Before the High Court

Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards*; *Preston v Avery*

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Abstract

Two cases currently before the High Court of Australia — *Clubb v Edwards* and *Preston v Avery* — raise the validity of state laws that seek to prohibit certain communication and protest outside abortion clinics. The laws are justified on the basis that they protect the 'safety', 'dignity', 'well-being' and 'privacy' of those seeking abortion services. The cases therefore pose the question of how these values are accommodated within the Australian system of representative and responsible government.

I Introduction

Few aspects of the *Australian Constitution* take the courts as directly to the heart of social and political controversy as the freedom of political communication, said to be 'implied' in the *Constitution*. Over the 26 years since it was first recognised,[1] many central features of the doctrine have become clear. Since *Lange v Australian Broadcasting Corporation*,[2] it has been apparent that the application of the doctrine turns on the answer to two questions: the first is whether a challenged law burdens communication of the relevant kind; and the second is whether the imposed burden is 'reasonably appropriate and adapted' to achieving a legitimate end. Since 2015, moreover, a majority of the High Court of Australia has held that the second question can be applied through proportionality analysis.[3]

However, the current cases show that uncertainties remain. In this comment, we focus on two unsettled questions likely to be central to the decisions in *Clubb v*

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1 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 ('*Australian Capital Television*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

2 (1997) 189 CLR 520, 567–8 ('*Lange*').

3 *McCloy v New South Wales* (2015) 257 CLR 178, 193 [2]–[3] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'); *Brown v Tasmania* (2017) 349 ALR 398, 422 [104] (Kiefel CJ, Bell and Keane JJ), 464–9 [281]–[295] (Nettle J) ('*Brown*').

Edwards[4] and *Preston v Avery*[5]: (1) the nature of 'political communication'; and (2) the role of proportionality analysis in the freedom of political communication, including the significance of 'discriminatory' burdens on political communication.

II The Facts and Legislation

A *Clubb v Edwards*

On 4 August 2016, an anti-abortion activist, Ms Clubb, approached a couple at the entrance of the East Melbourne Fertility Control Clinic, to attempt to dissuade them from proceeding with an abortion. Ms Clubb spoke to the couple and tried to give them a pamphlet. In doing so, Ms Clubb breached s 185D of the *Public Health and Wellbeing Act 2008* (Vic) ('*Victorian Act*').[6]

Section 185D provides that '[a] person must not engage in prohibited behaviour within a safe access zone'. 'Safe access zone' is defined in s 185B(1) as 'an area within a radius of 150 metres from premises at which abortions are provided'. Relevant to this proceeding, the s 185B(1) definition of prohibited behaviour includes in paragraph (b) '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'.

Ms Clubb was charged and, in response, argued that s 185D of the *Victorian Act* was invalid for breaching the constitutional freedom of political communication. Her argument was dismissed by the magistrate and she was convicted. Ms Clubb appealed to the Supreme Court of Victoria and the case was subsequently removed to the High Court of Australia.[7]

B *Preston v Avery*

The *Reproductive Health (Access to Terminations) Act 2013* (Tas) ('*Tasmanian Act*') also operates by reference to a 150-metre 'access zone'[8] around premises at which abortions are provided.[9] 'Prohibited behaviour' is defined to cover 'a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided'.[10] Notably, the term 'protest' is not defined[11] and, while there is a requirement that such protest be seen or heard by persons accessing the premises, unlike s 185B(1) of the *Victorian*

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4 *Clubb v Edwards*, High Court of Australia, Case No M46/2018 ('*Clubb*').
5 *Preston v Avery*, High Court of Australia, Case No H2/2018 ('*Preston*').
6 Ms Kathleen Clubb, 'Appellant's Submissions', Submission in *Clubb v Edwards*, Case No M46/2018, 8 June 2018, 2–3 [12]–[19] ('*Clubb Submissions*').
7 Ibid 4–5 [23]–[25].
8 *Tasmanian Act* s 9(1).
9 Ibid s 9(2) states: 'A person must not engage in prohibited behaviour within an access zone.'
10 Ibid s 9(1).
11 The prohibition in the *Victorian Act* does not use the word 'protest'.

Act, there is no requirement that the behaviour be 'reasonably likely' to cause distress or anxiety.

On various occasions in 2014 and 2015, Mr Preston protested against abortions within 150 metres of the Specialist Gynaecology Centre in Hobart and was seen and heard by persons entering the premises. The protest involved signs, leaflets and placards, which included statements like 'EVERY ONE HAS THE RIGHT TO LIFE, Article 3, Universal Declaration of Human Rights' and 'EVERY CHILD HAS THE RIGHT TO LIFE, Article 6, UN Convention on the Rights of the Child'.[12]

Mr Preston was charged with three breaches of the *Tasmanian Act*. In the Magistrates Court, he argued that the *Tasmanian Act* breached the freedom of political communication. The magistrate held that the law burdened political communication, but found that the burden was justifiable and Mr Preston was convicted. Mr Preston sought review in the Supreme Court of Tasmania, then the matter was removed to the High Court of Australia.[13]

III The *Lange* Test

The starting point for the analysis of *Clubb* and *Preston* is the well-established test for the application of the freedom of political communication. Initially stated as a two-stage test in *Lange*,[14] it has been modified in subsequent cases[15] and can now be stated as a three-stage test that poses the following questions:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
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?[16]

If the first question is answered 'yes' and the second or third 'no', the law is invalid.

