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

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary 1903* (Cth) in support of the respondents.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

Intervener's submissions
Filed on behalf of the Attorney-General for the State of Queensland (Intervening)
Form 27C

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Per James Potter
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PART IV: Submissions

Summary of argument

5. These submissions focus on the first *Lange* inquiry, as to burden. In that respect, Attorney-General for the State of Queensland submits:

(a) The inquiry as to burden is critical and indispensable. It marks out the scope of the constitutional freedom and the boundary of judicial power, by limiting the circumstances in which a law need be justified. A law will burden the implied freedom only where:

(i) it is capable of applying to communication on 'political or government matters'; and

(ii) in so applying, its *qualitative effect* is to impose a real or meaningful restriction on the free flow of communication on government or political matters (any *quantitative* assessment of the *extent* of the burden being irrelevant at the first stage).

(b) Section 185D of the *Public Health and Wellbeing Act 2008* (Vic) ('**Public Health Act**') is capable of applying to communications on government and political matters. When it does so in circumstances which are not adventitious, its qualitative effect will be real or meaningful. Hence the first question should be answered 'yes'.

(c) However, the communication which is the subject of the appellant's conviction (the purpose of which was to dissuade an individual woman from having an abortion) was not a communication on government or political matters. In its application to the appellant, s 185D of the Public Health Act therefore imposed no burden on the free flow of political communication on government and political matters.

(d) Section 185D of the Public Health Act is capable of being read down in accordance with s 6 of the *Interpretation of Legislation Act 1984* (Vic). It is therefore unnecessary and inappropriate for this Court to consider whether s 185D may have an invalid operation in circumstances which have not arisen. The appeal should be dismissed on that basis, and at that point.

6. Alternatively, if it is necessary to consider whether s 185D is compatible and reasonably appropriate and adapted, the answer to each of those questions is 'yes'. As to those matters, the Attorney-General for Queensland adopts the written submissions of the second respondent.[1]

Statement of argument

10 The function and significance of the inquiry as to burden

7. The first inquiry required by the test in *Lange v Australian Broadcasting Corporation* is whether the law 'effectively burden[s] freedom of communication about government or political matters either in its terms, operation or effect'.[2] That inquiry is not perfunctory.[3] As discussed below, it performs at least five functions: it identifies the scope of the implied freedom according to what is mandated by the Constitution; it
20 guides the legislature as to when legislative choices must be justified; it avoids distorting the freedom into something akin to a limitless personal right; it marks out the boundary of judicial power; and it informs the level of justification required in the second *Lange* question.

8. The scope[4] of the freedom is determined by the text of ss 7, 24, 64 and 128 of the Constitution.[5] A failure to identify the scope by treating burden as perfunctory risks
30 detaching the *Lange* analysis from the constitutional text and the 'function it was formulated to perform'.[6] The entirety of the *Lange* analysis must 'cleave[] to the reasons for the implication of the constitutional freedom'.[7]

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[1] Written submissions for second respondent, [34]-[63].
[2] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').
40 [3] *McCloy v New South Wales* (2015) 257 CLR 178, 231 [127] (Gageler J) ('*McCloy*'); *Brown v Tasmania* (2017) 91 ALJR 1089, 1132 [237] (Nettle J) 1149 [307] (Gordon J) ('*Brown*').
[4] 'Scope' here is used in the sense of the scope of the freedom in its unlimited state prior to determining the residue left after justified limitations. Thus, at the level of specificity of a particular law, the scope of the implied freedom is the correlative of the burden on the implied freedom.
[5] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 350 [27] (Gleeson CJ and Heydon J), 358 [56] (Mc Hugh J) ('*APLA*'); *McCloy* (2015) 257 CLR 178, 223 [102], 228 [118] (Gageler J). See also, Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 45.
[6] *McCloy* (2015) 257 CLR 178, 231 [127] (Gageler J).
[7] *McCloy* (2015) 257 CLR 178, 238 [150] (Gageler J).

9. In this respect, the implied freedom stands in stark contrast to human rights in other jurisdictions, in which the inquiry as to 'burden' is perfunctory. In that context, there is little attempt to define the scope of rights because 'all limits are framed as being *external* to, not part of the right; they are exceptions to the right, circumvent its scope, and restrict its otherwise limitless application.'[8] That approach relegates the inquiry into what interests and values fall outside the right to the later justification stages of analysis. In human rights jurisdictions, this has led to the idea of the 'total constitution'[9] – 'the idea that there is nothing that rights do not cover, nothing that is not within their reach.'[10]

10. That is distinctly not the correct approach to the implied freedom, which is not a personal right that must be optimised to the maximum extent possible;[11] it is a structural limit 'addressed to legislative power, not rights'.[12] It is a restriction on legislative power confined to 'what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.'[13] Thus burden must be taken seriously, lest the implied freedom take on the characteristics of a personal right and assume a reach disconnected from its constitutional rationale.

11. Moreover, if all or most laws are assumed to burden the implied freedom (because 'most laws on most topics will in some circumstances have some effect on some forms

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[8] Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 66 (emphasis in original). The reason is that human rights are treated as 'principles' which must be optimised, so that they are seen as having no 'fixed points in the field of the factually and legally possible': Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002) 48. Thus, attempting to 'fix' the scope of rights runs counter to this logic. See, for eg, *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 434 [80] (Warren CJ) (the scope of human rights 'should be construed in the broadest possible way').

[9] M Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341.

[10] Webber, above n 8, 68.

[11] *McCloy* (2015) 257 CLR 178, 202-203 [30] (French CJ, Kiefel, Bell and Keane JJ), 283 [317] (Gordon J); *Brown* (2017) 91 ALJR 1089, 1110 [90] (Kiefel CJ, Bell and Keane JJ), 1171 [433], 1176-1177 [465] (Gordon J).

