IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M46 of 2018

BETWEEN:

KATHLEEN CLUBB
Appellant

and

ALYCE EDWARDS
First Respondent

and

ATTORNEY-GENERAL FOR VICTORIA
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

PART I: Internet publication

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

PART II: Outline of propositions

Burden

2. The burden inquiry is not perfunctory – burden must be determined as 'real' or 'meaningful'. It involves two inquires.

- First, a binary inquiry as to whether there is a real or meaningful burden or not. This inquiry is always made.
- Second, an inquiry as to the extent of the burden. This is an important inquiry for conducting the later stages of the *Lange* analysis. Typically this inquiry is required; except where either there is no burden or in a case such as the present where the statute could be read down and no political communication was involved.

- QS at [7]-[14] and [34]
- *McCloy* (2015) 257 CLR 178, 231 [127] (Gageler J) (**vol 5, tab 35, 2190**); *Brown* (2017) 91 ALJR 1089, 1132 [237] (Nettle J) (**vol 3, tab 21, 1178**); *Tajjour* (2014) 254 CLR 508, 578-579 [146] (Gageler J), 604 [234] (Keane J) (**vol 7, tab 45, 3093-**

Outline of oral submissions, filed on behalf of
the Attorney-General for Queensland
Form 27F; Rule 44.08.2
Dated: 11 October 2018
Per Kent Blore
Ref PL8/ATT110/3735/PXJ

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3094, 3119); *Wotton* (2012) 246 CLR 1, 19 [41]-[42] (Heydon J) (**vol 9, tab 51, 3682**)

3. The second respondent, New South Wales, Queensland, South Australia and Western Australia approach burden according to the same principle. The difference in the answer as to whether there is a burden reflects that the question is one of evaluation and degree, and that the burden in this case – if it exists – is slight. In a marginal case, it is unsurprising that different people applying the same approach might arrive at a conclusion of either no burden or a slight burden.

- QS in *Preston* [4(b)]; QS in *Clubb* at [41]; VS at [28]; NSWS at [8]; SAS [8]; WS [38]

4. The better view is that the Victorian Law imposes a qualitatively 'real' or 'meaningful' – albeit slight – restriction on free political communication.

- QS at [19]-[22]; [37]-[41]

5. This is why in a case where there is a slight burden but a compelling justification, it is not appropriate to engage in a full structured proportionality analysis. The application of that analysis would necessarily proceed at a level of granularity that is inappropriate.

6. The appellant's submission at [42] should be rejected. The burden is viewpoint neutral. Political communications in favour of abortion may also meet the test of 'reasonably likely to cause distress or anxiety'.

Severance and reading down

7. It is unnecessary, and for the reasons developed below, undesirable, to consider whether the burden imposed by the Victorian law is justified, as even if the burden were *not* justified, the Victorian law would be capable of being read down so as to apply only in circumstances where it does not effect any real or meaningful restriction on the freedom of political communication. It is unnecessary to ascertain at this point any more than that the statute is capable of being read down.

- *Tajjour* (2014) 254 CLR 508, 589 [178] (Gageler J) (**vol 7, tab 45, 3104**)

  - Such circumstances will include where the communication is not about government or political matters, but will also extend to circumstances in which a communication designed to dissuade a woman from having an abortion is 'constructed' so as to include political material.

- *APLA* (2005) 224 CLR 322, 451 [382] (Hayne J) (**vol 2, tab 16, 634**); QS at [44]

- *Tajjour* (2014) 254 CLR 508, 582 [155] (Gageler J), 604 [234] (Keane J) (**vol 7, tab 45, 3097, 3119**)

- Cf Appellant's oral submissions [2018] HCATrans 206, lines 1100-1105

  - Because the object of reading down is to avoid a burden, rather than an impact on political communications simpliciter, Queensland's approach to the question of

reading down should be preferred to the Commonwealth's, as it better deals with trivial and adventitious political communications, although either approach is open.

8. If it were to be read down in the way described at [7], the Victorian law:

   - would impose no burden on the freedom; but
   - would continue to apply to Ms Clubb's conduct, which was not political in the constitutional sense.

     - QS at [27]-[33], [43]; cf AS at [19]
     - CAB p 289 [4]; pamphlets handed up by the Solicitor-General for Victoria

9. In this case, there is no 'state of facts' which makes it necessary for the Court to consider the question of justification. To engage in justification analysis without a state of facts that engage the freedom and thereby inform that analysis would be to engage in a hypothetical inquiry.

   - *Knight v Victoria* (2017) 345 ALR 560, 567 [32] (the Court) (**vol 4, tab 30, 1800**)

   - *Tajjour* (2014) 254 CLR 508, 585-589 [168]-[176] (Gageler J) (**vol 7, tab 45, 3100-3104**)

10. The above approach is consistent with the orthodox position that the inquiry as to burden is directed to the legal and practical effect of the law on the freedom *generally*.

11. It is not possible to consider whether a law is capable of being read down in such a way that it would not burden the freedom (for example, whether general words might be applied distributively), without first considering the legal and practical effect of the law on the freedom generally.

    - *Sunol v Collier [No 2]* (2012) 289 ALR 128, 146 [83] (Basten JA)

12. The assertion at AS [21] that if the above submission were accepted, 'the appeal should be allowed: the prosecutor did not prove beyond reasonable doubt that the communications were not political communications…' is respectfully incorrect. If it were found necessary to read the Victorian law down (because the burden was not justified), the result would be that the prosecution would be required to prove that the communication was not political only if the defendant had adduced sufficient evidence to raise the issue. That is not this case.

    - eg *He Kaw Teh v The Queen* (1985) 157 CLR 523, 534-535, 593

13. The appeal should be dismissed on that basis.

Dated: 11 October 2018

Peter Dunning QC
Solicitor-General

Felicity Nagorcka