IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M46 of 2018**

B E T W E E N:

KATHLEEN CLUBB
Appellant

AND

10

ALYCE EDWARDS
First Respondent

AND

ATTORNEY-GENERAL FOR VICTORIA
Second Respondent

20 **ANNOTATED WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)**

PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia (**Western Australia**) intervenes pursuant to s 78A of the *Judiciary Act* 1903 (Cth) in support of the Respondents.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

30 3. Not applicable.

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Filed on behalf of the Attorney General for Western Australia by:

State Solicitor for Western Australia
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000
Solicitor for the Attorney General for Western Australia

Tel: (08) 9264 1888
Fax: (08) 9321 1385
Ref: Jennifer Perera
Email: j.perera@sg.wa.gov.au

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. Western Australia accepts and adopts the outline of relevant constitutional provisions and legislation as contained in the submissions for the Second Respondent.

PART V: SUBMISSIONS

5. As the Respondents submit, the question in the present case is whether s 185D of the *Public Health and Wellbeing Act* 2008 (Vic) impermissibly burdens the freedom of political communication implied in the *Constitution.*

6. In light of the particular offence for which the appellant was charged[1], it is submitted, that, relevantly, that question arises (and only arises) in relation to the "prohibited behaviour" proscribed by s 185B(1)(b), namely:

> (b) subject to subsection (2), communicating by any means in 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.

7. The validity of s 185D, insofar as it prohibits other behaviour, does not arise in the present case[2].

8. The test to be applied, as to whether s 185D (together with s 185B(1)(b)) (hereafter "the law") impermissibly burdens the implied freedom (the *Lange*[3] test), as most recently refined in *Brown v Tasmania* (2017) 91 ALJR 1089[4], is as follows:

> 1. Does the law effectively burden the freedom either in its terms, operation or effect?

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1 Amended Charge [**AB 275-276**].

2 In particular by the *Public Health and Wellbeing Act* 2008 (Vic), s 185B(1)(a), (c) and (d).

3 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

4 *Brown v Tasmania* (2017) 91 ALJR 1089 per Kiefel CJ, Bell & Keane JJ at 1112 [104] (incorporating Question 1 from *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2] and restating Questions 2 and 3), per Gageler J at 1119 [156], per Nettle at 1131-1132 [236], per Gordon J at 1151 [315]-[318].

2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

9. Western Australia respectfully adopts submissions made by the Second Respondent (**Victoria**) as to what it identifies as the purpose of the law in paragraphs [34] and [35] of its submissions, being, in summary, "the protection of persons accessing and leaving abortion clinics". Western Australia also adopts Victoria's submissions (at paragraphs [36]-[46]) that that purpose is legitimate in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. [Question 2 above]

10. Western Australia also adopts Victoria's submissions that, insofar as the law is found to burden the implied freedom, the law is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (Victoria's Submissions at [47] to [63]). [Question 3 above]

11. In relation to Question 1, Victoria, while accepting that the law may "in some cases"[5] (although not this case[6]) burden the freedom of political communication, submits that any effect of the law on political communication, is "insubstantial"[7].

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5 Victoria's Submissions at paragraph [28].

6 Victoria's Submissions at paragraph [29].

7 Victoria's Submissions at paragraph [30].

12. Western Australia adopts the submission that any effect on political communication is "insubstantial" and submits further that, for that reason and the reasons that follow, the law does not ***effectively*** burden the freedom. For that reason, it is submitted, Question 1 of the *Lange* test may be answered "No".

Identification of an Effective Burden

13. Question 1 of the *Lange* test requires that the law "effectively" burden the implied freedom of political communication. That is a question to be asked by reference to the legal operation and practical effect of the law, which in turn necessarily involves construing the relevant law[8].

14. Importantly, the burden must be on ***the*** freedom implied in the *Constitution*, an implication which arises because:

> "...ss 7, 24 and 128 of the Constitution (with Ch II, including ss 62 and 64) create a system of representative and responsible government. It is an indispensable incident of that system because that system requires that electors be able to exercise a free and informed choice when choosing their representatives, and, for them to be able to do so, there must be a free flow of political communication within the federation. For that choice to be exercised effectively, the free flow of political communication must be between electors and representatives and "between all persons, groups and other bodies in the community."[9]

15. At its heart, the freedom is concerned with ensuring persons are able to exercise a free and informed choice as electors[10].

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8 *Brown v Tasmania* (2017) 91 ALJR 1089 per Gordon J at 1151 [316]; *Monis v The Queen* (2013) 249 CLR 92 per Hayne J at 154 [147]; *Coleman v Power* (2004) 220 CLR 1 per Gleeson CJ at 21-22 [3], per Gummow & Hayne JJ at 68 [158], per Kirby J at 80-81 [207].