[12] *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions NSW*').

[13] *Lange* (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). On that confinement, see also *APLA* (2005) 224 CLR 322, 350 [27] (Gleeson CJ and Heydon J), 358 [56], 361 [66] (McHugh J); *Brown* (2017) 91 ALJR 1089, 1110 [88] (Kiefel CJ, Bell and Keane JJ), 1150 [313] (Gordon J).

of communication'[14]), there would be a radical reworking of the relationship between the legislature and the judiciary. As Professor Barak points out, 'members of the legislative branch want to know, should know, and are entitled to know, the limits of their legislative powers'.[15] The beginning of that limit is marked by burden. Thus, a meaningful conception of burden is required because Australian legislatures are entitled to know when the effect of a law must be justified, and when it need not be (and there must be circumstances in which it need not). Moreover, only a meaningful conception of burden is capable of guiding legislative choice as to whether a legitimate aim is significant enough to warrant burdening the implied freedom.

12. The corollary is that the role of the courts begins with burden and ends with justification analysis: the burden inquiry marks the engagement of judicial power, and the reasonably appropriate and adapted criterion 'marks the … the borderlands of judicial power.'[16] Moreover, because it limits the necessity for justification analysis to circumstances in which there is something real to be justified, the burden inquiry removes the hypothetical and the tenuous. In doing so it also avoids courts being required to review the 'justification' (and hence validity) of practically all laws. Further, it assists lower courts in determining when justification is called for and when engaging in such an analysis would intrude on the province of the legislative branch. It also relieves such courts from pointless and hypothetical inquiries.

13. Carefully identifying, in each case, that the law imposes an effective burden is therefore indispensable: if the effect of the law falls outside of the freedom's scope, there is nothing for the legislature to justify and 'the supervisory role of the courts is not engaged.'[17]

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[14] *Tajjour v New South Wales* (2014) 254 CLR 508, 578 [146] (Gageler J) ('*Tajjour*'). See also *Wotton v Queensland* (2011) 246 CLR 1, 23 [53] (Heydon J).
[15] Barak, above n 5, 379, quoted in *McCloy* (2015) 257 CLR 178, 216 [74] (French CJ, Kiefel, Bell and Keane JJ).
[16] *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1037 [31] (French CJ and Bell J).
[17] *McCloy* (2015) 257 CLR 178, 231 [127] (Gageler J). See also *Sunol v Collier [No 2]* (2012) 289 ALR 128, 145-146 [83] (Basten JA) ('*Sunol*') (albeit in dissent as to the existence of a burden) ('to accept the common ground without exploration is unsatisfactory. If this course were adopted on a regular basis, the presumed reach of the implied immunity will tend to expand, with a correlative restriction on the extent of legislative power').

14. Thus, burden cannot be assumed.[18] Even where it is proper to concede the existence of a burden, the exact nature of the burden which has been conceded must be identified in the first *Lange* inquiry.[19] That is because 'the careful identification of the burden upon the implied freedom is the foundation for any posterior analysis of its justification.'[20] Otherwise, the court will on occasion inquire into justification without the benefit of a meaningful set of facts to engage in such inquiry and may inadvertently require the legislature to justify more than the effect that the law has on the implied freedom.

The first burden inquiry: identifying an effective burden on political communication

15. In order to find that a law burdens the implied freedom, the burden must be 'effective' (in the sense of imposing a real or meaningful constraint on political communication), the burden must be on 'communication', and the communication must be about 'government or political matters'.

'Effective burden' – the quality of the constraint must be real or meaningful

16. As Hayne J pointed out in *Monis v The Queen*, 'the expression effective burden means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications'.[21] Thus, as five

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[18] It is true that a majority of the Court in *Wotton v Queensland* (2012) 246 CLR 1 accepted the Commonwealth's submission that the issues between the parties in that case could appropriately be considered on an assumption that the first *Lange* question was to be answered 'yes' (at 15 [29]). Nonetheless, their Honours did identify the relevant burden imposed by the impugned law (at 15 [28]).

[19] See, for eg, the identification of the burden in *Coleman v Power* (2004) 220 CLR 1, 30 [27] (Gleeson CJ), 45-46 [80]-[82] (McHugh J); 78 [197] (Gummow and Hayne JJ, contra); 89 [232] (Kirby J), 112 [298] (Callinan J, albeit finding the concession was wrongly made); 120 [319] (Heydon J, noting it is unsatisfactory to undertake the second limb analysis when the burden has not been identified). See also *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 44 [67] (French CJ), 62 [133] (Hayne J, contra), 86 [209] (Crennan and Kiefel JJ) ('*Adelaide City*'); *Unions NSW* (2013) 252 CLR 530, 553-555 [35]-[42], despite the concession recorded at 555 [43].

[20] *Brown* (2017) 91 ALJR 1089, 1132 [237] (Nettle J). See also at 1114 [118] (Kiefel CJ, Bell and Keane JJ), 1121 [165] (Gageler J); *McCloy* (2015) 257 CLR 178, 231 [128] (Gageler J); *Tajjour* (2014) 254 CLR 508, 579 [147] (Gageler J); *Sunol* (2012) 289 ALR 128, 146 [83] (Basten JA).