The application of this test will be informed by the interpretive method *Lange* established. In a passage often understood as a retreat from the High Court's earlier boldness,[17] a unanimous Court held that

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12 Mr John Graham Preston, 'Appellant's Submissions', Submission in *Preston v Avery*, Case No H2/2018, 6 July 2018, 4 [20] (emphasis in original) ('*Preston Submissions*').

13 Ibid 6–7 [36]–[38].

14 (1997) 189 CLR 520, 567–8.

15 *Coleman v Power* (2004) 220 CLR 1, 77–8 [196] (Gummow and Hayne JJ); 50 [92]–[93] (McHugh J); 82 [210]–[213] (Kirby J) ('*Coleman*'); *McCloy* (2015) 257 CLR 178, 193 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 349 ALR 398, 422 [104] (Kiefel CJ, Bell and Keane JJ), 464–9 [281]–[295] (Nettle J).

16 In Part VC below, we discuss how this test is supplemented by a form of 'proportionality analysis'.

17 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*') and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 are usually considered the high watermark of

> the *Constitution* gives effect to the institution of 'representative government' only to the extent that the text and structure of the *Constitution* establish it … Under the *Constitution*, the relevant question is not, 'What is required by representative and responsible government?' It is, 'What do the terms and structure of the *Constitution* prohibit, authorise or require?'[18]

This method entails that the freedom of political communication protects only communication necessary to allow citizens to make free and informed choices as voters in federal elections, for the proper functioning of the referendum process, and the proper functioning of responsible government.[19]

With these aspects of method in mind, we now turn to consider key unsettled aspects of the *Lange* test (modified as described above) that are likely to be central to the High Court's decision in *Clubb* and *Preston*.

IV Is There an 'Effective Burden' on 'Political Communication'?

The *Victorian Act* and the *Tasmanian Act* impose prohibitions on communication backed by criminal sanction. There seems little doubt that they impose an 'effective burden' on communication. Argument on the first limb of the *Lange* test in *Clubb* and *Preston* is likely to focus on whether the communication at issue is 'political communication'. We argue that the communication is 'political', and the first limb of the *Lange* test is satisfied.[20]

The emphasis in *Lange* on the text and structure of the *Constitution* seems to favour a narrow definition of 'political communication' to include only communication relevant to the functioning of specified institutions of the Federal Government. Consistent with this, the concept of 'political communication' was, for a time, defined narrowly.[21] This approach seems to distinguish the freedom of political communication from a general guarantee of freedom of expression, and may call into doubt the High Court's earlier position that political communication

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the doctrine: George Williams 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20(3) *Melbourne University Law Review* 848, 848 n 5. However, as Stone has shown, the method adopted in *Lange* in practice places few significant limits on the scope and meaning of the freedom: Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *University of New South Wales Law Journal* 842.

18 *Lange* (1997) 189 CLR 520, 566–7.

19 The sections of the *Constitution* usually cited in support of the freedom are ss 7, 24, 64 and 128. See Stone above n 17, 674; Adrienne Stone and Simon Evans 'Australia: Freedom of Speech and Insult in the High Court of Australia' (2006) 4(4) *International Journal of Constitutional Law* 677. See also Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438, 467.

20 We consider below the submission by the Commonwealth Attorney-General that additional factors should be considered at this stage: see below n 78–9 and accompanying text.

21 See the cases discussed in Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 383–4.

should include 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'.[22]

However, developments in the subsequent case law have made it apparent that the concept of 'political communication' is rather broad. Early suggestions by some judges that the freedom may not encompass discussion of state political matters[23] have been conclusively set aside.[24] It has been accepted that political communication includes expressive conduct,[25] speech that causes offence, hatred, disgust or outrage,[26] and could also include invective or abuse.[27] Moreover, the High Court's acceptance in *Attorney-General (South Australia) v Adelaide*[28] that a city by-law prohibiting 'preaching', 'canvassing' or 'haranguing' without a council permit was a burden on political communication[29] indicates that religious speech may also be 'political communication' for the purposes of the freedom.[30]

The trajectory of the case law is not surprising. As argued at length elsewhere, the *Lange* method itself supports a conclusion that 'political communication' should be understood to cover a broad category of matters of public interest, extending well beyond communication explicitly about the public conduct of government officials from all branches of government and government policy.[31]

The conduct at issue in *Preston* is clearly 'political communication'. Mr Preston was holding placards and handing out flyers that opposed abortions in explicitly political terms. Abortion is a live policy and political issue in Tasmania, and given the well-known depth of controversy over the legality of abortion, the controversy over abortion law is likely to continue.[32] Therefore, these protest actions are within the core category of explicitly political communication.

