IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

H2 OF 2018

JOHN GRAHAM PRESTON
Appellant

and

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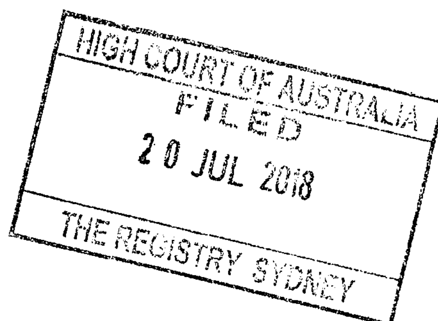
ELIZABETH AVERY
First Respondent

SCOTT WILKIE
Second Respondent



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ANNOTATED SUBMISSIONS OF LIBERTYWORKS INC TO BE HEARD AS AMICUS CURIAE

PART I: INTERNET PUBLICATION

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

PART II: BASIS OF APPEARANCE

30 2. LibertyWorks Inc (**LibertyWorks**) is a Brisbane-based, non-religious, non-profit private 'think-tank' dedicated to the active promotion of, and activities which encourage the expansion of, the value of individual liberty amongst the citizens of Australia.[1]

3. LibertyWorks supports the submissions of the appellants in the two proceedings[2] as to invalidity of the impugned provisions of the two Acts, but makes these submissions to

[1] See the affidavit of Andrew Cooper affirmed on 20 July 2018 (**Cooper affidavit**), filed in support of this application to appear as amicus curiae, for details about LibertyWorks.

[2] Although LibertyWorks seeks leave to intervene as amicus curiae only in proceeding H2 (and not also in proceeding M46), the legal issues are common between those two proceedings, and the Court has

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emphasise different matters or similar matters from another perspective. It also considers that the present case calls for clarification of important matters of principle regarding peaceful protest activity and the constitutionally implied freedom of political communication (**Freedom**) and it offers its assistance to the Court in relation to that.

4. LibertyWorks is concerned at the criminalisation of peaceful protesting activities brought about by the impugned provisions in the two Acts the subject of these two proceedings, and notes that this is the second case in less than a year in which this Court has been asked to scrutinise state-level legislation which directly or indirectly bans peaceful protest.[3]

10 5. LibertyWorks submits that the impugned provisions in both Acts (dealing with protest in a public space (Tasmania) or with communicating in a public space that might cause anxiety and distress in others (Victoria)) are constitutionally flawed:

   a) They impose a direct and substantial burden on the Freedom directed at protest or else at communication *per se* (that is, not as an incident of restraint), and are calculated *in effect* to eliminate political protest in respect of anti-abortion concerns.

   b) They do so in pursuit of a legislative object or end (in Victoria, preventing 'anxiety and distress') that is not just of secondary significance when compared to the high constitutional value underpinning the Freedom, but in fact is a
20 legislative object or end incompatible with the maintenance of the scheme of representative and responsible government for which the Constitution provides.[4]

6. With respect to the Victorian Act, many of the opposing submissions are at pains to argue that the burden is slight and the legislative end compelling.[5] Those submissions

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indicated that it anticipates the two proceedings will be set down for a joint hearing (no hearing date is yet set down for either proceeding).

[3] *Brown v Tasmania* (2017) 91 ALJR 1089 (**Brown**)

[4] *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 (**Lange**) at 567-568

[5] For example, see the *Submissions of the Attorney-General of the Commonwealth (Intervening)* (**CS**) dated 25 May 2018, at [5] ("Its burden is slight, and is readily justified as rationally advancing the legitimate (and compelling) objectives of protecting safety, wellbeing, privacy and dignity of persons accessing or providing lawful health services . . . " (emphasis added)), and as another example the *Annotated submissions of the Fertility Control Clinic (a firm) – Application to intervene, alternatively to be heard as amicus curiae* (dated 25 May 2018) (**FCCS**) at [15] ("Any burden on speech is slight and the justification for it is compelling." (emphasis added))

have it exactly backwards. Properly considered, the burden is substantial (as any restraint on the freedom to protest *a priori* must be) and the legislative end sought to justify the constraint is of *de minimus* counter-vailing public interest.

