IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY NO M46 OF 2018

KATHLEEN CLUBB

Appellant

and

ALYCE EDWARDS

First Respondent

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Second Respondent

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

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Date of this document: 25 May 2018

File ref: 18001902

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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 185D of the *Public Health and Wellbeing Act 2008* (Vic) (the **Public Health Act**), read with para (b) of the definition of "prohibited behaviour" in s 185B(1), prohibits communicating in relation to abortions in a "safe access zone" extending 150m from premises at which abortions are provided, where those communications are reasonably likely to cause distress or anxiety to a person accessing or leaving those premises (**communication prohibition**). The question the Appellant seeks to raise is whether that prohibition is contrary to the implied freedom of political communication.

4. The Commonwealth submits that it is inappropriate to answer that question due to a threshold issue. That issue arises because there is no evidence that Ms Clubb's conduct involved *political* communication. The short point is that the communication prohibition could (if necessary) be read down so as not to apply to communicative conduct on governmental or political matters. For that reason, the communication prohibition validly applied to Ms Clubb's conduct whether or not, in other operations, it unjustifiably burdens political communication.

5. Alternatively, insofar as the prohibition burdens political communication: it restricts the manner and place of communications; it leaves ample alternative modes of communication open; and it does not target communications that are inherently political. Its burden is slight, and is readily justified as rationally advancing the legitimate (and compelling) objectives of protecting the safety, wellbeing, privacy and dignity of persons accessing or providing lawful health services, and facilitating effective access to those services. The communication prohibition is therefore valid.

Foundational principles: a restriction on legislative power concerning *political* communication that facilitates electoral choice

6. Three points should be kept in mind when approaching the analytical framework

formulated in *Lange v Australian Broadcasting Corporation*[1] and explained in *McCloy v New South Wales* and *Brown v Tasmania*, for that framework is a "functional reflection of the nature of the protected freedom".[2]

7. ***First***, as this Court has long acknowledged, "[u]nlike the Constitution of the United States, our Constitution does not create rights of communication".[3] Thus, the implied freedom is not "a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation".[4] The reverse is true: parliaments make laws on matters within their purview, subject only to a constitutional immunity that is "limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution."[5] The protection is a means for the realisation of systemic constitutional values. It is not an end in itself.

8. ***Secondly***, the freedom's purpose is to ensure that the people can "exercise a free and informed choice as electors,"[6] by preventing the legislature from denying "access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election".[7] The flow of political discourse between and amongst the governed and the governors must be free, to ensure that the constitutionally protected choice at general elections or referenda can be an "informed" choice. The freedom is one both to receive and disseminate information that might ultimately bear on electoral choice. The focal point is the *recipient or listener*, who is called upon to assert her or his "share in political power",[8] although the freedom also protects the provision of information to elected representatives and officers of the executive. What is protected is the freedom to communicate political ideas "to those who are willing to listen", not a "right to force an unwanted message on those who do not wish

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[1] (1997) 189 CLR 520 (***Lange***), as modified in *Coleman v Power* (2004) 220 CLR 1 (***Coleman***) at 51 [95] (McHugh J), 78 [198] (Gummow and Hayne JJ), 82 [211] (Kirby J).
[2] *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at 230 [124] (Gageler J), citing *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at 578 [144] (Gageler J).
[3] *Levy v Victoria* (1997) 189 CLR 579 (***Levy***) at 622 (McHugh J). See also *Brown v Tasmania* (2017) 91 ALJR 1089 (***Brown***) at 1124 [185] (Gageler J), 1138 [262] (Nettle J), 1175 [459] (Gordon J).
[4] *McCloy* (2015) 257 CLR 178 at 202-203 [30] (French CJ, Kiefel, Bell and Keane JJ), citing *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 150 (Brennan J).
[5] *Lange* (1997) 189 CLR 520 at 561 (The Court); *McCloy* (2015) 257 CLR 178 at 229 [121] (Gageler J).
[6] *McCloy* (2015) 257 CLR 178 at 193-194 [2] (French CJ, Kiefel, Bell and Keane JJ); see also at 227 [115], 228 [118] (Gageler J), 257 [215]-[216] (Nettle J), 280 [303] (Gordon J); *Lange* (1997) 189 CLR 520 at 560 (The Court); *Levy* (1997) 189 CLR 579 at 607-608 (Dawson J), 622 (McHugh J).
[7] *Lange* (1997) 189 CLR 520 at 560 (The Court).
[8] *McCloy* (2015) 257 CLR 178 at 226 [110] (Gageler J), citing Moore, *The Constitution of the Commonwealth of Australia* (1902) at 329.

to hear it".[9]

9. ***Thirdly,*** the implied freedom exists to "protect political communication, not communication in general".[10] The communications to which electors have constitutionally protected access – and which are the subject of the "effective burden" inquiry under the *Lange* test – are such "information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation".[11] That is, they are communications about "government or political matters",[12] being "communications which are capable of bearing on electoral choice".[13] Whilst the "class of communication protected by the implied freedom in practical terms is wide",[14] "freedom of speech ... is wider than freedom of political discourse".[15] As three judges observed in *Theophanous v Herald and Weekly Times Ltd*,[16] there is a "significant difference" between the representative democracy-protective implied freedom and "an unlimited freedom of expression and that difference, though it does not lend itself to precise definition, is capable of being ascertained when the occasion to do so arises".

Threshold issue: the communication prohibition and non-political communication

10. The third of these points gives rise to a threshold issue in this case. Victoria correctly points out that not all communication concerning abortion involves political communication (VS [29], [31]). As its examples illustrate, not every communication concerning an "activity the control of which may be politically controversial"[17] is necessarily capable of bearing upon electoral choice. That is significant because there is no evidence that the communications the subject of Ms Clubb's charge were political in nature (VS [29]). The consequence is that, as the Court recently held in *Knight v Victoria*,

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[9] *Brown* (2017) 91 ALJR 1089 at 1141 [275] (Nettle J). Although, elected representatives do have a responsibility to take account of and respond to the views of the people on whose behalf they act: *ACTV* (1992) 177 CLR 106 at 138-139 (Mason CJ).

[10] *McCloy* (2015) 257 CLR 178 at 228 [119] (Gageler J). See also *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions NSW***) at 548 [19] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[11] *ACTV* (1992) 177 CLR 106 at 231 (McHugh J).

[12] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at 403 [216] (Gummow J); see also at 351 [28] (Gleeson CJ and Heydon J), 362 [68], [70] (McHugh J), 450-451 [379] (Hayne J), 477-478 [449]-[451] (Callinan J); *Brown* (2017) 91 ALJR 1089 at 1111 [94] (Kiefel CJ, Bell and Keane JJ).