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22 *Theophanous* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ), quoting Eric Barendt, Freedom of Speech (Clarendon Press, 1985) 152. This expanded notion was reiterated in *Cunliffe v Commonwealth* (1994) 182 CLR 272, 298–9 (Mason CJ), 336 (Deane J), 379–80 (Toohey J), 387 (Gaudron J) ('*Cunliffe*').

23 *Levy v Victoria* (1997) 189 CLR 579, 595–6 (Brennan J) ('*Levy*'). See also *Hogan v Hinch* where it was suggested that the freedom only applies to Commonwealth matters: (2011) 243 CLR 506, 543 [48].

24 *Unions NSW v New South Wales* (2013) 252 CLR 530, 549–51 ('*Unions NSW*').

25 *Levy* (1997) 189 CLR 579, 595 (Brennan CJ). Justice McHugh noted that non-verbal political communication could include '[s]igns, symbols, gestures and images' (at 622) and Kirby J noted the communicative power of visual gestures and activities like '[l]ifting a flag in battle, raising a hand against advancing tanks, wearing symbols of dissent, participating in a silent vigil, public prayer and meditation' (at 638) as examples of actions that may attract constitutional protection.

26 *Monis v The Queen* (2013) 249 CLR 92, 131 (French CJ), 171–4 (Hayne J) ('*Monis*').

27 Ibid 136 [85] (Hayne J).

28 (2013) 249 CLR 1 ('*A-G (SA) v Adelaide*').

29 Ibid 33 [35] (French CJ). While the by-law in question burdened political communication, the High Court found it did not breach the freedom. See also Mitchell Landrigan, 'Can the Implied Freedom of Political Discourse Apply to Speech By or About Religious Leaders?' (2014) 34(2) *Adelaide Law Review* 427, 441–2.

30 Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34(2) *Federal Law Review* 287. See also Landrigan, above n 29.

31 Stone, above n 21, 383–4.

32 *Reproductive Health (Access to Terminations) Act 2013* (Tas). For example, in 2018, there is continuing discussion about whether women in Tasmania have access to safe abortions: see Calla Wahlquist, 'Number of Tasmanians Travelling Interstate for Abortions Rises Fivefold', *The Guardian* (online), 27 April 2018 <https://www.theguardian.com/australia-news/2018/apr/27/number-of-tasmanians-travelling-interstate-for-abortions-rises-fivefold>.

Clubb raises more difficult questions because, though it was accepted that Ms Clubb attempted to dissuade a couple entering the clinic from procuring an abortion, it is not clear exactly what Ms Clubb said. The government submissions argue that not all communication about abortion is 'political communication', and that a mere attempt to dissuade persons from procuring an abortion is not relevantly political.

A *Is All Communication about Abortion 'Political Communication'?*

The Commonwealth and State submissions in *Clubb* contend that, while communication about abortion laws and policies is 'political communication', a personal communication or offer of assistance, help and alternatives is not, because '[a] communication of that character (concerning an intensely personal issue involving utilisation of a lawful health service) does not concern government or political matters.'[33] Victoria's submission contends:

> not all communication about abortion is political. A medical professional speaking on the topic from a medical perspective at a health conference will not (usually) be engaging in political communication. A woman and her doctor speaking to each other about the procedure are not (usually) engaging in political communication. Something more is required for communication about abortion to be characterised as 'political'. In the context of anti-abortion protesters outside abortion clinics, while it may be accepted that some individuals might be engaging in political communication, in other cases the aim is to deter women from having an abortion, often through imposing guilt and shame. This latter type of communication is not political communication, although it may represent deeply and sincerely held personal beliefs. It is communication directed at influencing a personal and private medical choice. It is not directed at public debate, nor at ensuring that the people of the Commonwealth can 'exercise a free and informed choice as electors'.[34]

Thus, it is argued that there is 'no evidence that Ms Clubb's conduct involved *political* communication'.[35]

There may be strong common-sense appeal to the idea of a category of communication — such as a private medical consultation — that should not be regarded as political communication within the scope of the freedom. However, the proper basis for excluding a medical consultation about abortion is not entirely clear.

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[33] Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Clubb v Edwards*, Case No M46/2018, 25 May 2018, 4 [11] ('*Attorney-General (Cth) Submissions*'). See also Attorney-General (Qld), 'Submissions for the Attorney-General for the State of Queensland (Intervening)', Submission in *Clubb v Edwards*, Case No M46/2018, 25 May 2018, 12–14 ('*Attorney-General (Qld) Submissions*'); Attorney-General (NSW), 'Annotated Submissions of the Attorney General for New South Wales, Intervening', Submission in *Clubb v Edwards*, Case No M46/2018, 25 May 2018, 3.

[34] Attorney-General (Vic), 'Submissions of the Attorney-General for the State of Victoria', Submission in *Clubb v Edwards*, Case No M46/2018, 11 May 2018, 9 [31] (citations omitted) ('*Attorney-General (Vic) Submissions*').

[35] *Attorney-General (Cth) Submissions*, above n 33, 1 [4] (emphasis in original). The same view is taken in *Attorney-General (Vic) Submissions*, above n 34, 8 [29] and *Attorney-General (Qld) Submissions*, above n 33, 2 [5(c)].