PART III: WHY LEAVE TO BE HEARD AS AMICUS SHOULD BE GRANTED

Legal principles

7. Distinct from an application to intervene, an application to appear as amicus need not demonstrate a 'substantial affection' (direct or indirect) of its legal interests arising from the proceedings. Rather, an application to appear as amicus must demonstrate to the Court a willingness to make submissions "on law or relevant fact which will assist
10 the Court in a way in which the Court would not otherwise have been assisted",[6] such that the Court can be satisfied that it will be significantly assisted by the submissions.[7]

8. Where the proceeding involves the possible constitutional invalidation of a statute, submissions concerning constitutional and legislative facts might more readily assist the Court given that the Court "is free also to inform itself from other sources," so as to ascertain those facts "as best it can".[8]

Application of legal principles to LibertyWorks

9. Firstly, as set out in the Cooper affidavit, LibertyWorks has acted, in its short life-span, to further the cause of the value of individual liberty in Australian society in relation to the *specific* issue of political communication (since its mission is all liberty) through
20 deliberate media-engagement, through the production of articles both internally and for external magazine-publication, through conducting petition-campaigns, and via submissions to parliamentary inquiries in relation to freedom of speech issues.

10. Secondly, in the Cooper affidavit it is stated that LibertyWorks would hesitate to advise an individual to stage a protest within a buffer zone of an abortion clinic (where such a protest would have maximum effect) in protest against the criminal law-backed censorship of anti-abortion protest activity within those zones, because so to do would place such an individual at a small but material risk of arrest of conviction. If correct,

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[6] *Levy v Victoria* (1997) 189 CLR 520 (**Levy**) at 604 (Brennan J)

[7] *Roadshow Films Pty Ltd v iiNet Limited* (2012) 248 CLR 37 at 39 [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ)

[8] *Re Day* (2017) 340 ALR 368 at [20]-[26] (Gordon J); *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142 (Brennan J)

it shows the wide-ranging effect on protest the introduction of buffer laws are bringing about, and the importance of the Court being fully apprised of their effect on protest activities.

11. Thirdly, LibertyWorks' submissions put arguments not directly made by the appellants or else made in a different way or from a different perspective or degree of emphasis. The appellants' primary focus is understandably on successfully appealing criminal conviction and penalisation; LibertyWorks' primary focus is bringing broader argument and constitutional fact to bear on the proceedings given the potentially far-reaching implications for location-centred protest activities and picketing or vigil-holding activities throughout Australia (which ought otherwise to be protected by the Freedom).

12. Finally, LibertyWorks' participation as amicus is likely to result in a more thorough and balanced consideration of the issues before the Court in circumstances where the appellants are met with opposition from not only the two respondents in each proceeding, but also the Attorney-Generals of five other polities (the Commonwealth and four of the six States not already parties), as well as (at current count) possibly three opposing amici curiae (should they be granted leave to appear).

Proposed submissions to be useful and different

13. LibertyWorks' submissions are set out in Part V. They do not repeat in substance the submissions of the appellants, which LibertyWorks otherwise adopts and supports. Confining itself to submissions that are useful and different, LibertyWorks addresses and expands on the following select issues, alternatively argued by the appellants:

    a) LibertyWorks makes submissions in support of the fact that the conduct for which the two appellants were convicted was not only political communication, but indeed orthodox protest activity.

    b) LibertyWorks makes submissions of constitutional fact regarding the orthodox protest nature of the conduct of anti-abortion protesters generally (given that other States are, or soon will be, introducing similar legislative protest bans as those the subject of these proceedings).

c) LibertyWorks makes submissions that the statutory provisions at issue criminalise the *content* of political speech, and are not just 'time, manner and place' restrictions.

d) LibertyWorks makes submissions that the statutory provisions, in effect, discriminate in its state censorship political viewpoints in relation to the political topic of abortion, and further, that *that was the explicit parliamentary intent*, as revealed both in the statutes themselves (via ordinary process of construction) and - especially - in the secondary materials contained in the Core Appeal Book **(CAB)**.

10 e) LibertyWorks makes submissions on the non-substantial, and indeed constitutionally incompatible and illegitimate, legislative ends said to justify the substantial and discriminatory burden imposed by the impugned legislation on the content of the political speech of a class of protesters (anti-abortion protesters) perhaps currently culturally-disfavoured.