[21] *Monis v The Queen* (2013) 249 CLR 92, 142 [108] (Hayne J) ('*Monis*') (emphasis added), quoted with approval in *Unions NSW* (2013) 252 CLR 530, 574 [119] (Keane J); *McCloy* (2015) 257 CLR 178, 230-231 [126] (Gageler J); *Brown* (2017) 91 ALJR 1089, 1123 [180] (Gageler J).

members of this Court said in *Unions NSW*, '[t]he central question is: how does the impugned law affect the freedom?'[22]

17. It is settled that this inquiry requires consideration of the legal and practical effect of the law[23] on the freedom generally,[24] although examples of how the law operates in individual cases may be useful in understanding its practical effect.[25] That is not to deny that a law might burden the freedom in some of its operations but not others.[26] Nor does it suggest that, in the implied freedom context alone, the Court will decide constitutional questions without a state of facts which makes that decision necessary.[27]

18. It is also settled that the 'extent'[28] or 'degree'[29] of the burden – measured as 'an overall quantum'[30] or in a 'volumetric sense'[31] – is irrelevant to the inquiry of whether a burden exists. The reasons it would be wrong to take into account such considerations, when answering the first *Lange* question, were set out by Hayne J in *Monis*.[32] The quantitative

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[22] *Unions NSW* (2013) 252 CLR 530, 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added). See also at 547 [119] (Keane J): 'The issue is as to the effect of the proscriptions upon the free flow of political communication within the federation.'

[23] *Monis* (2013) 249 CLR 92, 142 [108] (Hayne J); *Tajjour* (2014) 254 CLR 508, 560 [71] (Hayne J); *Brown* (2017) 91 ALJR 1089, 1118 [150] (Kiefel CJ, Bell and Keane JJ), 1123 [180] (Gageler J), 1132 [237] (Nettle J), 1149 [307], 1165 [395] (Gordon J).

[24] *Unions NSW* (2013) 252 CLR 530, 553 [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[25] *Brown* (2017) 91 ALJR 1089, 1110 [90] (Kiefel CJ, Bell and Keane JJ).

[26] *Tajjour* (2014) 254 CLR 508, 582 [154] (Gageler J).

[27] *Tajjour* (2014) 254 CLR 508, 588-589 [175]-[176] (Gageler J); *Brown* (2017) 91 ALJR 1089, 1195 [565] (Edelman J).

[28] *Unions NSW* (2013) 252 CLR 530, 555 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Tajjour* (2014) CLR 508, 548 [33] (French CJ), 558 [61] (Hayne J).

[29] *Brown* (2017) 91 ALJR 1089, 1115 [128] (Kiefel CJ, Bell and Keane JJ); *Tajjour* (2014) 254 CLR 508, 569 [106] (Crennan, Kiefel and Bell JJ).

[30] *Tajjour* (2014) 254 CLR 508, 548 [33] (French CJ).

[31] *Tajjour* (2014) 254 CLR 508, 578 [145] (Gageler J).

[32] *Monis* (2013) 249 CLR 92, 143-146 [113]-[122] (Hayne J). Justice Hayne was addressing submissions put on behalf of various Attorneys-General, that the impugned law in that case regulated so narrow or unimportant a category of political communication that the law could not be inconsistent with the implied freedom: 143 [113]. Those submissions were rejected for three reasons. First, the inquiry as to burden cannot be determined by 'some attempted survey of whether there is *sufficient* communication on government or political matters either to make the system work, or to make it work satisfactorily': 145 [119]. Second, if accepted, the submissions would subordinate the freedom to 'small and creeping legislative intrusions until ... the last and incremental burden is no longer to be called a 'little' burden': 145 [120]. Finally, the approach leads inevitably to the consignment of unpopular or minority views to a 'netherworld of unimportance': 146 [22].

extent of the burden is, however, relevant to the justification inquiry: more extensive burdens require greater justification.[33]

19. Instead, for the first *Lange* question, the inquiry is qualitative, not quantitative.[34] The question of how the law 'affects the freedom generally' is to be answered by reference to the quality, character or nature of the restriction it imposes on the free flow of communication on government or political matters. So, for example, a law which prohibits prisoners from speaking to the media is *qualitatively* different to a law which prohibits prisoners from receiving payment for speaking to the media. The first law would burden the freedom but the second would not: the second would place no real impediment in the way of political communications, but would leave prisoners free to communicate on any subject matter without constraint as to time, manner or place. On the other hand, a law which prohibited all prisoners from speaking to the media would be *quantitatively* different to similar law that only applied to prisoners serving a sentence of three years or more. Both laws, however, would impose a burden.

20. Moreover, in recognition of the 'high purpose and substantive nature of the protected freedom',[35] the qualitative effect of a burden on the freedom must be 'real' or 'meaningful'.[36] In the very least, this means the burden must be 'more than inconsequential'[37] – it must have some real or actual consequence for the free flow of political communication within the federation.[38] It must be a real impediment to political communication, or be an obstacle in its way. But because the question is

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[33] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ); *Monis* (2013) 249 CLR 92, 146 [124] (Hayne J); *Brown* (2017) 91 ALJR 1089, 1110 [90], 1114 [118] (Kiefel CJ, Bell and Keane JJ).

[34] *Tajjour* (2014) 254 CLR 508, 578 [145] (Gageler J); *Brown* (2017) 91 ALJR 1089, 1132 [237] (Nettle J), 1151 [316] (Gordon J).

[35] *Tajjour* (2014) 254 CLR 508, 579 [146] (Gageler J).

[36] *Monis* (2013) 249 CLR 92, 212-213 [343] (Crennan, Kiefel and Bell JJ) ('real effect'); *Tajjour* (2014) 254 CLR 508, 569 [106] (Crennan, Kiefel and Bell JJ) ('real effect'); *McCloy* (2015) 257 CLR 178, 231 [127] (Gageler J) ('meaningful restriction'); *Brown* (2017) 91 ALJR 1089, 1120 [162] (Gageler J) ('meaningful constraint'), 1132 [237], 1140 [270] (Nettle J) ('real or actual effect'); *Sunol* (2012) 289 ALR 128, 148 [90] (Basten JA) ('real or significant burden').

[37] *Unions NSW* (2013) 252 CLR 530, 554 [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *Monis* (2013) 249 CLR 92, 212 [343] (Crennan, Kiefel and Bell JJ), explained in *Tajjour* (2014) CLR 508, 569-570 [105]-[107] (Crennan, Kiefel and Bell JJ).