Perhaps it can be excluded on the basis that it has another purpose or dominant characteristic — for example, a therapeutic, rather than political, purpose. But there is scant indication in the case law that either purpose or the idea of a dominant characteristic are relevant to determining whether communication is 'political'. Alternatively, it might be argued that communications of this kind between a patient and doctor bear such a tangential relationship to the 'constitutionally prescribed system of representative and responsible government' that the burden on political communication is negligible. Notably, however, the High Court has, in general, resisted the conclusion that minor burdens on the freedom do not meet the standard of 'effective burden' prescribed in the first stage of the *Lange* test[36] and so such a conclusion would involve a development of constitutional doctrine.

The logic of the *Lange* method could, in fact, lead to the opposite conclusion. It may well be that communication during a medical consultation is relevant to a citizen's political views. It is easy to imagine how hearing facts about the abortion procedure might influence a citizen's views about abortion policy. Indeed, hearing such information in the context of considering or undergoing an abortion may even make the information a more powerful determinant of political views than communication in other contexts.[37]

B *Was Ms Clubb's Conduct 'Political Communication'?*

Even if it is possible to identify a category of non-political communication about abortion, there is a strong argument that Ms Clubb's conduct is properly categorised as political. The relevant interaction was not a private medical consultation. Even assuming Ms Clubb merely tried to dissuade the couple from proceeding with an abortion by offering alternatives and support, Ms Clubb's conduct should be regarded as political protest against abortion laws and hence within the scope of the freedom of political communication.

In support of this conclusion, we draw attention to the High Court's continued acceptance of protest activity as political communication and acknowledgment that the site of a protest can contribute significantly to the emotional impact of the communication. The significance of site-based protest, first recognised in *Levy v Victoria*,[38] was more recently specifically acknowledged in *Brown v Tasmania*.[39] Justice Gageler held:

> The communicative power of on-site protests, the special case emphasises and common experience confirms, lies in the generation of images capable of attracting the attention of the public and of politicians to the particular area of the environment which is claimed to be threatened and sought to be protected.[40]

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36 *Monis* (2013) 249 CLR 92, 130 [64] (French CJ), 144–5 [120]–[121] (Hayne J), 212–13 [343] (Crennan, Kiefel and Bell JJ).

37 We express no opinion as to the nature of the opinion that a patient would be likely to form.

38 (1997) 189 CLR 579, 622–3 (McHugh J), citing *Brown v Louisiana*, 383 US 131 (1966).

39 (2017) 349 ALR 398, 409 [32]–[33], (Kiefel CJ, Bell and Keane JJ).

40 Ibid 440–41 [191].

Returning to the facts of *Clubb*, the Minister's Second Reading Speech, as well as the Statement of Compatibility required under s 28 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), explained that the *Victorian Act* was a response to a long history of protest outside the East Melbourne abortion clinic.[41] Repeated protests at that site included displaying 'distressing and sometimes graphic' images and props, handing out confronting material and creating 'disturbing theatre' utilising things like a bloody doll in a pram.[42]

In this context, Ms Clubb's presence as an anti-abortion activist, approaching those entering the facility to try to persuade them not to have an abortion, effectively communicated her opposition regarding abortion as a matter of principle and her support for laws and policies that would restrict abortion. In the context of the history of on-site protest outside abortion clinics, moreover, Ms Clubb's very act of standing near the clinic, and trying to dissuade the couple from having an abortion, was a political act of demonstration that could influence electoral decision-making.

We argue, therefore, that in both cases the communication was political and that the first element of the *Lange* test is satisfied.[43]

V Do the Laws Impose Justifiable Limitations on Freedom of Political Communication?

Turning to the second limb of the *Lange* test,[44] the relevant question is whether the burden on the freedom of political communication imposed by the *Tasmanian Act* and the *Victorian Act* can be justified as reasonably appropriate and adapted to a legitimate end.[45]

A *A Legitimate End?*

The *Lange* test, as now formulated, requires identification of the 'end' to which the law is directed. This determination can prove critical. In *Monis*, the three judges who held the law invalid (French CJ, Hayne and Heydon JJ) did so on the basis that the

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41 In *Attorney-General (Vic) Submissions*, above n 34, 4 [14] (citations omitted), Victoria submits that:

> In the statement of compatibility for the Bill, the Minister explained that there was a 'long history' of anti-abortion protesters engaging in disruptive activities and worse outside abortion clinics and hospitals that perform abortion. The Minister described women attending clinics (and their support people) being subjected to 'harassing and intimidatory conduct', and staff having experienced 'sustained harassment and verbal abuse over many years'. The most extreme case in Victoria involved the fatal shooting in 2001 of a security guard at the East Melbourne Clinic.

42 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3976 (Jill Hennessy).

43 We consider below the submission by the Commonwealth Attorney-General that additional factors should be considered at this stage: see below nn 78–9 and accompanying text.

44 Including the elaborations in: *McCloy* (2015) 257 CLR 178, 194 [2]; *Brown* (2017) 349 ALR 398, 422 [104] (Kiefel CJ, Bell and Keane JJ), 461 [271] (Nettle J).