PART IV: APPLICABLE PROVISIONS

14. The applicable statutory provisions are contained in the annexures to each of the two appellant's submissions.

a) The impugned provision in proceeding M46 is section 185D of the *Public Health and Wellbeing Act 2008* (Vic) **(Victorian Act)** (when read with section
20 185B for the definition of "prohibited behaviour", at paragraph (b))

b) The impugned provision in proceeding H2 is section 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) **(Tasmanian Act)** (when read with section 9(1) for the definition of "prohibited behaviour", at paragraph (b))

(Collectively, the **impugned provisions** in **the Acts**)

PART V: PROPOSED ARGUMENT

15. *Background to the legislative censorship movement*: Both the techniques of anti-abortion protest activity,[9] and the techniques of *legislative*[10] response thereto (bubble

[9] Munson, *The Making of Pro-life Activists: How Social Movement Mobilization Works* (2010) University of Chicago Press, at pages 85ff; Forbes, *Rise in 'anti-abortion protests' in England and Wales*, BBC News, available at: https://www.bbc.co.uk/news/health-34641228

and buffer zones),[11] derive from the 1990s in North America (Canada and the United States), and have now recently spread to Australia, and are beginning to emerge in the UK.[12]

16. *United States Supreme Court – current position on buffer zones:* In the United States, the Supreme Court in 2000 upheld the validity of a form of bubble zone legislation, but that decision must now be considered impliedly over-ruled at least in relation to its overlap with *McCullen v Coakley* 537 U.S. ___ (2014) (**McCullen**), and indeed in that later case at least three and possibly four justices would have explicitly over-ruled it. Despite its frequent reference in a number of the submissions in these proceedings,[13]
10 this Court would be cautious in citing for persuasive purposes a case of now fragile authority within its own jurisdiction.[14]

17. *The nature of anti-abortion protests:* While it can be accepted that not all communication about abortion is political communication,[15] the conduct engaged in

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[10] The reference to *legislative* zones around people (bubble) or clinics (buffer) is to distinguish bubble or buffer zones via *injunctions*, and it follows that cases dealing with injunctions can be of only limited persuasiveness to the Court in this case, despite being referenced in a number of opposing submissions, for example in the *Submissions of the Attorney-General the State of Victoria* (**VS**), dated 11 May 2018 at [46](2) and (3) – and it should also be noted as a precaution that, in reference to any Canadian jurisprudence sought to be relied on (*idem* at VS[46](1)), cases within that jurisprudential tradition (and in the US) rely or might eventually rely on constitutional values (such as equality of access – see Ginsburg J dissenting in *Gonzaeles v Carhart* 550 U.S. 124, 172 (2007)) which find no analogue in Australia's Constitution.

[11] Phelps, *Picketing and Prayer: Restricting Freedom of Expression outside Churches* (1999) 85 Cornell Law Review 271. See also the 1994 passing in the US of the *Freedom of Access to Clinic Entrances Act* (1994).

[12] The Economist Magazine, *Britain's first buffer zone against protests outside abortion clinics*, 12 April 2018 available at: https://www.economist.com/britain/2018/04/12/britains-first-buffer-zone-against-protests-outside-abortion-clinics

[13] For example, *VS*[46](4)

[14] Phillips, *The unavoidable implication of McCullen v Coakley: Protection against unwelcome speech is not sufficient justification for restricting speech in traditional public fora* (2015) 47 Connecticut Law Review 937; Tribe, *The Supreme Court Was Right to Allow Anti-Abortion Protests*, 26 June 2014, New York Times, available at: https://www.nytimes.com/2014/06/27/opinion/the-supreme-court-was-right-to-allow-anti-abortion-protests.html

[15] Examples such as those given in some of the opposing submissions are both hypothetically correct and widely beside the point given the facts and issues in the two cases before the Court: see for example the hypotheticals given in VS[31] and also the discussion in the Commonwealth's submissions at CS[10]-[11].

by the appellants was that; indeed, it was a form of orthodox protest activity, namely peaceful picketing or 'vigil'-keeping in a public space.[16]

a) Peaceful picketing/vigil-keeping in a public space is consistent with, and indeed often simultaneously involves approaching others to distribute information, and to try to engage them in conversation to change their opinions or actions.[17]

b) In addition to picketing/vigils, the history of protest also includes silent marches and other non-verbal conduct.[18] The definition of political protest is not confined to verbal communication:[19] *Levy* at 594-5 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-623, 625 (McHugh J), 638 (Kirby J)