[38] *Unions NSW* (2013) 252 CLR 530, 574 [119] (Keane J).

qualitative and not quantitative, a constraint will be 'meaningful' even if it applies only to the smallest minority.[39]

21. The opposite of 'meaningful' is adventitious, trivial or inconsequential. Therefore, the 'mere possibility' that the activity to which the law is directed might be accompanied by political communication does not of itself give rise to a burden.[40] For example, a law that prohibits two people from meeting to play cards would also impact on their capacity to discuss politics between hands. But such an effect is 'properly characterised as adventitious, even if it might not in every conceivable circumstance be trivial.'[41] It is not a 'meaningful constraint' on the free flow of political communication.

22. To exclude from the concept of 'effective burden' those burdens which are merely trivial, adventitious or inconsequential effects on the freedom is an approach consistent with other areas of Australian constitutional law. For example, s 92 (despite the absolute terms in which it is expressed) does not prohibit all burdens on interstate trade, but only those which have a protectionist effect.[42] Whether a law has a protectionist effect is a question of 'fact *and degree*'.[43] That is, some burdens on interstate trade will be inconsequential and, for that reason, will fail to engage s 92. Similarly, s 109 does not operate in respect of a State law which effects an alteration of, or detraction from, a Commonwealth law that is insignificant and trivial.[44] Again, in the context of s 51(xxxi), there are 'considerations of degree' in determining whether there is an acquisition of property.[45]

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[39] *Monis* (2013) 249 CLR 92, 146 [122] (Hayne J); *Tajjour* (2014) 254 CLR 508, 578 [145], 581 [153] (Gageler J).

[40] *Tajjour* (2014) 254 CLR 508, 604 [234] (Keane J). See also at 548 [33] (French CJ); *APLA* (2005) 224 CLR 322, 351 [28] (Gleeson CJ and Heydon J). Cf Deane J's obiter in *Cunliffe v Commonwealth* (1994) 182 CLR 272, 339 (adopted by the joint judgment in *Hogan v Hinch* (2011) 243 CLR 506, 555 [96]) should be understood as referring to a real effect which is incidental.

[41] *Tajjour* (2014) 254 CLR 508, 582 [155] (Gageler J).

[42] *Cole v Whitfield* (1988) 165 CLR 360, 394 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[43] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 265 [37] (emphasis added). See also at 271 [56], citing with approval the Full Court's finding that it could not be concluded that the uniform application of the fee 'is apt to diminish Betfair's competitive advantages *in a material way*' (emphasis added).

[44] *Jemena Asset Management v CoInvest Ltd* (2011) 244 CLR 508, 525 [41] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

[45] *Cunningham v Commonwealth* (2016) 259 CLR 536, 560 [59] (Gageler J). See also *Smith v ANL Ltd* (2000) 204 CLR 493, 505 [23] (Gaudron and Gummow JJ), cited in *Wurridjal v Commonwealth* (2009) 237 CLR 309, 440 [365] (Crennan J); *Phonographic Performance Co of Australia Ltd v Commonwealth* (2012) 246 CLR 561,

23. Even in a human rights context – in which the logic of human rights tends to broaden the scope of rights – adventitious impacts are not treated as true burdens. According to Professor Barak:[46]

> The interpretation of the constitutional text protecting a constitutional right should not include, as per its proper interpretation, tenuously related issues not reflecting the reasons for which it was made. Accordingly, for example, the right to freedom of expression should not be interpreted as including the right to commit perjury, or the right to issue threats, or the right to freedom of contract. Rather, such interpretation should reflect the spectrum of reasons underlying the right's creation.

24. None of this attempts to re-enliven the concluded debate about whether 'slight burdens' – measured in quantitative terms – are in fact burdensome; they clearly are. Instead, by focusing on the quality of the *effect* of the law, the function of the first question is to separate those laws which have an actual effect on the free flow of political communication from laws the relevant effect of which is trivial, adventitious or without consequence. The reasons given by Hayne J in *Monis* do not suggest that a *qualitative* assessment of the burden is to be eschewed: rather, his reasons (and the repeated statements that 'extent' is not relevant at the first stage) are consistent with that approach.[47]

25. Once the inquiry as to burden is understood *qualitatively*, it is clear that McHugh J was, with respect, correct in *Coleman* to reason that '[i]n all but exceptional cases', a law does not effectively burden the freedom 'unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place manner or conditions of their occurrence.'[48] As Gageler J reasoned in *Brown*, the effect of a law on the making or content of political communications:[49]

> may be … gauged by nothing more complicated than comparing: the practical ability of a person or persons to engage in political communication with the law; and the practical ability of that same person or persons to engage in political communication without the law.

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595 [111] (Crennan and Kiefel JJ); *JT International SA v Commonwealth* (2012) 250 CLR 1, 59 [135] (Gummow J).

[46] Barak, above n 5, 71. See also at 103-105, regarding de minimis constitutional limitations.

[47] *Monis* (2013) 249 CLR 92, 142-143 [108]-[111] (Hayne J).

[48] *Coleman v Power* (2004) 220 CLR 1, 49 [91] (McHugh J).

[49] *Brown* (2017) 91 ALJR 1089, 1123 [181] (Gageler J).