9 *Brown v Tasmania* (2017) 91 ALJR 1089 per Gordon J at 1150 [312] (footnotes omitted). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-559; *Brown v Tasmania* (2017) 91 ALJR 1089 per Kiefel CJ, Bell and Keane JJ at 1110 [88]; *Unions NSW v New South Wales* (2013) 252 CLR 530 per French CJ, Hayne, Crennan, Kiefel and Bell JJ at 548 [17]; *McCloy v NSW* (2015) 257 CLR 178 per Gordon J at 279-280 [301]-[303]; *Levy v Victoria* (1997) 189 CLR 579 per Gaudron J at 622.

10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Unions NSW v New South Wales* (2013) 252 CLR 530 per French CJ, Hayne, Crennan, Kiefel and Bell JJ at 551 [27]-[28], per Keane J at 570 [103]; *Brown v Tasmania* (2017) 91 ALJR 1089 per Gageler J at 1120 [162] and 1124 [188], per Gordon J at 1129 [312]; *McCloy v NSW* (2015) 257 CLR 178 per French CJ, Kiefel, Bell and Keane JJ at 193 [2], per Gageler J at 226 [111]-[112], per Gordon J at 280 [303]; *Levy v Victoria* (1997) 189 CLR 579 per Dawson J at 606-7, per Gaudron J at 622.

16. A law can be said to effectively burden the implied freedom if it prohibits, or puts some limitation on, the making or content of political communications[11], unless perhaps that prohibition is so slight as to have no real effect[12].

17. This first step in the test is critical and not perfunctory[13]. If a law does not operate so as to impose a meaningful restriction on political communication, the supervisory role of the courts is not engaged[14]. The determination as to whether there is a meaningful restriction on political communication, in that regard, is not volumetric or quantitative, but qualitative[15].

18. In that regard the fact that a law prohibits or proscribes certain conduct, and that ***any*** conduct might be carried out for political purposes, cannot be enough, it is submitted, to satisfy the need for an effective or meaningful burden. Many, if not most, laws may be so characterised and such a test would indeed be perfunctory. A law which prohibits the lighting of a fire does not burden political communication merely because a person may wish to light fires as an act of political protest.

19. Rather, the qualitative analysis, it is submitted, requires that it be identified how the impugned law meaningful restricts political communication. That is, it must be asked: how is it said that the behaviour prohibited by the law, limits the making of political communication necessary for the maintenance of the system of representative and responsible government?

20. It is the qualitative aspects of the law in the present case that, it is submitted, belie any such limit.

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11 *Brown v Tasmania* (2017) 91 ALJR 1089 per Gageler J at 1123 [180]; *McCloy v NSW* (2015) 257 CLR 178 per Gageler J at 230-231 [126]; *Monis v The Queen* (2013) 249 CLR 92 per Hayne J at 142 [108]; *Unions NSW v New South Wales* (2013) 252 CLR 530 per Keane J at 574 [119].

12 *Brown v Tasmania* (2017) 91 ALJR 1089 per Nettle J at 1132 [237].

13 *McCloy v NSW* (2015) 257 CLR 178 per Gageler J at 231 [127]. *Brown v Tasmania* (2017) 91 ALJR 1089 per Nettle J at 1132 [237].

14 *McCloy v NSW* (2015) 257 CLR 178 per Gageler J at 231 [127].

15 *Tajjour v New South Wales* (2014) 254 CLR 508 per Gageler J at [145]; *Brown v Tasmania* (2017) 91 ALJR 1089 per Gageler J at [180], per Nettle J at [237], per Gordon J at [316].

Construing the Relevant Statutory Provisions

21. As noted above, the behaviour prohibited by s 185D (together with s 185B(1)(b)) involves the following essential elements:

    (a) communicating in relation to abortion;

    (b) 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;

    (c) in a manner reasonably likely to cause distress or anxiety; and

    (d) within a radius of 150 metres from premises at which abortions are provided.

10 22. Each of these elements is necessary. That is, no communication, of any kind, is affected unless *all* of these elements are present.

23. The scope of the law, on its proper construction will also be affected by the purpose of the law, which, relevantly, is set out in s 185A:

> The purpose of this Part is –
>
> (a) to provide safe access zones around premises at which abortions are provided so as to protect the safety and wellbeing and respect the privacy and dignity of –
>
> (i) people accessing the services provided at those premises; and
>
> 20 (ii) employees and other persons who need to access those premises in the course of their duties and responsibilities; ..

24. Similarly, the principles applicable to Part 9A, set out in s 185C, are as follows:

> The following principles apply to this Part –
>
> (a) the public is entitled to access health services, including abortions;
>
> (b) the public, employees and other persons who need to access premises at which abortions are provided in the course of their duties and responsibilities should be able to enter and leave such premises without interference and in a manner which –
>
> (i) protects the person's safety and wellbeing; and
>
> 30 (ii) respects the person's privacy and dignity.

25. These purposes and principles are also reflected in the Second Reading Speech[16].

26. On its proper construction, it is submitted, the law only proscribes communications affecting persons accessing the premises for the purpose of, or related to, treatment or employment.

