimated that, in combination with its submissions in *Clubb*, 1 hour will be required to present the Commonwealth's oral argument.

Dated: 10 August 2018

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[38] See *Brown* (2017) 91 ALJR 1089 at 1146 [290] (Nettle J).

[39] See further CS (*Clubb*) at [41], [53].