10 c) Even if the content of the communication for which the appellants were convicted (and in the case of Ms Stubbs there is no evidence for that either way, not even inferentially[20]) involved no explicit political content, the fact of picketing/vigil-keeping itself is a politically communicative act.[21]

18. *Previous High Court cases on 'protest':* It is uncontroversial that picketing/vigil (being a form of protest) is a form of political communication protected by the Freedom, and extends to non-verbal protest: *Levy* at 622 and 625 (McHugh J)

19. Various judges of this Court have also indicated that a corollary of the Freedom might be a *limited* freedom of citizens peaceably to assemble in public spaces in order to communicate political information and ideas: *South Australia v Totani* (2010) 242

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[16] *Brown v. Louisiana*, 383 U.S. 131, 142 (1965) (the seminal 'vigil' case in the US); *Seven Hills v. Aryan Nations*, 667 N.E.2d 942, 945 (Ohio 1996) (A vigil of Holocaust survivors before the home of Nazi camp guard.)

[17] See the majority in *McCullen* at 22: "Respondents also emphasize that the Act does not prevent petitioners from engaging in various forms of "protest"—such as chanting slogans and displaying signs—outside the buffer zones. Brief for Respondents 50–54.That misses the point. Petitioners are not protestors. They seek *not merely* to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them." (Emphasis added – making it clear that the statement "Petitioners are not protesters" is to be read in context as "Petitioners are not [only] protesters.")

[18] Garrow, *Protest at Selma,* Yale University Press, 1978 (containing detailed description of the Dr King-led Selma to Birmingham marches)

[19] Hessler, *Where do we draw the line between harassment and free speech?: An analysis of hunter harassment law*, (1997) Vol 2 Animal Law, 129, 143ff (**Hessler**) (see the discussion of the hypothetical 'silent vigil')

[20] See *Appellant's Submissions* in M46 at [21]

[21] Austin, *How to Do Things With Words*, 2nd Edition (1976) Oxford University Press; Kunstler, *The Right to Occupy - Occupy Wall Street and the First Amendment* 39 Fordham Urban Law Journal 989 (2011-2012) at 993-999 ("Symbolic Speech"); *McCullen* (above) at 22

CLR 1 at [30]-[31] (French CJ); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 91 (Toohey J) and 116 (Gaudron J); *Mulholland v AEC* (2004) 220 CLR 181 at 225 (McHugh J), 277 (Kirby J)

20. The two cases currently before the Court are to be distinguished from those previous 'protest' cases in which (unlike the current cases – see below) the legislative end supporting the burden on the Freedom was held to be compatible with the maintenance of the scheme of representative and responsible government for which the Constitution provides:[22] *Levy* at 614-615, 619-620, 627 and 642-648; *Brown* at [132]

21. *International treaties:* Picketing/vigil-keeping in a public space is a form of protest
10 protected by international treaty to which Australia is a signatory, namely in Articles 19 [freedom of expression] and 21 [freedom of assembly[23]] of the *International Covenant on Civil and Political Rights*, which was ratified by Australia in 1980, and which obliges all levels of government within the Commonwealth.

22. *Analytic framework:* The impugned provisions in the Victorian and Tasmanian Acts impermissibly burden the Freedom in so far as it purports to proscribe (in the case of Victoria) communications that are reasonably likely to cause distress or anxiety (s 185D of the Victorian Act, as read with s 185B), and, in the case of Tasmania, protests in relation to terminations that can be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided (s 9(2)(b) of the
20 Tasmanian Act).

23. LibertyWorks adopts the submission of the appellant in proceeding M46 (at [27]) that the validity of the impugned provisions falls to be determined by reference to the test articulated in *McCloy v State of NSW* (2015) 257 CLR 168 (**McCloy**) at [2]-[4] as modified by *Brown* at [104].[24]

24. It is the submission of LibertyWorks that the answer to the first two questions found at [2B] of *McCloy* (the burden on the Freedom, and the legitimacy of legislative end)

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22 See also *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382 (a legitimate end of protecting public health and safety)

23 On the requirement for assembly to be peaceful, see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases and Materials and Commentary* (3rd ed) at [19.05]

24 See also the Commonwealth's submissions at CS[6]

dispose of the two cases now before the Court, such that the third question (the 'proportionality test') does not arise for consideration.