45 *McCloy* (2015) 257 CLR 178, 201 [23] (French CJ, Kiefel, Bell and Keane JJ):

> The *Lange* test requires a more structured, and therefore more transparent, approach. In the application of that approach it is necessary to elucidate how it is that the impugned law is reasonably appropriate and adapted, or proportionate, to the advancement of its legitimate purpose.

purpose of the law[46] was promoting civility in uses of the postal service, which was not a 'legitimate end'. By contrast, those judges who found the law valid (Crennan, Kiefel and Bell JJ) held its purpose was to prevent offensive intrusions into the private sphere.[47]

The difference between these positions lies in the level of generality at which the notion of statutory purpose is identified. On the former view, exemplified by Hayne J, purpose is construed narrowly, in a manner that is 'coterminus with the provision's legal operation'.[48] The position taken in the joint reasons of Crennan, Kiefel and Bell JJ, by contrast, identifies in broader terms 'the social objective'[49] of the challenged law.

In our view, the broader approach to identifying statutory purpose, which is more commonly adopted in freedom of political communication cases,[50] is better suited to the principled application of the implied freedom. *Lange* requires a consideration of the extent to which the freedom is necessary for the exercise of free voting choices, and how the burdened communication contributes to the operation of constitutional institutions. This determination requires a judgement to be made, often in the face of competing views, about how constitutional institutions should function.[51] Given the value-laden nature of this task, it is, we argue, better performed with a fuller understanding of the object of the challenged law. Only with a full understanding of a law's purpose can judges truly grapple with the question of whether the law is 'compatible with the constitutionally prescribed system of representative and responsible government'.[52]

Of course, there may be some cases where the statutory purpose is difficult to determine. However, with respect to the laws challenged here, there is considerable reason to support the conclusion that the objective of the laws is

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46 *Criminal Code Act 1995* (Cth) sch ('*Criminal Code* (Cth)') s 417.12 prohibited the use of 'a postal or similar service … in a way … that reasonable persons would regard as being in all the circumstances, menacing harassing or offensive'.

47 *Monis* (2013) 249 CLR 92, 207 [324]. As Stellios has identified, two approaches are evident in determining the purpose of an impugned provision: James Stellios, *Zines' The High Court and the Constitution* (Federation Press, 6th ed, 2015) 571, 591.

48 Stellios, above n 47, 591. See *Monis* (2013) 249 CLR 92, 161–4 [175]–[184].

49 *Monis* (2013) 249 CLR 92, 205 [317]. Their Honours held at 205 [317] that
> the question of purpose is rarely answered by reference only to the words of the provision, which commonly provide the elements of the offence and no more … it may be necessary to consider the context of the provision including other provisions in the statute and the historical background to the provision.

50 In cases concerning electoral funding, for instance, the High Court has consistently identified the ends pursued by the laws in terms of their public policy goal, which was to address the undue influence of wealthy donors, prevent corruption and the appearance of corruption: see *Australian Capital Television* (1992) 177 CLR 106, 144–5 (Mason J); *McCloy* (2015) 257 CLR 178, 203 [30] (French CJ, Kiefel, Bell, Keane JJ)*; Unions NSW* (2013) 252 CLR 530, 546 [9] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 579 [138] (Keane J).

51 See Stone above n 17 and for further elaboration of the value judgements required in these cases, see Adrienne Stone, 'Free Speech Balanced on a Knife's Edge: *Monis v The Queen*' on *Opinions on High* (26 April 2013) <http://blogs.unimelb.edu.au/opinionsonhigh/2013/04/26/stone-monis/>.

52 *Lange* (1997) 189 CLR 520, 567; *McCloy* (2015) 257 CLR 178, 193 [2]; *Brown* (2017) 349 ALR 398, 422 [104] (Kiefel CJ, Bell and Keane JJ).

'ensuring safety, dignity and privacy in access to abortion services'.[53] Once this is established, moreover, a conclusion that such an end is legitimate seems relatively straightforward. The goal of ensuring 'safety, dignity and privacy' in accessing a medical service has obvious appeal in a liberal democracy and seems compatible with the constitutional requirements that underpin the freedom of political communication. The purpose seems analogous to that of preventing obstruction in the roads, the 'safety and convenience of road users'[54] and protecting the physical safety of protestors.[55]

Before concluding discussion of statutory purpose, we note a complexity that arises in relation to the *Tasmanian Act*. Its operation is limited to 'protest' on abortions within a 150-metre 'access zone',[56] raising some question as to whether the purpose of this law is to stop particular kinds of protest and expressions of disapproval in this location. In our view, identifying this kind of purpose does not supplant recognition of the broader policy objective discussed above.[57] The *Tasmanian Act* is, the respondents submit, directed towards a policy goal that closely resembles the purpose of the *Victorian Act*.[58] It may also be true that it pursues this objective by targeting protest. This potentially discriminatory operation may be relevant to validity, but the question is dealt with as part of the next stage of the analysis.[59]

B *'Reasonably Appropriate and Adapted' and Proportionality*

The next step of the *Lange* test is to determine whether the law is 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[60] Since *McCloy*, it has been clear that this question may involve a form of 'proportionality analysis', which requires an assessment of whether the law is:

> *suitable* — as having a rational connection to the purpose of the provision
>
> *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

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53 Section 185A of the *Victorian Act* states the purpose of the prohibitions is to 'protect the safety and wellbeing and respect the privacy and dignity' of patients and employees.