27. Similarly, the requirement that the behaviour be reasonably likely to cause distress or anxiety, is to be interpreted in the context of those persons sought to be protected by the law. That is, in context, the likelihood of distress or anxiety is to be determined by reference to the effect of the behaviour upon persons accessing the premises for the purpose or, or related to, treatment or employment.

28. The reference to "distress or anxiety", in that context, refers to a serious psychological response, and not a mere emotional response or hurt feelings[17].

29. When added to the requirement that such behaviour is only prohibited with 150 metres of the premises being accessed by the persons likely to be affected, it is submitted, the law does not impose an effective burden on the freedom of political communication.

30. In order to identify an effective burden on freedom of "political communication" is necessary to ask: what kind of political communication is alleged to be affected? In *Brown v Tasmania*[18], for example, the history of political protests, including protests concerning environmental issues, were properly identified as a "means of bringing about political and legislative change on environmental issues"[19]. The effects of the law in that case were assessed by reference to the effect on such protests.

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16 Victoria, Legislative Assembly, *Parliamentary Debates*, 22 October 2015 (Ms Hennessy, Minister for Health) at 3974.

17 *Monis v The Queen* (2013) 249 CLR 92 per Crennan, Kiefel & Bell JJ at 205 [338].

18 *Brown v Tasmania* (2017) 91 ALJR 1089.

19 *Brown v Tasmania* (2017) 91 ALJR 1089 per Kiefel CJ, Bell & Keane JJ at [33].

31. The only political communication that could, relevantly, be said to be engaged by the law in the present case is communication directed toward "political or legislative change" in relation to abortion law and health policy.

32. Properly construed, it is submitted, the law imposes no effective burden on that communication.

33. First, the nature of the behaviour that *is* proscribed is confined by reference circumstances that, on their face, do not involve communication directed to "political or legislative change" in relation to abortion law and health policy, namely persons accessing the premises for the purpose or, or related to, treatment or employment.

34. Secondly, and by contrast, the law leaves unaffected the capacity of any person to communicate in relation to "political or legislative change" in relation to abortion law and health policy, even near the site of abortion clinics themselves.

35. Significantly, unlike the laws considered in *Levy v Victoria*[20] and *Brown v Tasmania*[21], the law does not impede the capacity for protest associated with, or in the vicinity of, abortion clinics. In that regard, there is no restriction imposed by the law that could make a political communication or political protest less effective, than it might otherwise be 150 metres closer.

36. In *Levy v Victoria*[22], for example, the Plaintiff was able to identify, and plead, to the effect that the law would have on political communication, including that "televised images of the bloodied bodies of dead and wounded ducks"[23] were more likely to attract public attention to their cause. In concluding that there was a burden on the implied freedom (*albeit* that the validity of the regulations was ultimately upheld), McHugh J observed, at 625:

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20 *Levy v Victoria* (1997) 189 CLR 579.

21 *Brown v Tasmania* (2017) 91 ALJR 1089.

22 *Levy v Victoria* (1997) 189 CLR 579.

23 *Levy v Victoria* (1997) 189 CLR 579 per Brennan CJ at 592, per McHugh J at 625..

> "For the reasons that I have given, the constitutional implication extends to protecting political messages of the kind involved here and also the opportunity to send those messages. By prohibiting protesters like the plaintiff and any accompanying media representatives from entering the permitted hunting area ... the Regulations effectively prevented the protesters from putting the kind of political message to the people and government of Victoria that they wished to put to them. It is beside the point that their arguments against the alleged cruelty of duck shooting could have been put by other means during the periods when the Regulations operated. What the Regulations did was to prevent them from putting their message in a way that they believed would have the greatest impact on public opinion and which they hoped would eventually bring about the end of the shooting of game birds. That being so, and subject to one qualification, the Regulations effectively burdened their freedom to communicate with other members of the Australian community on a political matter.

37. There is no analogous burden in the present case. The inability to engage in behaviour, within 150 metres of an abortion clinic, in a manner that is reasonably likely to cause alarm or distress to persons accessing or leaving that clinic, does not prevent any person from putting a message that they best consider will have the greatest impact on public opinion or "political or legislative change" in relation to abortion law and health policy.

38. For these reason, it is submitted that the law does not effectively burden the freedom and that Question 1 of the *Lange* test may be answered "No".

39. If, contrary to the above submission, the Court concludes that the law does impose an effective burden, it is submitted that any such burden is slight and, for the reasons submitted by Victoria at paragraphs [47] to [63], the law is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the answers to Questions 2 and 3 of the *Lange* test may be answered "Yes".

PART VI: LENGTH OF ORAL ARGUMENT

40. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

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P D Quinlan SC
Solicitor General for Western Australia
Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385
Email: p.quinlan@sg.wa.gov.au

F B Seaward
State Solicitor's Office
Telephone: (08) 9264 1888
Facsimile: (08) 9264 1670
Email: f.seaward@sso.wa.gov.au