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

[14] *Attorney-General (South Australia) v Adelaide City Corporation* (2013) 249 CLR 1 (***Corneloup***) at 44 [67] (French CJ).

[15] *ACTV* (1992) 177 CLR 106 at 217 (Gaudron J).

[16] (1994) 182 CLR 104 at 125 (Mason CJ, Toohey and Gaudron JJ).

[17] See *APLA* (2005) 224 CLR 322 at 403-404 [219]-[220] (Gummow J).

it would be "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."[18]

11. While communications concerning whether abortion should be lawful, or how it should be regulated, would constitute political communications, other communications relating to abortion may not have that character. In particular, whilst the evidence does not establish what Ms Clubb actually said, it may be inferred that her communication was directed to dissuading an individual woman from having an abortion.[19] A communication of that character (concerning an intensely personal issue involving utilisation of a lawful health service) does not concern government or political matters. It has an insufficient connection to matters that are capable of bearing on electoral choices to constitute political communication. It lacks the requisite "close relationship" to the provisions of the Constitution from which the freedom is implied.[20]

12. The point is illustrated by *APLA*, where it was noted that questions associated with the nature and extent of liability for negligently caused personal injury had been the subject of political controversy and debate at all levels of government in Australia.[21] It did not follow that advertising directed to persuading the recipients to engage the services of lawyers in that (politically controversial) area was itself political communication. The Court contrasted the prohibition on such advertising with the hypothetical example of a case where the content of the regulated communications concerned whether personal injury should be regulated differently, or whether the available rights and remedies should be changed.[22] A similar distinction has been drawn between communications concerning particular exercises of judicial power and communications respecting legislative and executive acts and omissions concerned with the administration of justice (where, except

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[18] *Knight v Victoria* (2017) 345 ALR 560 (***Knight***) at [33] (the Court); *Tajjour* (2014) 254 CLR 508 at 585-589 [168]-[176] (Gageler J).

[19] The couple was entering the clinic (AB 295); the Court below found Ms Clubb's intention was to engage with the couple in a discussion relevant to abortion (AB 296); and she did so in what she considered to be the exercise of a "right" to "offer [her] help to women" (AB 295).

[20] *APLA* (2005) 224 CLR 322 at 361-362 [68] (McHugh J); *Lange* (1997) 189 CLR 520 at 560-561 (The Court).

[21] See *APLA* (2005) 224 CLR 322 at 449-450 [377]-[378] (Hayne J).

[22] *APLA* (2005) 224 CLR 322 at 351[28] (Gleeson CJ and Heydon J), 361-362 [67]-[71] (McHugh J), 403-404 [216]-[220] (Gummow J), 450-451 [379]-[380] (Hayne J) and 481[459] (Callinan J).

in "some exceptional cases", only the latter will amount to political communication[23]).

13. The reasoning in *Knight* has the consequence that a "threshold question"[24] arises in cases where a constitutional point is sought to be raised in the absence of a "state of facts which makes it necessary to decide such a question".[25] Section 6(1) of the *Interpretation of Legislation Act 1984* (Vic) (**Interpretation Act**) creates a statutory presumption to the effect 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".[26] If that provision applies, then the communication prohibition validly applied to Ms Clubb's conduct *whether or not* it would infringe the implied freedom of political communication in other hypothetical operations. In such a case, it is inappropriate to determine the constitutional question.

14. There are two reasons that s 6(1) of the Interpretation Act might be said not to apply. *First*, its operation can be displaced by contrary legislative intention. However, such an intention would be held to exist only if it was possible to discern from the Public Health Act an intention that the communication prohibition should be *wholly* invalid unless it applies to *all* of the persons, subject-matters or circumstances to which it would otherwise have been construed as applicable.[27] The beneficial "protective" object in s 185A denies that the legislative design is founded upon such an "all or nothing" approach.

15. *Second*, the presumption for which s 6(1) provides will not apply if its application would require the court to take on "the legislative task of making a new law from the constitutionally unobjectionable parts of the old".[28] That limitation presents no difficulty in this case. As five members of this Court held in the *Industrial Relations Act case*, the standard by reference to which a law is read down may appear from the fact that Parliament's legislative power is subject to a clear limitation.[29] In such a case, even a provision expressed in general words can be read as subject to that limitation. Justice

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[23] *Hogan v Hinch* (2011) 243 CLR 506 at 554-555 [92], [93] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), referring to *APLA* (2005) 224 CLR 322 at 361 [65]-[66] (McHugh J).
[24] *Tajjour* (2014) 254 CLR 508 at 589 [176] (Gageler J).
[25] *Knight* (2017) 345 ALR 560 at [32] (the Court), citing *Lambert v Weichelt* (1954) 28 ALJR 282 at 283.
[26] *Tajjour* (2014) 254 CLR 508 at 585 [169] (Gageler J), citing *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 (***Bank of New South Wales***) at 371 (Dixon J).
[27] See, e.g., *Knight* (2017) 345 ALR 560 at [35] (the Court); *Victoria v Commonwealth* (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[28] *Bank of New South Wales* (1948) 76 CLR 1 at 372 (Dixon J).
[29] *Victoria v Commonwealth* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Tajjour* (2014) 254 CLR 508 at 586 [171] (Gageler J). See also *Burns v Corbett* [2018] HCA 15 at [64] (Kiefel CJ, Bell and Keane JJ), [120] (Gageler J).

McHugh applied this approach in reading down the law in issue in *Coleman* by reference to the implied freedom of political communication,[30] as did Gageler J in *Tajjour*.[31] In *Knight*, the Court illustrated the same point by reference to *Wilson*,[32] where a general word was read down to avoid infringing Ch III. These authorities demonstrate that the constructional imperative created by s 6(1) of the Interpretation Act demands that, if necessary, the communication prohibition would be read down so as to have no application insofar as it would apply to communicative conduct on governmental or political matters. As such, that prohibition plainly validly applies to communication of all other kinds.

16. That is sufficient to dispose of this appeal, for it has the result that the communication prohibition validly applied to Ms Clubb, irrespective of whether it might infringe the implied freedom in any of its other operations. If, however, the Court determines that it is appropriate to consider the validity of the communication prohibition more generally, the Commonwealth makes the further submissions below.