54 Accepted as legitimate ends in *A-G (SA) v Adelaide* (2013) 249 CLR 1, 63 [134] (Hayne J); 84 [203] (Crennan and Kiefel JJ).

55 Accepted as legitimate in *Levy* (1997) 189 CLR 579, 599 (Brennan CJ); 608 (Dawson J); 614–15 (Toohey and Gummow JJ); 619 (Gaudron J); 620 (McHugh J).

56 *Tasmanian Act* s 9(1). Section 9(2) states: 'A person must not engage in prohibited behaviour within an access zone.'

57 We note the rejection of a similar argument in *Brown* (2017) 349 ALR 398, 421 [97]–[100] (Crennan, Kiefel and Bell JJ)

58 Namely, enabling 'persons to access premises where terminations are provided unobstructed, uninjured and un-harried': Solicitor-General (Tas), 'Respondents' Submissions', Submission in *Preston v Avery*, Case No H2/2018, 3 August 2018, 4 [23] ('*Solicitor-General (Tas) Submissions*') citing Tasmania, *Parliamentary Debates*, Legislative Council, 19 November 2013, 50–51 (Ruth Forrest).

59 See below nn 83–7 and accompanying text.

60 *Lange* (1997) 189 CLR 520, 567.

> *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[61]

Although a majority of the High Court adopted proportionality analysis in *McCloy* and reaffirmed that position in *Brown*, a majority of the present Court justices have indicated that proportionality need not be used in all cases.[62] It remains uncertain, therefore, in which circumstances proportionality is to be used. We do not, in this comment, attempt to resolve this uncertainty because, in our view, there is little difference in practice between proportionality and the formulation of the test as it stood before *McCloy*.

In our view, proportionality analysis is best understood as an elaboration upon the position taken by the Court before *McCloy*, rather than a significant revision of it. We argue, first, that this view of proportionality is supported by the case law. The majority of the Court in *McCloy* accepted the plaintiffs' submissions that 'proportionality analysis of some kind is part of the *Lange* test'.[63] This position is consistent with the Court's earlier unanimous statement in *Lange* that '[i]n this context, there is little difference between the test of "reasonably appropriate and adapted" and the test of proportionality'.[64] This view of proportionality is also consistent with an argument made by Stone shortly after *Lange* that the three elements, 'suitability', 'necessity' and 'balancing' are all evident, though not explicitly, in the Court's application of the 'reasonably appropriate and adapted' formulation.[65] The principal effect of the *McCloy* formulation, therefore, is to state explicitly and separately the 'balancing' part of the analysis, which had previously been only implicit.[66] The important question, therefore, is not *whether* the Court uses proportionality, but *how* that test is employed. We turn now to that question. Taking the elements of proportionality in turn, we will outline the most relevant features of the argument.

Some clarity can perhaps be found in the application of the first element. Provided that the statutes are interpreted as we suggest, there is a clear argument that the challenged laws are 'suitable' in the sense that they bear a 'rational connection' to the legitimate end to which the laws are directed. In this regard, we note especially the evidence that Victoria and Tasmania put forward as to the negative effects of on-site abortion protests on patients and staff.[67]

The question of 'necessity', however, is a much closer call. To apply this element of the test, the Court will need to consider whether there are 'obvious and compelling alternative, reasonably practicable means of achieving the same

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61 *McCloy* (2015) 257 CLR 178, 195 [2] (emphasis in original).

62 *Brown* (2017) 349 ALR 398, 426 [125], 427 [131] (Kiefel CJ, Bell and Keane JJ), 432 [158]–[159] (Gageler J), 463–4 [279]–[280] (Nettle J), 508 [473] (Gordon J).

63 *McCloy* (2015) 257 CLR 178, 212 [66]. See also at 201 [23].

64 *Lange* (1997) 189 CLR 520, 567 n 272.

65 Stone, above n 17.

66 Anne Carter, '*McCloy* Symposium: Anne Carter on Proportionality and Its Discontents' on *Opinions on High* (3 December 2015) <http://blogs.unimelb.edu.au/opinionsonhigh/2015/12/03/carter-mccloy>.