'Communication'

26. That which is burdened must be some form of communication[50] (or potentially association as a corollary of that communication[51]). Communication clearly goes beyond spoken or written words,[52] but it must at least be conduct that conveys an idea or meaning.[53] Otherwise, the implied freedom will be 'debased by extending it to every activity of ordinary life'.[54] The element of 'communication' in the first inquiry does not assume significance in this case, but it may in another.[55]

'Political or government matters'

27. The communication which is burdened must be about 'political or government matters'. In *Lange*, this Court pointed out that 'representative and responsible government' is a shorthand expression for the system of government envisaged by ss 7, 24, 64 and 128 of the Constitution.[56] In a similar way, the meaning of 'political or government matters' is a shorthand expression for the class of communication which facilitates that constitutionally prescribed system of government. Just as the freedom is confined to what the Constitution requires, the scope of what is 'political' is confined to the range of matters that bear on ss 7, 24, 64 and 128.[57] Not all things which are political in the broad sense will be political in the constitutional sense.[58]

28. Although the expression 'political or government matters' may be imprecise,[59] it is clear that at its 'very centre' is speech about electoral matters such as 'criticism of the views,

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[50] *APLA* (2005) 224 CLR 322, 402 [215] (Gummow J).
[51] *Tajjour* (2014) 254 CLR 508, 566-567 [95] (Hayne J), 578 [143] (Gageler), 605-606 [242]-[244] (Keane J).
[52] *Levy v Victoria* (1997) 189 CLR 579, 594-595 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-623 (McHugh J) 638-642 (Kirby J).
[53] *Muldoon v Melbourne City Council* (2013) 217 FCR 450, 523 [356] (North J).
[54] *Levy v Victoria* (1997) 189 CLR 579, 638 (Kirby J).
[55] See, for eg, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 247 [185]-[186] (Gummow and Hayne JJ), 298 [337] (Callinan J), 304-305 [355] (Heydon J). Cf at 196 [30] (Gleeson CJ), 219 [94] (McHugh J), 276-277 [281]-[283] (Kirby J).
[56] *Lange* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[57] See *APLA* (2005) 224 CLR 322, 350 [27] (Gleeson CJ and Heydon JJ), 361 [66] (McHugh J).
[58] For this reason, the approach of Gillard AJA to ascertain the meaning of 'government' in this context by reference to the dictionary, with respect, wrong: see *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 52-53 [249]. The dictionary definition may inform, but cannot conclude, the inquiry.
[59] *APLA* (2005) 224 CLR 322, 350 [27] (Gleeson CJ and Heydon JJ). See also at 361 [67] (McHugh J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 123 (Mason CJ, Toohey and Gaudron JJ) ('*Theophanous*'); *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 9 [7] (Winneke ACJ).

performance and capacity of a member of Parliament and of the member's fitness for public office, particularly when an election is in the offing'.[60] The core meaning might also be expressed as 'debate about the institutions of government and the exercise of any kind of governmental power'.[61] The widest meaning might include at its periphery 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.'[62] However, even that broad conception does not encompass all communication,[63] for otherwise 'political communication' would collapse into 'communication'. The words 'political or government matter' must 'be given content'.[64] Ultimately, to be 'political' in the constitutional sense, the communication must be 'capable of bearing on electoral choice.'[65]

29. A number of further propositions may be made. First, because 'it is not possible to fix a limit to the range of matters that may be relevant to debate in the Commonwealth Parliament',[66] it is not possible to define what is 'political' for the purposes of the implied freedom by reference to topics. At the abstract level, no subject matter is a priori apolitical. For example, the general topic of the administration of justice may be a legitimate topic of political discourse, although the more specific topics of 'the results of cases or the reasoning or conduct of the judges who decide them are not ordinarily within the *Lange* freedom.'[67] Likewise, speech which is not political may be abstracted to a subject of political controversy.[68] For example, a doctor's advice about an abortion is not political but whether such advice should be given may be political. That does not, however, make the doctor's advice a 'political communication'. It is in this abstract sense that '[t]he class of communication protected by the implied freedom [is] in

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[60] *Theophanous* (1994) 182 CLR 104, 123 (Mason CJ, Toohey and Gaudron JJ). See also *Roberts v Bass* (2002) 212 CLR 1, 29-30 [73] (Gaudron, McHugh and Gummow JJ). See the lists of types of communication that are clearly political in *Catch The Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 264-265 [206] (Neave JA); *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 50-51 [243] (Gillard AJA).
[61] *Cunliffe v Commonwealth* (1994) 182 CLR 272, 329 (Brennan J).
[62] Eric Barendt, *Freedom of Speech* (Clarendon Press, 1985) 152, quoted in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ).
[63] *Theophanous* (1994) 182 CLR 104, 121 (Mason CJ, Toohey and Gaudron JJ).
[64] *APLA* (2005) 224 CLR 322, 478 [450] (Callinan J).
[65] *Brown* (2017) 91 ALJR 1089, 1125 [188] (Gageler J).
[66] *Theophanous* (1994) 182 CLR 104, 123 (Mason CJ, Toohey and Gaudron JJ).
[67] *APLA* (2005) 224 CLR 322, 361 [65] (McHugh J). On the specificity of the topic of the communication, see also *Sunol* (2012) 289 ALR 128, 146 [85] (Basten JA) (albeit in dissent as to burden).
[68] *Cunliffe v Commonwealth* (1994) 182 CLR 272, 329 (Brennan J).

practical terms … wide.'[69] It is also for this reason that matters of State concern cannot be excluded.[70]

30. Second, political communication includes not only communication between the people and their representatives, but also communication 'between the people of the Commonwealth'.[71] But the people of the Commonwealth communicate and receive communications in different capacities, sometimes as constituent elements of 'the people' in ss 7 and 24, and sometimes as private individuals. Thus, in *Brown v Classification Review Board*, it was relevant that a newspaper article advocating theft was 'not addressed to readers in their capacity as fellow citizens and voters.'[72] Similarly, in *Tajjour*, Keane J distinguished between the 'association of the people of the Commonwealth as electors' and 'the social separation implicit in particular individuals sorting together.'[73] Only the former lies within the scope of the implied freedom.