The place of calibrating factors within the *McCloy* approach

17. Since *Lange*, it has been settled that, where a law imposes an "effective burden" on freedom of political communication, its validity hinges on whether "the extent of the burden can be justified".[33] In *McCloy*, this Court re-formulated the two questions it had identified in *Lange*, and proposed a methodology for assessing any proposed justification for the impugned law (***McCloy* approach**). That approach, as reframed and applied by four Justices in *Brown*,[34] requires consideration of whether a law that effectively burdens political communication serves a purpose that is not incompatible with the constitutional system of representative and responsible government and, if so, whether the means adopted to achieve that purpose are suitable, necessary and adequate in their balance.[35]

18. The steps of the *McCloy* approach "are not constituent parts of the second question posed in *Lange*, but rather are tools of analysis that "may … assist" in answering that question.[36]

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[30] *Coleman* (2004) 220 CLR 1 at 54-56 [107]-[110] (McHugh J).
[31] *Tajjour* (2014) 254 CLR 508 at 588 [173], 589 [178]; see also at 586-587 (concerning s 92 cases).
[32] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 20, 26.
[33] *McCloy* (2015) 257 CLR 178 at 194 [2] (French CJ, Kiefel, Bell and Keane JJ).
[34] *Brown* (2017) 91 ALJR 1089 at 1112 [104], 1115 [127], 1116 [132], 1116-1117 [139] (Kiefel CJ, Bell and Keane JJ), 1141 [271], 1142-1143 [278]-[280] (Nettle J); see also at 1119 [155]-[156] (Gageler J).
[35] *McCloy* (2015) 257 CLR 178 at 194-195 [2] (French CJ, Kiefel, Bell and Keane JJ).
[36] *Brown* (2017) 91 ALJR 1089 at 1115 [125] (Kiefel CJ, Bell and Keane JJ), 1143 [280], 1142 [278] (Nettle J); see also at 1119 [158] (Gageler J), 117 [473] (Gordon J); *McCloy* (2015) 257 CLR 178 at 195 [4], 215-216 [73]-[74] (French CJ, Kiefel, Bell and Keane JJ).

They may not be the only such tools.[37] That recognises that some components of structured proportionality testing may not be necessary or appropriate in all situations.[38]

19. Some issues remain to be worked out. For example, the Court has noted that the level of justification that a law requires depends on the extent and nature of the burden that it imposes upon political communication.[39] However, the stage of the analytical framework at which to consider characteristics of an impugned law that may bear upon the level of justification required (conveniently described as "*calibrating factors*"[40]) is not settled.

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20. One critical calibrating factor is the impugned law's purpose. That "may be the most important factor in justifying the effect that the measure has on the freedom" – as "some statutory objects may justify very large incursions" on it.[41] This particular factor fits readily within the *McCloy* approach, step 2 of which expressly requires the purpose of a law to be identified and assessed for compatibility with the constitutional system of government. Once that purpose is identified, it becomes a major factor in the justification analysis that follows, because "[t]he 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".[42]

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21. Other possible calibrating factors include: whether the burden imposed is only "incremental", in the sense that the impugned provisions "overlap" with the conduct prohibited by the existing wider legal framework (the validity of which is not impugned); whether the law is targeted to the content of political "ideas or information" or is otherwise relevantly "discriminatory"; and whether the law is a "time, place and manner" restriction. But, unlike the purpose of the impugned law, the place of these other calibrating factors in the analytical framework is unclear. They could be analysed as part of the "effective burden" enquiry,[43] but conceivably might also be said to be relevant only at the "balancing stage of proportionality analysis".[44]

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22. The Commonwealth submits that, with the exception of legislative purpose, the other

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[37] *McCloy* (2015) 257 CLR 178 at 195 [4], 215 [74] (French CJ, Kiefel, Bell and Keane JJ).
[38] See *Murphy* (2016) 90 ALJR 1027 at 1039 [37] (French CJ and Bell J); cf *Brown* (2017) 91 ALJR 1089 at 1143 [280] (Nettle J).
[39] *Brown* (2017) 91 ALJR 1089 at 1114 [118], 1115 [128] (Kiefel CJ, Bell and Keane JJ), 1127 [200]-[201] (Gageler J), 1178 [478] (Gordon J).
[40] Reflecting the terminology used by Gageler J in *Tajjour* (2014) 254 CLR 508 at 579 [147], 580 [151] and in *Brown* (2017) 91 ALJR 1089 at 1127-1128 [200]-[206].
[41] *McCloy* (2015) 257 CLR 178 at 218 [84] (French CJ, Kiefel, Bell and Keane JJ).
[42] *McCloy* (2015) 257 CLR 178 at 218 [86] (French CJ, Kiefel, Bell and Keane JJ).
[43] See, eg, *Brown* (2017) 91 ALJR 1089 at 1123 [180] (Gageler J).
[44] See *Brown* (2017) 91 ALJR 1089 at 1114 [121] (Kiefel CJ, Bell and Keane JJ).

calibrating factors should typically be considered as part of the "effective burden" inquiry (although they do not concern the *existence* of such a burden). This is for two reasons.

23. ***First:*** although yet to be authoritatively determined, there is some support for the proposition that consideration of the extent or nature of the burden may alter the analysis to be undertaken in answering the second *Lange* question. In particular, where the burden is slight, the law may easily be justified without a detailed consideration of the availability of alternative and less restrictive means[45] or whether the law is adequate in its balance. For the reasons given below at [39]-[44] and [49], this analysis applies in the current matter and suggests that the nature and extent of the burden should be addressed at an early stage.

24. ***Secondly:*** the first stage of the *Lange* test does not simply conclude with a "yes" or "no" answer to the question of whether the impugned law effectively burdens the implied freedom. The approach in fact taken by the Court rather suggests that in the course of answering that question, and before moving to the stage of justification, it is necessary to identify the nature and extent of the burden with precision.[46] That empirical observation of judicial practice accords with principle: it is only *insofar as* the law imposes an effective burden on political communication that the courts' supervisory role is engaged to consider the justification for that restriction.[47] Any attempt to justify the burden will be too abstract to be of assistance unless it is undertaken against the backdrop of a focused understanding of *how* broadly and deeply the law affects political discourse. The calibrating factors contribute to that focused understanding and give direction to the inquiries occurring under the second stage of the *Lange* test.