67 See *Attorney-General (Vic) Submissions*, above n 34, 5–9; *Solicitor-General (Tas) Submissions*, above n 58, 6–8 [36]–[39].

purpose'. Ms Clubb and Mr Preston point to a number of alternatives. These include prohibitions (already found in both Acts) that are limited to 'besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing, or impeding';[68] the inclusion of defences and a 'carve out' applicable to political communication.[69] Notably, Mr Preston also points out that because the *Tasmanian Act* prohibits protest irrespective of whether that protest is 'reasonably likely' to cause harm, a less restrictive alternative form of the Act would incorporate a requirement for some kind of harm.[70]

In relation to both Acts, what will be required is a comparison of the challenged law against the putative alternatives and a consideration of whether each is 'obvious, compelling' and 'reasonably practicable', a judgement that includes a measure of deference to the legislature.[71] In addition, it will be necessary to consider arguments by Victoria and Tasmania that draw attention to the geographically confined operation of the Acts and to the availability of many alternative means and places in which protestors can express their opinions.[72]

The last element of the proportionality test, a 'balancing' assessment, required either as an element of determining the availability of alternative means or (under the proportionality formulation) as a separate element,[73] is perhaps the most open-ended of all. Balancing, in this context, cannot refer to a precise weighing in an objective sense, since the ends of the law (safety, dignity and privacy) and the constitutional limitation (freedom of political communication) are incommensurable. Moreover, although the determination is underscored by a question of what is compatible with the 'constitutionally prescribed system of representative and responsible government', constitutional text and structure provide little helpful guidance.[74] What is required, therefore, is a *value judgement* as to the relative importance of the freedom of political communication as measured against the importance of the ends pursued by the challenged laws (namely, the safety, privacy and dignity of those accessing abortion services).[75]

Stated at this level of precision, the complexity of proportionality analysis is fully evident. It requires both a value judgement about how constitutional institutions

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68 *Victorian Act* s 185B(1); *Tasmanian Act* s 9(1).

69 See *Clubb Submissions*, above n 6, 15–16 [83]–[88]; *Preston Submissions*, above n 12, 13–14 [62]–[70].

70 We note that Mr Preston raises this matter as going to suitability, submitting that the failure to include a harm requirement indicates that the *Tasmanian Act* is not properly directed to the prevention of harm: *Preston Submissions* above n 12 12 [58].

71 *Brown* (2017) 349 ALR 398, 428 [139] (Crennan, Kiefel and Bell JJ), 464 [282] (Nettle J). While 'necessity' is not applied this way in all constitutional systems, the stricter form of necessity is attributable to constitutional features not shared by the *Australian Constitution*. On the 'strict' interpretation of necessity and its relationship to specifically German conceptions of rights, see David Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach?' in Liora Lazarus et al, *Reasoning Rights* (Hart Publishing, 2014). Compare the more deferential approach taken by the Supreme Court of Canada in *Irwin Toy v Quebec (Attorney General*) [1989] 1 SCR 927, 994 (Canada).

72 *Attorney-General (Vic) Submissions*, above n 34, 18 [59]–[61]. Also adopted by *Solicitor-General (Tas) Submissions*, above n 58, 19 [96].

73 See above n 66.

74 On the difficulties inherent in this question, see Stone, above n 17.

75 In our view, like the 'necessity' element, it should be accompanied by some deference to parliaments, especially given the qualification (unique to the Australian context) that a challenged law be 'adequate in its balance': *McCloy* (2015) 257 CLR 178, 195 [2].

of representative and responsible government should operate *and* consideration of possible alternative laws and their relative effectiveness. This combination of a value judgement unconstrained by constitutional text and structure, and the detailed context-specific and fact-specific questions[76] about the operation of the challenged laws and possible alternatives, renders the results of this form of analysis particularly hard to predict.

C *Further Development of Proportionality Analysis*

Given the difficulties inherent in predicting the outcome of proportionality analysis, we do not make a firm view of the correct result. We offer instead a consideration of how proportionality analysis could be developed to address these difficulties.

One approach is for the High Court to develop specific and determinate tests of narrower application that could be used instead of (or as a supplement to) the test stated in *Lange*. Indeed, this approach is not wholly foreign to this area of law. The test developed in *Lange*, which applies specifically to defamation actions, is one such narrower, and at least somewhat more determinate, test.[77] Moreover, the Commonwealth Attorney-General's submissions in *Clubb* and *Preston* identify one way that this kind of development could occur. The Commonwealth submits that answering the first limb of the *Lange* test — whether the law constitutes a burden on political communication — requires more than just a 'yes' or 'no' answer. Rather, the Court should identify 'the nature and extent of the burden with precision', so as to give direction to inquiries into the justification for the burden.[78]

Another way this general strategy could be pursued is by identifying particular circumstances or places in which free political communication is to be especially highly valued. The many statements in *Brown* and *Levy* that point to the importance of site-based protest could be understood as developing just such a doctrinal category.[79] These cases provide an excellent opportunity for the significance of site-based protest to be further clarified. As noted above, these Acts both burden site-based protest, making the relevance of this criterion especially significant in this case.[80]

Another possibility is that particular kinds of laws might merit higher level scrutiny. It has long been suggested, for instance, that laws that target the content of speech, its information or ideas, need a 'compelling justification' and must be weighed against what is 'reasonably necessary to achieve the protection of the

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[76] On factual judgements required by proportionality, see Anne Carter, 'Constitutional Convergence? Some Lessons from Proportionality' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 373, 380–82.

[77] These matters are more fully explained in Stone, above n 17, 705–7.