31. Third, some communication is clearly not political, for example, commercial speech which is 'simply aimed at selling goods and services and enhancing profitmaking activities'.[74] Other examples of communication which is not political include: books and magazines containing child pornography,[75] books that incite terrorism,[76] articles advocating theft,[77] and potentially seminars, newsletters and websites that vilify a religion.[78] As Mason CJ, Toohey and Gaudron JJ held in *Theophanous*, '[t]here is a

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[69] *Adelaide City* (2013) 249 CLR 1, 44 [67] (French CJ). See also *Hogan v Hinch* (2011) 243 CLR 506, 543-544 [49] (French CJ).
[70] *Lange* (1997) 189 CLR 520, 571-572 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Unions NSW* (2013) 252 CLR 530, 549-551 [20]-[26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Brown* (2017) 91 ALJR 1089, 1151 [316] (Gordon J).
[71] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 74 (Deane and Toohey JJ).
[72] *Brown v Members of Classification Review Board of Office of Film & Literature Classification* (1998) 82 FCR 225, 246 (Heerey J).
[73] *Tajjour* (2014) 254 CLR 508, 601 [225] (Keane J).
[74] *Theophanous* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ).
[75] *Holland v The Queen* (2005) 30 WAR 231, 251-252 [110]-[112] (Malcolm CJ), 271-272 [222]-[224] (Roberts-Smith JA), 287 [297] (McLure JA).
[76] *NSW Council for Civil Liberties Inc v Classification Review Board [No 2]* (2007) 159 FCR 108, 150 [205]-[206] (Edmonds J).
[77] *Brown v Members of Classification Review Board of Office of Film & Literature Classification* (1998) 82 FCR 225, 246 (Heerey J), 258 (Sundberg J), cf 238 (French J).
[78] *Catch The Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 246 [113] (Nettle JA), 265 [208] (Neave JA). See also *Sunol* (2012) 289 ALR 128, 147-148 [88]-[89] (Basten JA), cf at 138 [42]-[43] (Bathurst CJ), 141-142 [65], 143 [68] (Allsop P); *Owen v Menzies* [2013] 2 Qd R 327, 333 [2]-[4] (de

difference between entertainment and politics, though there may be occasions when one may merge into the other'.[79] Hence, comment on the acting ability of an actor is not political discussion, even if the actor is seeking public office.[80] Further, a child pornography magazine does not become political speech merely because it contains content that argues for changes in age of consent laws,[81] nor does a commercial advertisement become political simply because it happens to mention politicians.[82]

32. Finally, '[r]eligious beliefs and doctrines frequently attract public debate and sometimes have political consequences reflected in government laws and policies', but they do not always.[83] Even Professor Kent Greenawalt, who accords a broad role for religion in shaping political choices, acknowledges: 'Among religious convictions that do bear on correct ethical choices, many do not involve political decisions. When a person relies on religious grounds to decide how much of his income to give to help the starving, the decision has no direct import for public laws and policies.'[84] The reason is that personal and ethical questions about what individuals should do *qua* individuals lack the requisite nexus to the community as a whole to be characterised as political.

33. The personal question of whether a particular woman should have an abortion falls into the first category: it lacks the requisite nexus to the community as a whole. In a different context, Hayne J has observed that the choice of a woman to have an abortion or to offer her child for adoption is 'necessarily determined by the application of a combination of reason, emotion and beliefs that is unique to that individual.'[85] That personal question is

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Jersey CJ), 352-353 [73]-[76] (McMurdo P), 368-369 [156] (Muir JA). Cf *Jones v Scully* (2002) 120 FCR 243, 305 [239] (Hely J).

[79] *Theophanous* (1994) 182 CLR 104, 123 (Mason CJ, Toohey, Gaudron JJ).

[80] *Theophanous* (1994) 182 CLR 104, 124 (Mason CJ, Toohey, Gaudron JJ).

[81] *Holland v The Queen* (2005) 30 WAR 231, 274 [235]-[236] (Roberts-Smith JA, Malcolm CJ agreeing), cf 288 [298] (McLure JA).

[82] *APLA* (2005) 224 CLR 322, 351 [28] (Gleeson CJ and Heydon J), 360-362 [63]-[71] (McHugh J), 450-451 [380], [382] (Hayne J) 477-481 [448]-[461] (Callinan J).

[83] *Evans v New South Wales* (2008) 168 FCR 576, 578 [2] (French, Branson and Stone JJ) (emphasis added). See also *Adelaide City* (2013) 249 CLR 1, 44 [67] (French CJ): the Attorney-General for South Australia 'accepted that some "religious" speech may also be characterised as "political" communication for the purposes of the freedom.'

[84] Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford University Press, 1988) 34.

[85] *Cattanach v Melchior* (2003) 215 CLR 1, 80 [221] (Hayne J) (in dissent as to the consequences of that choice, not as to the personal nature of the choice). See also *Harriton v Stephens* (2006) 226 CLR 52, 106 [178] (Hayne J). In the US context, abortion is also characterised as a personal and private choice: *Roe v Wade*, 410 US 113, 153 (Blackmun J, delivering the opinion of the Court) (1973).

qualitatively different from the public question of whether women should be permitted to have abortions, or whether the government should fund or support health care associated with abortions.

The second burden inquiry: identifying the nature and extent of the burden

34. Once it is accepted that there is an effective burden, its nature and extent must be identified in a second stage of the burden inquiry, in order to 'focus' the justification analysis required by the second *Lange* question.[86] However the justification analysis is undertaken, it is 'trite' that a more severe burden will require a more compelling justification.[87]

Does s 185D of the Public Health Act burden the implied freedom?