25. This point is usefully illustrated by considering the operation of two calibrating factors: whether the law's burden on the freedom is (i) "incremental", or (ii) "discriminatory". Asto (i): take the situation where an impugned law overlaps with other parts of the regulatory framework, which may either suggest that there is no effective burden at all (where the overlap is complete) or that any such burden is merely the "incremental" difference between the burden imposed by the (presumptively valid and unchallenged)

[45] See, eg, *Tajjour* (2014) 254 CLR 508 at 580-581 [151]-[152] (Gageler J); *Brown* (2017) 91 ALJR 1089 at 1170 [426]-[427] (Gordon J) and (albeit in a different context); *Murphy* (2016) 90 ALJR 1027 at 1039 [37] (French CJ and Bell J), 1080 [305] (Gordon J). See also, confirming that the availability of alternative restrictive means is not determinative, *McCloy* (2015) 257 CLR 178 at 233 [135] (Gageler J), 259 [222] (Nettle J), 285 [328] (Gordon J). Cf *Brown* (2017) 91 ALJR 1089 at 1114-1116 [121], [126]-[130] (Kiefel CJ, Bell and Keane JJ).

[46] See eg *Brown* (2017) 91 ALJR 1089 at 1106-1111 [61]-[95] (Kiefel CJ, Bell and Keane JJ); 1123-1127 [180]-[199] (Gageler J); 1137-1140 [258]-[270] (Nettle J) and 1165-1168 [397]-[411] (Gordon J).

[47] *McCloy* (2015) 257 CLR 178 at 231 [127] (Gageler J); see also at 213 [68] (French CJ, Kiefel, Bell and Keane JJ).

existing law and the additional burden imposed by the impugned law. In the first case (no effective burden), the impugned law would obviously be held valid.[48] To the extent of the overlap, there is no burden that is required to be justified. In the second case (only an incremental burden), consideration of the surrounding legislative context will expose the *particular burden* that is required to be justified.[49] Put another way, this analysis reveals the necessity at the initial stage of analysis to identify the "breadth" of the burden, meaning the extent to which the freedom is burdened by the law in the various shades of its operation.

26. A clear understanding of the particular aspects of a law's operation that demand justification will assist in undertaking compatibility testing. As a first step, that process requires the identification of the "true" statutory purpose[50] or the mischief that the law is designed to address.[51] But this exercise is not always straightforward: for example, in both *Corneloup* and *Monis*, the Court was divided as to the proper characterisation of the relevant purpose or mischief.[52] One reason that discernment of the statutory purpose may prove difficult is that it is often possible to articulate one or more of a law's various (and possibly competing) purposes at greater and lesser levels of abstraction – the different approaches in *Corneloup* and *Monis* supplying examples. That can cause divergent views, and resulting difficulties, at later steps in the analysis (particularly at the stage of necessity testing[53]). Those difficulties are ameliorated by an approach which identifies, early and with precision, the particular aspects and operation of the law that require justification. The mischief addressed by *those aspects* of the law is then more readily discerned.[54]

27. As to (ii): similarly, identification of whether a law is relevantly "discriminatory" – a concept examined below – can facilitate a more precise framing of the burden at the outset, which then shapes the court's subsequent inquiries. As the plurality observed in

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[48] See the conclusion reached by Edelman J in *Brown* (2017) 91 ALJR 1089 at 1195 [566] (in dissent); see also at 1192-1194 [557]-[563]; cf 1114 [116]-[118] (Kiefel CJ, Bell and Keane JJ).

[49] *Brown* (2017) 91 ALJR 1089 at 1113 [111] (Kiefel CJ, Bell and Keane JJ); 1137-1138 [259] (Nettle J), 1167-1168 [411] (Gordon J). See also *McCloy* (2015) 257 CLR 178 at 201 [24] (French CJ, Kiefel, Bell and Keane JJ).

[50] *Brown* (2017) 91 ALJR 1089 at 1111 [96] (Kiefel CJ, Bell and Keane JJ).

[51] *APLA* (2005) 224 CLR 322 at 394 [178] (Gummow J); *Brown* (2017) 91 ALJR 1089 at 1112 [101] (Kiefel CJ, Bell and Keane J), 1128 [208] (Gageler J), 1152 [321] (Gordon J).

[52] See *Monis* (2013) 249 CLR 92 at 134 [74] (French CJ), 162 [178] (Hayne J) and cf 206 [324] (Crennan, Kiefel and Bell JJ); *Corneloup* (2013) 249 CLR 1 at 43 [66] (French CJ), 62 [134] (Hayne J) and cf 90 [221] (Crennan and Kiefel JJ – Bell J relevantly agreeing).

[53] See also Barak, *Proportionality – Constitutional rights and their Limitations* (2012) at 331-333.

[54] Of course, that will often be coterminous with the broader statutory objects – but not always, as is illustrated by *Unions NSW* (2013) 252 CLR 530.

Brown,[55] consideration of this feature will inform the assessment of the law's restrictions upon the ability of the persons it targets to communicate on matters of politics and government (that being the assessment which must be undertaken to determine whether the freedom is burdened). Further, a conclusion that a law operates in that necessarily "selective" or differential fashion will point to the need to relate that "selection" to one or more of the broader statutory objects. [56] As a condition of validity, it must be possible to attribute to the impugned provision a purpose explaining that selective approach, being one going beyond merely imposing a differential burden on the freedom (which is not, of course, a permissible end[57]). In *McCloy*, for example, central to the validity of the ban on donations by property developers was the plurality's acceptance of the submission that those developers were "sufficiently distinct to warrant specific regulation in light of the nature of their business activities and the nature of the public powers which they might seek to influence in their self-interest.[58] The Court held that these provisions furthered the general purpose of Pt 6 of the Act by reducing the risk of corruption or undue influence in an area where "risk might be greater than in other areas of official decision-making".[59]

"Discriminatory" laws

28. As the authorities confirm, it is relevant to consider whether the impugned law "discriminates" against (or is targeted at) particular ideas, content or segments of the community. It is convenient to refer to such laws as "discriminatory" laws, in that they have a differential legal or practical operation by reference to the above matters.[60] But here, as in other areas of constitutional doctrine, some care is required with the concept of "discrimination", the precise meaning of which may vary according to the context.[61] Consistently with the limited rationale and scope of the implied freedom (see [6]-[9] above), the better view is that a law is relevantly "discriminatory" in this context *only* if it singles out *political* communication, or discriminates against certain speakers or points of view on *political matters*. That is, the feature of potential constitutional significance is a *discriminatory burden on political communication*, not discrimination per se.