[78] *Attorney-General (Cth) Submissions*, above n 33, 8 [24]. See also *Attorney-General (Qld) Submissions*, above n 33, 3 [7].

[79] See above nn 38–40 and accompanying text.

[80] Amelia Simpson, '*Brown v Tasmania*: High Court Delivers a Win for Protesters' (2018) 41 L*aw Society Journal* 90, 90.

competing public interest',[81] whereas other laws are presumed to be valid unless the burden is 'disproportionate to the attainment of the competing public interest'.[82]

More recently, a distinction has been drawn between a law that is *aimed* at political communication or at political communication of certain kinds.[83] Justice Gageler held in *Brown*[84] that such discriminatory laws warrant closer scrutiny because of the risk 'political communications unhelpful or inconvenient or uninteresting to a current majority might be unduly impeded'.[85]

Once again, a rule articulated along these lines could be especially helpful in this case. Both the challenged laws could be characterised as having a discriminatory operation in the sense that they target certain kinds of political communication. The *Victorian Act* applies only to communications 'about abortion', and not to other communications (even if distressing) within a safe access zones, whereas the *Tasmanian Act* applies specifically to 'protest' within such zones.

One matter that such a rule might address is the distinction between discrimination against political communication in general and discrimination against particular viewpoints. We would argue that the discrimination in the *Victorian Act* against communication 'in relation to abortion' is more easily justified in terms of the objective of the Act, which is to ensure safe and dignified access to abortion services.[86] However, the discrimination effected by the *Tasmanian Act* is more troubling. By prohibiting 'protest', the *Tasmanian Act* appears to come dangerously close to implementing a form of viewpoint discrimination.[87] That is, a restriction applying only to those who oppose abortion and not those who might support the provision of abortion services. Viewpoint discrimination is widely regarded as the most problematic form of a content-based law, because it raises the greatest risk that some ideas are preferred over others.

As Gageler J explained, developing the analysis in this way allows for a more precise identification of the nature of the justification for the challenged law and the cost that the law imposes on political communication. His Honour stated:

> Of course, the measure is not scientific. It can itself be nothing more than a heuristic tool. *But it is a tool custom-made to place the question of the justification for the particular burden which the law imposes on political*

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81 *Australian Capital Television* (1992) 177 CLR 106, 143 (Mason CJ).

82 Ibid 143 (Mason CJ). See also ibid 234–5 (McHugh J); *Cunliffe* (1994) 182 CLR 272, 299–300 (Mason CJ). In the context of proportionality analysis, it might be that such laws require more by way of justification at the balancing stage: see *Brown* (2017) 349 ALR 398, 420 [94]–[95], 425 [120]–[121] (Crennan, Kiefel and Bell JJ).

83 For comparative analogies, consider the United States and Canada. Under the First Amendment of the *United States Constitution*, 'content-based' laws are 'presumptively invalid': *R.A.V v St Paul, Minnesota*, 505 US 377, 382 (1992). In Canadian constitutional law, if a law is content-based then the need for a factual inquiry into the effect of the law on freedom of expression is circumvented and the Court automatically proceeds to apply s 1 of the *Canada Act 1982 (UK)* c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'): *Irwin Toy* [1989] 1 SCR 927, 972–5.

84 *Brown* (2017) 349 ALR 398, 446 [220], [223].

85 Ibid 443 [202].

86 A similar argument was accepted by the joint reasons in *Brown*: ibid 421 [101].

87 See Leslie Kendrick 'Content Discrimination Revisited' (2012) 98(2) *Virginia Law Review* 231, 242; Adrienne Stone, 'Viewpoint Discrimination, Hate Speech Laws, and the Double-Sided Nature of Freedom of Speech' (2017) 32(3) *Constitutional Commentary* 687.

> *communication on a scale which reflects the reason why the question is asked*.[88]

In our opinion, the apparent viewpoint discrimination effected by the *Tasmanian Act* renders it vulnerable to invalidation (though we do not think this conclusion is certain). But just as important for our argument is the question of method. The close tailoring of analysis to the circumstances of the particular case and the generation of a more precisely defined rule (that could serve as an alternative or as a supplement to a 'one-size-fits-all' form of proportionality) will lend decision-making in these cases a greater measure of clarity and predictability.[89]

VI Conclusion

Clubb and *Preston* concern a matter of high public controversy: the longstanding moral and political dispute about abortion. In constitutional terms, they represent an opportunity to resolve some doctrinal uncertainties.

In the preceding section we noted two factors — the effect on site-based protest and the discriminatory operation of the laws — that may require comparatively greater justifications for the Acts. It may well be that in their strong submissions on the effect of abortion protest, Victoria and Tasmania discharge this requirement. However these cases are decided, decisions in future cases on the freedom of political communication would be assisted if the High Court could clarify the relevance of these kinds of factors as a general matter, as well as their significance in these particular cases. That kind of doctrinal development would be a step towards greater predictability in freedom of political communication cases.

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88 *Brown* (2017) 349 ALR 398, 443[202] (emphasis added).

89 For further analysis, see Stone, above n 17, 705–7.