The general inquiry as to burden

35. The application of the first limb requires, first, the construction of s 185D of the Public Health Act.[88] That task involves the attribution of meaning to the statutory text, considered in context. 'Context' includes the purpose of the provision and the statute as a whole, the relevant legislative history and extrinsic materials.[89] The statutory context of s 185D is amply summarised in the submissions for the second respondent.[90]

36. Section 185D provides that a person must not engage in 'prohibited behaviour' within a 'safe access zone'. That zone is a radius of 150 metres from premises at which abortions are provided.[91] 'Prohibited behaviour' is, relevantly, 'communicating by any means in

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[86] *Tajjour* (2014) 254 CLR 508, 579 [147] (Gageler J). See also *Brown* (2017) 91 ALJR 1089, 1114 [118] (Kiefel CJ, Bell and Keane JJ), 1121 [165] (Gageler J), 1132 [237] (Nettle J), 1168 [411] (Gordon J).
[87] *Monis* (2013) 249 CLR 92, 146 [124] (Hayne J). See also *Brown* (2017) 91 ALJR 1089, 1114 [118], 1115 [128] (Kiefel CJ, Bell and Keane JJ), 1120 [164] (Gageler J), 1146 [291] (Nettle J), 1178 [478], 1152 [352] (Gordon J).
[88] *Brown* (2017) 91 ALJR 1089, 1152 [326] (Gordon J); *Tajjour* (2014) 254 CLR 508, 594 [200] (Keane J); *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ), 68 [158] (Gummow and Hayne JJ), 80 [207] (Kirby J); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ).
[89] *Thiess v Collector of Customs* (2014) 250 CLR 664, 671-672 [22]-[23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ). See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
[90] Written submissions for second respondent, [12]-[27].
[91] Section 185B of the Public Health Act.

relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety.'[92]

37. Consistently with the explanation by Gageler J in *Brown*, the qualitative effect of s 185D is to be assessed by comparing the practical ability of a person to engage in political communication with that law, and the practical ability of the same person to engage in political communication without that law.[93]

38. In undertaking that analysis, it is necessary first to note that a communication could be both capable of bearing upon electoral choice, and within the prohibition imposed by s 185D. A large sign posted immediately outside a clinic during its opening hours which said 'Vote against your local member who supports the murders carried out here' is an example.

39. What is the effect of s 185D upon such communications? Without the law, such communications may be made immediately outside the clinic or in other public spaces, at any time, and in any manner consistent with other laws. With the law, a political communication about abortion may be made:

(a) outside a safe access zone;

(b) inside a safe access zone, if it is *not* able to be seen or heard by persons accessing or leaving the clinic (for example, around the corner from the entrance to the clinic, or at a time when the clinic is closed); and

(c) inside a safe access zone, if it is able to be seen or heard by a person access or leaving the clinic, but it is *not* reasonably likely to cause distress or anxiety.

40. That analysis reveals that s 185D imposes constraints on political communication as to place, time and manner. Although the qualitative effect of those constraints on the free

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[92] Section 185B of the Public Health Act.

[93] *Brown* (2017) 91 ALJR 1089, 1123 [181] (Gageler J). See also 1111 [95], (Kiefel CJ, Bell and Keane JJ) (explaining that the inquiry as to burden requires an 'assessment of the restrictions imposed by the law upon the ability of those persons [targeted by the law] to communicate on matters of politics and government').

flow of political communication is minor, it should be accepted to qualify as 'real' or 'meaningful'.

41. For those reasons, the general inquiry dictated by the first *Lange* question should be answered 'yes': s 185D effectively burdens the freedom of communication on government or political matters.

Burden on the facts of this case

42. As the above analysis makes clear, s 185D is capable of applying to political communications. However, consideration of its text, context and purpose demonstrates that it is primarily directed to communications of a different kind. It is primarily directed to distressing communications made to persons going in and out of premises at which abortions are provided. The communication for which the appellant was convicted was of that kind. It was not a communication on 'government or political matters'.

43. Unlike the political protest at issue in *Levy*, the appellant's communication was neither 'calculated to express', nor 'capable of expressing' a political message.[94] Its purpose was, rather, to dissuade a particular woman from having an abortion.[95] Such a communication is not 'capable of bearing on electoral choice'.[96] Even on the broadest definition, it was not 'political': whereas the topic of abortion in the abstract is an issue 'which an intelligent citizen should think about',[97] an individual woman's decision to have an abortion is not. The appellant's communication was directed to influencing a woman in her capacity as a private individual, not in her 'capacity as [a] fellow citizen[] and voter[].'[98]

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[94] *Levy v Victoria* (1997) 189 CLR 579, 595 (Brennan CJ), 624-625 (McHugh J); *Tajjour* (2014) 254 CLR 508, 603 [232] (Keane J).
[95] Core Appeal Book, pp 294-296. Even in the context of the first amendment, which applies to speech generally, the US Supreme Court has drawn a distinction between 'protestors' and 'sidewalk counsellors', between 'express[ing] ... opposition to abortion' and 'inform[ing] women of various alternatives': *McCullen v Coakley*, 573 US __; 134 S Ct 2518, 2527, 2536 (2014).
[96] *Brown* (2017) 91 ALJR 1089, 1125 [188] (Gageler J).
[97] See above at [28]. Eric Barendt, *Freedom of Speech* (Clarendon Press, 1985) 152, quoted in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ).
[98] *Brown v Members of Classification Review Board of Office of Film & Literature Classification* (1998) 82 FCR 225, 246 (Heerey J).

44. Moreover, even if the appellant's communication happened to contain material that might be capable of bearing on electoral choice, that would not mean that s 185D imposed an effective burden in its application in this case. It is possible to hypothesise that, as in other cases,[99] a non-political communication might be constructed in such a way as to include 'political' material. A pamphlet handed to a woman entering a clinic for the purpose of persuading her as to a personal choice, might, for example, argue that a foetus has rights which should be protected by Victorian law, or, more tangentially, invite the recipient to 'join the fight against legalised abortion'. In its application to such communications, however, s 185D has no real effect on the free flow of political communication. The burden in such cases is 'properly described as adventitious'.[100] It is equivalent to the burden imposed by a law which prevents those who meet to play cards from discussing politics between hands: it is no burden at all.[101] To find otherwise would be contrary to the orthodoxy that the identification of a burden does not turn on 'how an individual might want to construct a particular communication'.[102]

45. It follows that, in its application to the appellant, s 185D imposed no burden on the free flow of political communication.