29. ***Laws targeting political communication:*** The suspect nature of laws targeting political

[55] *Brown* (2017) 91 ALJR 1089 at 1111 [95] (Kiefel CJ, Bell and Keane JJ).
[56] See *Unions NSW* (2013) 252 CLR 530 at 558-560 [53]-[60] (French CJ, Hayne, Crennan, Kiefel, Bell JJ).
[57] See, eg, *Brown* (2017) 91 ALJR 1089 at 1115 [122] (Kiefel CJ, Bell and Keane JJ).
[58] *McCloy* (2015) 257 CLR 178 at 208 [49] (French CJ, Kiefel, Bell and Keane JJ).
[59] *McCloy* (2015) 257 CLR 178 at 209 [53] (French CJ, Kiefel, Bell and Keane JJ).
[60] *Brown* (2017) 91 ALJR 1089 at 1127 [202] (Gageler J).
[61] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548 at 578 [35] (French CJ).

communications emerges from *ACTV*. There, the impugned laws were not of "general application", but rather were "specifically directed at", and prohibited, "the broadcasting, in connexion with the electoral process, of matters relating to public affairs and political discussion, including political advertisements".[62] Thus, they constituted "a legislative prohibition not of advertising as such but of political communication",[63] and required justification in this more onerous sense described by the Court.[64] Justices Deane and Toohey stated that a law restricting "communications about government or governmental instrumentalities or institutions", "*by reference to their character as such*", is "much more difficult to justify as consistent with the implication than ... a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications".[65] Similarly, in distinguishing between "restrictions on communication which target ideas or information" and other laws,[66] Mason CJ "was speaking of a law specifically directed at, and which prohibited, the broadcasting of matters relating to public affairs and political discourse".[67] Justice McHugh also drew this distinction, stating that a "compelling justification" is required for "laws which restrict the freedom of electoral communications by prohibiting or regulating their contents".[68] The same concern with laws "directed to political communications or the content of them",[69] or regulating "communications which are inherently political or a necessary ingredient of political communication",[70] is evident in later cases.

30. ***Laws targeting particular <u>sources</u> of political communication:*** A law may also impose a relevant "discriminatory burden" if it "disfavour[s] some sources of political communication and thus necessarily favour[s] others".[71] In *ACTV*, for example, a central reason for the invalidity of the provisions regulating the allocation of free broadcasting time was that they gave "preferential treatment to political parties represented in the

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[62] *ACTV* (1992) 177 CLR 106 at 144 (Mason CJ).
[63] *ACTV* (1992) 177 CLR 106 at 171 (Deane and Toohey JJ).
[64] *ACTV* (1992) 177 CLR 106 at 144 (Mason CJ), 171 (Deane and Toohey JJ), 235 (McHugh J).
[65] *ACTV* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ, emphasis added).
[66] *ACTV* (1992) 177 CLR 106 at 143 (Mason CJ).
[67] *Brown* (2017) 91 ALJR 1089 at 1114 [120] (Kiefel CJ, Bell and Keane JJ).
[68] *ACTV* (1992) 177 CLR 106 at 234-235 (McHugh J).
[69] *Levy* (1997) 189 CLR 579 at 618 (Gaudron J); see also at 645 (Kirby J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] (Gleeson CJ); *Coleman* (2004) 220 CLR 1 (2004) 220 CLR 1 at 31-32 [31]-[33] (Gleeson CJ).
[70] *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Hogan v Hinch* (2011) 243 CLR 506 at 555 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at 238 [152] (Gageler J).
[71] *Unions NSW* (2013) 252 CLR 530 at 579 [140] (Keane J). See also *McCloy* (2015) 257 CLR 178 at 233 [136] (Gageler J).

preceding Parliament or legislature", and then favoured the parties in government by "giv[ing] weight to the first preference voting in the preceding election".[72] And in *Brown*, the impugned provisions "discriminated" by singling out "protestors",[73] defined as persons engaging in certain activities "in furtherance of, or 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".[74] The vice of this legislative targeting is that it may "distort the flow of political communication"[75] and thereby undermine "the equality of political power which is at the heart of the Australian constitutional concept of political sovereignty".[76] That "distortion" will involve matters of degree. The laws in issue in *Brown* did not favour particular protest groups, but treated all such groups alike. In contrast, the laws in *ACTV* favoured established political parties over other parties and persons seeking to take part in the political process.

31. The foregoing analysis of "discrimination" reveals some necessary departures between the implied freedom jurisprudence under the Australian Constitution and "content-based" discrimination under the First Amendment – a term that, as the plurality noted in *Brown*,[77] was not adopted by Mason CJ in *ACTV*. In the United States, "content-based" restrictions on speech are "presumptively invalid",[78] and regulation both of "the subject matter of messages" and of viewpoints expressed on those subjects are "objectionable form[s] of content-based regulation".[79] Conversely, in the Australian context, the singling out of a "subject matter" of communications is only relevant, and indicative of a "discriminatory burden" on the freedom, to the extent that it demonstrates that *political* discussion is the law's target. Only in that respect will the law bear upon the people's capacity to exercise an informed choice as electors. Accordingly, whilst it is true that discrimination "against political communications" or against "political communications expressing particular viewpoints"[80] may require comparatively greater justification, that is not true for a law

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[72] *ACTV* (1992) 177 CLR 106 at 132 (Mason CJ); see also at 147 (Mason CJ), 172, 175 (Deane and Toohey JJ), 221 (Gaudron J), 235, 237 (McHugh J).
[73] *Brown* (2017) 91 ALJR 1089 at 1110-1111 [92]-[95] (Kiefel CJ, Bell and Keane JJ).
[74] *Brown* (2017) 91 ALJR 1089 at 1098-1099 [2] (Kiefel CJ, Bell and Keane JJ).
[75] *Unions NSW* (2013) 252 CLR 530 at 578 [137] (Keane J).
[76] *McCloy* (2015) 257 CLR 178 at 273-274 [271] (Nettle J).
[77] (2017) 91 ALJR 1089 at 1114 [120] (Kiefel CJ, Bell and Keane JJ).
[78] *RAV v City of St Paul*, 505 US 377 at 382 (Scalia J for the Court) (1992).
[79] *Hill v Colorado*, 530 US 703 at 724-725 (Stevens J for the Court) (2000) (***Hill***); see also *Carey v Brown*, 447 US 455 at 462 (Brennan J for the Court) (1980).
[80] *Brown* (2017) 91 ALJR 1089 at 1127 [202] (Gageler J).

targeting "communications" in general.[81]

32. ***Identification of a "discriminatory burden":*** The "discriminatory" character of a law is ascertained by reference to the law's terms, operation and effect.[82] This directs attention to the class of political communications that are caught by the law on its proper construction – not to the particular communications that are said to be captured on the evidence in a particular case (that being likely to distort the analysis by shifting the analysis away from an assessment of a limitation on legislative power).

