

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN



No M46 of 2018

KATHLEEN CLUBB
Appellant

AND

ALYCE EDWARDS
First respondent

ATTORNEY-GENERAL FOR VICTORIA
Second respondent

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN

No H2 of 2018

JOHN GRAHAM PRESTON
Appellant

AND

ELIZABETH AVERY
First respondent

SCOTT WILKIE
Second respondent

OUTLINE OF ORAL ARGUMENT OF ATTORNEY GENERAL OF NSW

PART I: PUBLICATION

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

PART II: PROPOSITIONS TO BE ADVANCED

The extent of any burden on political communication

2. The Victorian/Tasmanian provisions are not directed at regulating political communications. Exercise of a liberty created by statute does not render all communication about such conduct political (**NSWAG Clubb [4]-[8]**, **NSWAG Preston [22]-[23]**).

- *Hogan v Hinch* (2011) 243 CLR 506 at 554 [93]

3. The Victorian/Tasmanian laws do not target a particular viewpoint (**NSWAG Clubb [14]-[15]** and **NSWAG Preston [11]**).
 - Note *Evans v NSW* (2008) 168 FCR 576 at [7], [59]
4. Despite the absence of evidence as to whether Ms Clubb's communication was political, the Court should determine the constitutional challenge: cf **Cth AG Clubb [10]-[16]**.
 - a. The Court can resolve the two constitutional challenges without considering the question of reading down first.
 - *Knight v Victoria* (2017) 91 ALJR 824 at [32]-[33]; note *O'Flaherty v City of Sydney* (2014) 221 FCR 382
 - 10 b. Laws can be read down so as not to infringe the implied freedom.
 - *Victoria v Commonwealth* (1996) 187 CLR 416 at 502-3; *Tobacco Plain Packaging Act 2011* (Cth), s.16; *Spam Act 2003* (Cth), s.44; *Telecommunications Act 1997* (Cth), s.138.

Justification analysis

5. The "suitability" inquiry assists in identifying the purpose of the law: if the law is not a rational means of achieving the claimed end, that suggests the purpose claimed by the defenders of the law is not the appropriate characterisation.
6. The purpose of the law should be determined by reference to the text and context, including appropriate use of extrinsic materials. Evidence of the claimed harm is unnecessary. Here, the text and context reveal that the purpose of the laws is to facilitate the exercise of a lawful liberty and preserve human dignity, where the possibility of harm and deterrence is real (**NSWAG Clubb [9]-[12]**).
 - *Brown v Tasmania* (2017) 91 ALJR 1089 at [208]-[209], [321].
7. "Necessity" analysis also sheds light on whether the claimed purpose is in substance as claimed. It might also be seen as indicating whether an appropriate balance has been struck between the implied freedom and the legislative purpose, although that is a more evaluative understanding.
 - *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471-2; *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [81]

8. The various alternatives posited by the Appellants are not obvious and compelling alternatives (NSWAG Clubb [18]-[21]; NSWAG Preston [12]-[20]).

- Note *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632-3

9. The “adequacy of the balance” stage necessarily involves judgments about the importance of achieving the law’s purpose. The difficult issues that arise here are not unique to the implied freedom. Suitability and necessity are at the heart of justification testing. If a balancing assessment is to be undertaken, the question should be whether there is a gross disproportionality between burden/purpose.

- *Betfair v Western Australia* (2008) 234 CLR 418 at [98]-[103]; *McCloy* at [89]; *Brown* at [290]

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10. A “right to protest” is irrelevant to analysis here.

- *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30-31

11 October 2018


J K Kirk


Z C F Heger