Reading down

46. As has been recently reiterated:[103]

> it is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties.

47. It follows that, in a case such as the present, even where a person has standing:[104]

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[99] *APLA* (2005) 224 CLR 322, 451 [381]-[382] (Hayne J).
[100] *Tajjour* (2014) 254 CLR 508, 582 [156] (Gageler J), 604 [234] (Keane J).
[101] Cf *Tajjour* (2014) 254 CLR 508, 582 [155] (Gageler J).
[102] *APLA* (2005) 224 CLR 322, 451 [381] (Hayne J); see also at 351 [28] (Gleeson CJ and Heydon J). See also *Monis* (2013) 249 CLR 92, 129 [62] (French CJ); *Unions NSW* (2013) 252 CLR 530, 572 [110], 574 [119] (Keane J); *Tajjour* (2014) 254 CLR 508, 604 [234] (Keane J); *McCloy* (2015) 257 CLR 178, 267 [248] (Nettle J).
[103] *Knight v Victoria* (2017) 91 ALJR 824, 830 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), citing *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ, delivering the judgment of the Court). See also *Duncan v New South Wales* (2015) 255 CLR 388, 410 [52] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ).

> a party will not be permitted to 'roam at large' but will be confined to advancing those grounds of challenge which bear on the validity of the provision *in its application to that party*.

48. Where an impugned provision *might* have an invalid operation in some circumstances, but it is apparent that, if necessary, the provision could be read down to apply validly to the facts before the Court, the challenge to validity should be dismissed on that basis.[105] In such a case, the ground of challenge will not 'bear upon the validity of the provision in its application to the party'. To proceed to determine the question of validity in those circumstances would necessarily require the Court to consider hypothetical or speculative applications of the provision.[106] Such an approach is to be avoided,[107] particularly in the determination of constitutional questions.

49. Section 185D of the Public Health Act is capable of being read down in accordance with s 6 of the *Interpretation of Legislation Act 1984* (Vic) (**Interpretation Act**), so that it would apply validly to the communication for which the appellant was convicted (even if it might be invalid in other circumstances). That is not to suggest that s 185D should be read down, or that it is invalid to any extent (a proposition which Queensland denies). Rather, the submission is that, if s 185D is *capable* of being read down, the question of whether it is *necessary* to do so (which turns on whether the burden identified above[108] is justified) should be left to a case in which the answer to that question matters.

50. It is submitted that s 185D is capable of being read down so as not to apply to 'communications' made for political purposes.[109] It is well-settled that provisions expressed in general terms are capable of being applied distributively, so as to have no application outside the area of legislative competence,[110] including where the

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[104] *Knight v Victoria* (2017) 91 ALJR 824, 830 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (emphasis added).
[105] *Knight v Victoria* (2017) 91 ALJR 824, 831 [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Brown* (2017) 91 ALJR 1089, 1191 [565] (Edelman J); *Tajjour* (2014) 254 CLR 508, 589 [176] (Gageler J).
[106] *Tajjour* (2014) 254 CLR 508, 587 [172] (Gageler J).
[107] *Brown* (2017) 91 ALJR 1089, 1099 [6] (Kiefel CJ, Bell and Keane JJ).
[108] At [39]-[40].
[109] Compare *Tajjour* (2014) 254 CLR 508, 589 [178] (Gageler J).
[110] *Knight v Victoria* (2017) 91 ALJR 824, 831 [34] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Victoria v Commonwealth* (1996) 187 CLR 416, 503 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ) ('*Industrial Relations Act Case*'); *Pidoto v Victoria* (1943) 68 CLR 87, 110-111 (Latham CJ).

distribution is in respect of subject matter or circumstance.[111] There is no reason to doubt that s 6 is capable of applying where the relevant constitutional limitation is the implied freedom of political communication.[112] Nor is it any impediment to the application of s 6 that an inquiry of fact may be required to determine the constitutional limitation.[113] If read down, s 185D would operate, in respect of the matters within power, in a manner which remained unchanged.[114] Moreover, there is no contrary intention which would displace the application of s 6 in this case.[115]

51. Because s 185D is capable of being read down if it were necessary to do so, the Court should dispose of this case on that basis.

PART V: Time estimate

52. It is estimated that 20 minutes will be required for the presentation of oral argument.

Dated 25 May 2018.

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[111] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 252 (Rich and Williams JJ); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 520 (Walsh J).
[112] *Wotton v Queensland* (2012) 246 CLR 1, 9-10 [9]-[10] (referring to s 9 of the *Acts Interpretation Act 1954* (Qld)) 13-14 [21], 16 [31] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Tajjour* (2014) 254 CLR 508, 585-589 [168]-[178] (Gageler J); *Coleman v Power* (2004) 220 CLR 1, 54-56 [107]-[111] (McHugh J).
[113] *Tajjour* (2014) 254 CLR 508, 586 [171] (Gageler J), *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, 291 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 487 (Brennan and Toohey JJ).
[114] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 176, 371 (Dixon J).
[115] Given that s 185D is primarily directed at communications which are not political, it is not possible to conclude that s 185D 'was intended to operate fully and completely according to its terms, or not at all': *Knight v Victoria* (2017) 91 ALJR 824, 831 [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), quoting *Industrial Relations Act Case* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), in turn quoting *Pidoto v Victoria* (1943) 68 CLR 87, 108 (Latham CJ).