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33. The correct approach is illustrated by an analogy with *Hill*, where a majority of the US Supreme Court upheld the constitutional validity of a State law rendering it unlawful for any person within 100 feet of a health care facility's entrance to "knowingly approach" another person within 8 feet, without the person's consent, in order to pass the person a leaflet, display a sign to, or engage in oral protest, education or counselling with, that person. The majority rejected the argument that "a statute restricting speech becomes unconstitutionally content based because of its application 'to the specific locations where [that] discourse occurs'", or "because its enactment was motivated by the conduct of the partisans on one side of a debate".[83] As Stevens J observed, the statute was "not limited to those who oppose abortion", and would apply equally to a speaker seeking to hand out a leaflet saying "We are for abortion rights".[84]

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34. A similar analysis appears in Gordon J's reasons in *McCloy*, in rejecting the submission that various provisions imposed a discriminatory burden on the freedom by having "an unequal practical effect" upon the recipients of donations.[85] Her Honour remarked that "[t]he law affects those whom the law affects", and the relevant donation provisions "operate[d] in a uniform manner as between all donors and all recipients" regardless of their political affiliation.[86] Thus, a law is not relevantly "discriminatory" merely because it might, from time to time and depending upon the prevailing circumstances, operate to affect one group wishing to express a particular political viewpoint in a manner that engages the mischief which the law is designed to address.[87]

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35. That coheres with the approach taken more generally in Australian constitutional

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[81] Cf *Brown* (2017) 91 ALJR 1089 at 1127 [202] (Gageler J).
[82] See *Brown* (2017) 91 ALJR 1089 at 1115 [122] (Kiefel CJ, Bell and Keane JJ).
[83] *Hill*, 530 US 703 at 724 (Stevens J for the Court) (2000).
[84] *Hill*, 530 US 703 at 725 (Stevens J for the Court) (2000).
[85] *McCloy* (2015) 257 CLR 178 at 287 [333] (Gordon J).
[86] *McCloy* (2015) 257 CLR 178 at 287 [334] (Gordon J).
[87] Cf what may be suggested in *Brown* (2017) 91 ALJR 1089 at 1126 [192]-[193] (Gageler J).

jurisprudence to putatively "discriminatory" measures. For example, in *Betfair (No 2)*, this Court cited with apparent approval the Full Federal Court's holding that the inquiry for the purposes of s 92 was whether there was a "denial by the law or measure of a competitive advantage in trade", not whether "an individual trader's particular circumstances are such as may be adversely affected by a law of general application to all traders".[88] Thus, a focus upon a litigant's circumstances risks characterising the law not by its effect upon political communication generally, but rather by its effects upon particular individuals and, indeed, happenstance.[89] That is inapt given the systemic focus of the inquiry.

36. ***The extent of the burden:*** Even if a law is "discriminatory" in one of the senses described above, it is not presumptively invalid.[90] The animating principle is that a "more convincing justification will be required" where the "restrictive effect of legislation on the freedom is direct and substantial"[91] – and "discrimination" only assumes constitutional significance where it bears upon those metrics.[92] The notion of a "substantial" effect involves an evaluation of the "intensity" or "depth" of the burden, as well as its breadth. The presence of a discriminatory burden may expose an aspect or operation of a law which has a "substantial" effect upon the freedom. But it will not, of itself, demonstrate that the law *has such an effect*. Further analysis is required.

37. The notion of "directness" is separate, and more difficult. It has been understood as involving the distinction made by Deane and Toohey JJ in *ACTV* between a law whose character is that of a law with respect to the restriction of political communications and a law that has some other character and only "incidentally" affects political communication.[93] Thus, "directness" is concerned with the extent to which political communication comprises the "regulatory field".[94] A law's operation or effect may stamp it with a particular "character" or as serving a particular objective purpose (as Gaudron J put it in *Levy*[95] – a "direct" purpose of restricting political communication). Such a conclusion is more readily reached where a law singles out *political communication*: by

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[88] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 (***Betfair No 2***) at 267 [45] (Gummow, Hayne, Crennan and Bell JJ), referring to *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 388 [104] (Keane CJ, Lander and Buchanan JJ).
[89] *Betfair No 2* (2012) 249 CLR 217 at 268 [46] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[90] See *Brown* (2017) 91 ALJR 1089 at 1110 [92] (Kiefel CJ, Bell and Keane JJ).
[91] *McCloy* (2015) 257 CLR 178 at 214 [70] (French CJ, Kiefel, Bell and Keane JJ), emphasis added.
[92] See eg *Brown* (2017) 91 ALJR 1089 at 1111 [94] (Kiefel CJ, Bell and Keane JJ).
[93] See *McCloy* (2015) 257 CLR 178 at 268 [252]-[253] (Nettle J); *Hogan v Hinch* (2011) 243 CLR 506 at 555 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Mullholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] (Gleeson CJ).
[94] Williams and Hume, *Human Rights under the Australian Constitution* (2nd ed, 2013) at 200-201.
[95] *Levy* (1997) 189 CLR 579 at 619.

definition, such a law, in *all* of its operations, will burden that communication. A law targeting certain groups or voices as *potential sources of political communication* may be seen to have a similar character. By contrast, a law that has a regulatory target that is unrelated to political communication, but that incidentally burdens such communication to a greater or lesser extent in the course of pursuing that target, involves only an *indirect* burden (even if, for example, the law operates to prevent political communication by particular means or at particular places).

10 38. The relationship between "directness" and "substantial effect" in this context is important. Legislation singling out political discourse or its sources *may* warrant closer scrutiny due to its inherent tendency to impede political communications "unhelpful or inconvenient or uninteresting to a current majority".[96] But such a tendency may be readily justified, if the law serves a legitimate purpose and its effect upon political communication is slight.

"Time, place and manner" restrictions

20 39. In *ACTV*, Mason CJ recognised that "restrictions imposed on an activity or mode of communication by which ideas or information are transmitted are more susceptible of justification".[97] Borrowing from US jurisprudence, those are conveniently described as "time, place and manner" restrictions.[98] Such laws ordinarily do not "directly" burden the freedom in the sense just explained, for they usually serve a regulatory purpose unrelated to the content of communications. Nor do they impose a "substantial" burden on the freedom, at least where they leave ample alternative avenues of political communication
30 unburdened. Accordingly, restrictions on the time, place or manner of political communications are unlikely to infringe the implied freedom,[99] and they require close analysis only if they "significantly compromise ... the ability of those affected"[100] to "communicate with other members of the Australian community on relevant political and government matters"[101] (eg by substantially depriving protestors of "the ability to generate the type of attention most likely to sway public opinion"[102]).

