IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY **No. H2 of 2018**

BETWEEN:

JOHN GRAHAM PRESTON
Appellant

AND

ELIZABETH AVERY
First Respondent

AND

SCOTT WILKIE
Second Respondent

ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)
OUTLINE OF ORAL ARGUMENT

PART I: SUITABILITY FOR PUBLICATION

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

PART II: OUTLINE OF ORAL SUBMISSIONS

The application of Act is neutral in its operation (Appellant's Submissions [14(c), [42], [44(b)])

2. Section 9(1) of the Act is facially neutral in that it is not confined to protests opposing terminations. This neutrality should be given weight if the Court turns to consider whether section 9(1) is 'reasonably appropriate and adapted'.

3. The *Macquarie Dictionary*[1] defines 'protest' as 'a formal expression or declaration of objection or disapproval, often in opposition to something which one is powerless to prevent or avoid'. The noun "protest" in section 9(1), in its statutory context, applies to a protest *in relation to* terminations, not merely a protest *against* terminations. Accordingly, although section 9(1) embraces a

[1] Available at <http://www.macquariedictionary.com.au>).

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protest like that carried out by the Appellant, it also applies to a protest in support of a woman's right to terminate, or a protest against the conduct of persons carrying out protests like that of the Appellant. It is not a prohibition of consensual private conversations. This is consistent with the principle that statutes will not lightly be construed as restricting free speech: *Brown v Tasmania* at 1190 [546] (Edelman J) (Tab 21).

4. In any event, a law effecting a discriminatory burden is not invalid for that reason alone. Rather, it is relevant in the context considering whether the law is reasonably appropriate and adapted: *Brown v Tasmania* at 1110-1111 [92]-[95] (Kiefel CJ, Bell and Keane JJ) (Tab 21).

Ordinary statutory construction establishes, and relevant legislative history affirms, the object of the Act (*Appellant's Submissions* [5]-[17], [42], [44]-[45] [50]-[58]; *Respondent's Submissions* [10]-[26])

5. The objects of a statute are identified through the ordinary rules of statutory construction, and any extrinsic materials or legislative history that is relevant: *Unions NSW v New South Wales* at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (Tab 50); *Brown v State of Tasmania* at 1134-1135 (Nettle J); 1151-1152 [321] (Gordon J) (Tab 21).

6. The Respondent's submissions ([10]-[26]) exhaustively apply ordinary rules of construction, correctly identify an object of the Act ([11]) and correctly conclude that no constructional difficulty requiring resort to further material arises ([27]). Nevertheless, the Respondent identifies relevant legislative history and extrinsic materials supporting its submission ([28]-[46]).

7. The Appellant's submissions ([5]-[17], [50]-[58]) rely on or critique passages of the Second Reading Speech where, on any reading, the Minister is stating her opinion or expectation as to how the Bill will operate. These passages, and the Appellant's critique of them, are irrelevant to the constructional task. Submissions of the Appellant relying on this irrelevant material should be rejected (AS [12]-[17], [42], [44]-[45], [50]-[58]).

Extrinsic materials are irrelevant to consideration of alternative means (*Appellant's Submissions* [62]-[70])

8. Courts applying the reasonably appropriate and adapted limb may consider alternative legislative means as a useful 'tool of analysis'. However, only

'obvious and compelling' alternatives may be considered. Courts must not substitute their legislative judgment for that made by the parliament: *McCloy v New South Wales* at 210-211 [57]-[58] (French CJ, Kiefel, Bell and Keane JJ) (Tab 35).

9. The alternatives to the 'Protest Prohibition' identified in the Appellant's submissions ([62]-[69]) comprise numerous subtle legislative amendments that are not obvious or compelling. The Appellant's submission, that the Second Reading Speech evidences that the Tasmanian Parliament did not consider alternatives ([70]), is erroneous. The question is for the court and it is whether obvious and compelling alternatives exist. The question is not whether the legislature considered alternatives.

Relevance of the site (*Western Australia's Submissions* [34]-[37]; cf. *Appellant's Submissions* [74])

10. To the extent that any communication in relation to terminations can be regarded as a political communication, the efficacy and force of any such communication is not dependent on the communication being precisely at a place at which abortions are provided.

11. The prohibition against protesting in relation to terminations, within 150 metres of premises which terminations are provided, does not meaningfully detract from the efficacy and persuasiveness of such protest influencing public opinion or "political or legislative change" in relation to abortion law and health policy.

12. Compare *Levy v Victoria* at 592 and 625 (Tab 33) where the Plaintiff was able to identify the effect that the law would have on political communication, including that, "televised images of the bloodied bodies of dead and wounded ducks" were more likely to attract public attention to their cause.

13. Compare also *Brown v Tasmania* at 1102-1103 [32]-[33] (Tab 21) where the parties agreed that, "onsite protests have been a catalyst for granting protection to the environment in particular places". There are no such agreed facts here.

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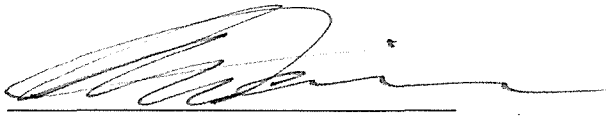

George Tannin SC