40 40. For the above reasons, where a law burdens political communication only by restricting

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[96] *Brown* (2017) 91 ALJR 1089 at 1127 [202] (Gageler J).
[97] *ACTV* (1992) 177 CLR 106 at 143 (Mason CJ), approved in (for example) *McCloy* (2015) 257 CLR 178 at 238 [152] (Gageler J), 268 [252] (Nettle J) and *Levy* (1997) 189 CLR 579 at 618 (Gaudron J).
[98] See *ACTV* (1992) 177 CLR 106 at 234-335 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 127 (Gaudron J); and *Brown* (2017) 91 ALJR 1089 at 1178 [478], [480] (Gordon J).
[99] *Levy* (1997) 189 CLR 579 at 623-624 (McHugh J).
[100] *Brown* (2017) 91 ALJR 1089 at 1137 [258] (Nettle J).
[101] *Levy* (1997) 189 CLR 579 at 624 (McHugh J).
[102] *Brown* (2017) 91 ALJR 1089 at 1137 [258] (Nettle J).

the "time, place or manner" of such communications then, except in unusual cases of the kind identified in the previous paragraph (ie where the burden imposed is nevertheless substantial), it may be justified without reference to the *McCloy* approach, simply by showing that it has a rational connection to its identified purpose.[103] A law of that kind may "*readily be seen* not to infringe" the implied freedom notwithstanding that it may operate to restrict some political communications.[104]

41. An alternative way of looking at this is that, once "suitability" is established in respect of such a law, the answers to the further inquiries under the *McCloy* approach – necessity and adequacy in balance – will be obvious. As to necessity: the difference between a burden on communication resulting from such a law and a "less restrictive" alternative will ordinarily be small. As such, the application of the "necessity" step can only be answered by concluding that the measure falls within the "domain of selections"[105] available to the legislature, because there can be no "significantly lesser burden"[106] on the freedom if the burden imposed by the legislature's chosen measure is slight, regardless of the nature of the putative alternative measure or how "compelling" or "obvious" it might appear.[107] Relatedly, given the marginal differences between the two, it cannot be said that the legislature's choice of the former rather than the latter is "inexplicable".[108] Much the same analysis applies with respect to "adequacy in balance" – particularly given that the proper inquiry is whether the law's burden is grossly disproportionate when considered against the importance of the law's purpose.[109]

42. The point is that, where fine differences are involved, it is no part of the Court's role to distinguish between such measures. If it seeks to do so, it risks engaging in a "review of the relative merits of competing legislative models"[110] – that being the province of the Parliament. Indeed, absent any significantly lesser burden, the Court would be forced to embark on that task with no clear signposts as to how that judgment is to be made. How, for example, could the Court identify whether the legislature should have chosen an

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[103] It being sufficient that it is capable of furthering that purpose: *McCloy* (2015) 257 CLR 178 at 217 [80] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 91 ALJR 1089 at 1116 [132] (Kiefel CJ, Bell and Keane JJ).
[104] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (*Nationwide News*) at 76-77 (Deane and Toohey JJ, emphasis added).
[105] *McCloy* (2015) 257 CLR 178 at 217 [82] (French CJ, Kiefel, Bell and Keane JJ).
[106] *Brown* (2017) 91 ALJR 1089 at 1144 [282], 1145 [289] (Nettle J).
[107] See, as to those limitations on necessity testing, *Brown* (2017) 91 ALJR 1089 at 1116-1117 [138]-[139] (Kiefel CJ, Bell and Keane JJ), 1143-1145 [282]-[289] (Nettle J).
[108] Cf *Brown* (2017) 91 ALJR 1089 at 1116 [130] (Kiefel CJ, Bell and Keane JJ).
[109] *Brown* (2017) 91 ALJR 1089 at 1146 [290] (Nettle J).
[110] *Brown* (2017) 91 ALJR 1089 at 1144 [286] (Nettle J).

exclusion zone of 100m, 150m or 200m, in circumstances where none of those impose any substantial burden on political communication? The implied freedom, which protects representative democracy and responsible government, imposes constraints on legislative choice, but does not transfer the questions of judgment involved in legislative design to the courts. Nor does it mandate some "lowest common denominator" approach to regulation.[111] In contrast to the approach under the First Amendment, in our constitutional context, "the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose": their jurisdiction is to "determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose".[112]

43. Of course, a measure imposing only a small burden may warrant further scrutiny if the burden is "direct" (in the sense identified at [37] above). The tendency of such laws to diminish the capacity of minority voices to be heard in the political process may mean that even a comparatively small effect on the freedom requires further justification. However, for the reasons already advanced, a "time, place and manner" restriction is unlikely to display that tendency and is not aptly characterised as imposing a "direct" burden.

44. Consistently with the above, even in the United States, "time, place and manner" restrictions on the right to free speech are regularly upheld, including with respect to laws that restrict protests near abortion facilities.[113] Similar results have been reached in Canada, and in Europe.[114] In circumstances where there is no constitutional right to speak – let alone to speak via a preferred mode[115] – restrictions of the same kind should not readily be found to infringe the implied freedom under the Australian Constitution.

Application in this case

45. ***Question 1 – existence, nature and extent of the effective burden:*** Victoria accepts (VS [28]) that the communication prohibition may burden political communication, but correctly emphasises (VS [30(2)]) that any such burden is not "substantial" in the sense identified at [36] above. As Victoria notes (VS [33]), that follows in part from an analysis

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[111] *McCloy* (2015) 257 CLR 178 at 293 [359] (Gordon J).
[112] *Levy v Victoria* (1997) 189 CLR 579 at 598 (Brennan CJ); see also, referring to that passage, *Brown* (2017) 91 ALJR 1089 at 1143 [282] (Nettle J).
[113] See the restrictions upheld in *Hill*, 530 US 703 (2000); *Schenck v Pro-Choice Network of Western New York*, 519 US 357 (1997); *Madsen v Women's Health Center*, 512 US 753 (1994).
[114] See *R v Lewis* (1996) 139 FLR (4th) 480; *R v Spratt* (2008) 298 DLR (4th) 317; *Van den Dungen v Netherlands* (1995) 80 D&R 147 (upholding various "safe access zone" limitations, but without recourse to the concept of "time, place and manner" restrictions).
[115] See *Brown* (2017) 91 ALJR 1089 at 1137 [258] (Nettle J).

similar to that undertaken by the plurality in *Brown* of the holding in *McCloy*: the limited restrictions imposed by the Public Health Act leave open many other methods of communicating such views concerning abortion as constitute political communication.[116]

46. Four further observations are relevant. ***First***, much of the conduct restricted by the law is of a kind that does not involve "communications which are capable of bearing on electoral choice"[117] or "communicating on matters of politics and government".[118] Instead, as the examples given by the magistrate show (AB 288), the regulated communication in practice involves restriction on various forms of communication directed to personal choices. ***Secondly***, although the existing law may not have addressed all of the conduct comprising the relevant legislative mischief (or may not have done so in an equally efficacious way – see VS [26]), at least some of that conduct was already unlawful under existing law, such that any burden on political communication from s 185D is incremental.[119] ***Thirdly***, the law is framed so as to operate in a spatially precise fashion: see the definition of "safe access zones" in s 185B(1). Thus, there is no reason to apprehend that it will burden political communication outside safe access zones.[120]

47. ***Fourthly***, the burden imposed by the communication prohibition is not "discriminatory" in either of the ways identified at [29]-[30] above. It does not target communications that are inherently political, or that are a necessary ingredient of political communication. The appellant's argument to the contrary (AB 285) seemingly reflects a position akin to the United States authorities (see [31] above) that *all* "content based" laws are prima facie invalid or constitutionally suspect. But, again, in our constitutional setting, the singling out of a "subject matter" of communications is only relevant insofar as it demonstrates that *political* discussion is the law's target. The fact that the law applies to communications "in relation to abortions" does not involve targeting of that kind. Nor, given that it operates in a uniform manner regardless of the viewpoint of the person engaging in "prohibited behaviour", could the communication prohibition be said to target particular viewpoints or

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[116] *Brown* (2017) 91 ALJR 1089 at 1111 [94] (Kiefel CJ, Bell and Keane JJ).
[117] See again *Brown* (2017) 91 ALJR 1089 at 1125 [188] (Gageler J).
[118] *Brown* (2017) 91 ALJR 1089 at 1111 [94] (Kiefel CJ, Bell and Keane J).
[119] Depending on the content of the communication, such conduct could infringe the prohibition on various forms of obscene language and behaviour in s 17(1) of the *Summary Offences Act 1966* (Vic): see *Fraser v Walker* [2015] VCC 1911 at [21], [24], [31]. Note also *Fraser v County Court of Victoria* [2017] VSC 83 at [8], [9], [109] and *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 226 [16], 239 [70]. Depending on the location and other circumstances, such conduct could amount to a public nuisance (particularly if it obstructs a thoroughfare or prevents entry into a building): see, eg, *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760, 767. It could also constitute a nuisance under s 61 of the Public Health Act.
[120] Cf *Brown* (2017) 91 ALJR 1089 at 1108 [78]-[79] (Kiefel CJ, Bell and Keane JJ), 1147 [294] (Nettle J).

sources of communication, let alone *political* viewpoints or sources. As in *Hill,* the law applies regardless of the message any person engaging in such behaviour seeks to convey.[121] None of that suggests a discriminatory burden in the requisite sense (see [35] above).

48. Attention to the nature and extent of the burden assists in identifying the aspects of the Public Health Act's operation that require justification, and thus the particular statutory objects by reference to which the justification process must occur. The burden is the incremental restriction on political communication above that existing under extant laws (eg the law of public nuisance and proscriptions on obscene communicative conduct).

49. It follows that s 185D is nothing more than a constraint as to the place and manner of certain specified communications (see VS [33]). The nature and extent of the burden therefore falls within the category described in [39] above.

50. ***Question 2 – Compatibility testing:*** The communication prohibition is addressed to a particular mischief: protecting the safety and wellbeing of people accessing and leaving abortion clinics, and the "privacy and dignity" of such persons.[122] The fact that the law operates with respect to "premises at which abortions are provided", and to the governing principle in s 185C(a) that "the public is entitled to access health services, including abortions", further confirms that that harm is to be prevented to facilitate effective access to the health care services offered at those premises (see VS [41]).

51. In its First Amendment jurisprudence, the US Supreme Court has recognised that the protection of health and welfare is a particularly significant statutory objective, holding that the State has "unique concerns" with respect to "health care facilities", and a "substantial and legitimate interest" in safeguarding persons attempting to access them – who are often "particularly vulnerable" – from interference.[123] That is equally true in the Australian context. As such, there can be no doubt that a purpose of that nature is a legitimate or permissible purpose (being a purpose that is not incompatible with the system of representative and responsible government prescribed by the Constitution[124]).

52. ***Question 3 – Justification:*** The communication prohibition plainly has a rational

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[121] *Hill*, 530 US 703 at 725 (Stevens J for the Court) (2000).
[122] See Public Health Act, ss 185A, 185C; Victoria, Legislative Assembly, *Parliamentary Debates*, 22 October 2015 at 3973.
[123] *Hill*, 530 US 703 at 728-729 (Stevens J for the Court) (2000).
[124] In the sense that it does not impede the functioning of that system and all that it entails: *McCloy* (2015) 257 CLR 178 at 203 [31] (French CJ, Kiefel, Bell and Keane JJ).

connection to the legitimate purpose just identified, in that it can be considered to advance that purpose.[125] And, as a "time, place and manner" restriction effecting only an insubstantial, and indirect, burden on communication, it is sufficiently justified.

53. Alternatively, if one applies the *McCloy* approach, the remaining questions are easily answered. No "obvious" and "compelling" alternative measures of "significantly lesser burden" can be identified in this context – and, indeed, the appellant proffered no concrete alternatives of this kind in the proceedings below. While the notion of "onus" in a constitutional matter has some difficulty, Nettle J was correct to observe in *Brown* that a defendant does not bear the burden of persuading the Court that there are no alternative means of lesser effect on the freedom that would be as effective (ie proving a negative).[126] At least as a practical matter, the burden of persuasion lies the other way, and was not discharged by the appellant.[127] As to balancing: there can be no "gross disproportion" here between the burden and the (marked) importance of the law's purpose (see [41] above).

PART V ESTIMATED HOURS

54. It is estimated that 1 hour will be required to present the Commonwealth's oral argument.

Dated: 25 May 2018

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[125] *McCloy* (2015) 257 CLR 178 at 217 [80] (French CJ, Kiefel, Bell and Keane JJ).
[126] *Brown* (2017) 91 ALJR 1089 at 1145 [288] (Nettle J).
[127] See, by analogy, *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at 77 [34], 82 [50].