Assessing the burden

25. *Burden on content:* The Acts impose a *content* burden on the Freedom in that they specifically restrain political communication:[25]

    a) In the case of the Tasmanian Act that is evident on the face of the statute, since it locationally restrains in terms "protest" (which includes peaceful protest), which is an accepted form of political communication.

    b) In the case of the Victorian Act that is evident on the face of the statute, since it locationally restrains in terms "communicating" *per se*; that is, it restrains not an activity or conduct that may have a secondary impact on political communication, but restrains communicating itself (without any carve-out for political communicating).

        i) The legal and practical effect of the Victorian Act is therefore also locationally to prohibit protest.

26. *Locational restrictions are a substantial burden:* A majority in *Levy* acknowledged that locational restrictions on protest or political communications can limit the ability to protest to maximum effect: *Levy* at 609 (Dawson J), at 613-614 (Toohey and Gummow JJ), at 623-625 (McHugh J) and at 636 (Kirby J).

    a) This acknowledgement has been repeated by this Court: *Brown* at [191] (Gageler J), [258] (Nettle J)

    b) There is empirical evidence in the United States that locational protesting or picketing near abortion clinics has had a negative, statistically significant impact on the national rate of abortion.[26]

27. *Practical discriminatory effect:* It is the submission of LibertyWorks that, even though the Acts do not in terms target anti-abortion protesters, in their practical operation they

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[25] This distinguishes the Acts in these proceedings from that in *Brown* (where the terms, operation and effect of the Act there under consideration was on the *conduct* of protesters, not on the content of the protests: *Brown* [122] (Kiefel CJ, Bell and Keane JJ)

[26] Doan, *Opposition and Intimidation: The Abortion Wars and Strategies of Political Harassment*, University of Michigan Press 2009, at chapter 5

significantly impact that group and are calculated to have an especially 'chilling' effect on political communication in relation to anti-abortion concerns.[27]

28. Indeed, LibertyWorks submits that the secondary materials of both Acts amply reveal that the asymmetric targeting of anti-abortion protesters and protests was a legislatively intended effect of both Acts, as detailed (though for a different purpose) in the State of Victoria's own submissions: VS[12]-[27]

Illegitimacy and secondary significance of the legislative 'end' of the restraint

29. *Tasmania:* There is no - in terms - 'end' or 'purpose' in the Tasmanian Act in relation to the impugned provision of that Act.

10 30. Since the statute - in terms - directly restrains 'protest', or at least a class of protest (when it is able to be seen or heard by a person accessing an abortion clinic), as a matter of statutory construction[28] it is to be inferred that a purpose of the restraint is the elimination of a class of protest within the 'access zone'. That is not a legitimate purpose in the *Lange* sense.

31. LibertyWorks adopts the submissions of the appellant in the M46 proceedings at [50]-[58] that other discernible ends or purposes of the impugned provision are either not legitimate in the *Lange* sense, or else arguably legitimate in that sense, but insufficiently substantial.

32. *Victoria:* In the Victorian Act, the purpose of the impugned provisions is given in
20 terms, namely, "to protect the safety and wellbeing and respect the privacy and dignity of" people accessing, and employees working at, abortion clinics: s 185A of the Victorian Act. That stated purpose can be accepted as at least concerning the public interest (which is not the same as contending that it is legitimate in the *Lange* sense: *Monis* at [130] (Hayne J)).

33. Both cases before the Court involve peaceful protesting/picketing. Much is made in some submissions about the harassment and intimidation *some* picketing can have on people accessing abortion clinics.[29] Of course, what is harassment in the context of

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[27] *Brown* at [96] (Kiefel CJ, Bell and Keane JJ)

[28] The identification of the purpose or end of a burdening restraint on the Freedom is a matter of statutory construction: *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50]; *Monis v The Queen* (2013) 249 CLR 92 (**Monis**) at 147 [125]

[29] For example, see VS[14] and [22]

political protest might itself be a something more in the political eye of the beholder.[30] Nonetheless, to the extent there might be a genuine problem of harassment in some cases, such behaviour is picked up by other parts of section 185B: see sub-parts (a), (c) and (d) of the definition of "prohibited behaviour" in s 185D of the Victorian Act. Further, such cases would also be remediable under existing general or statutory law, which those provisions can be considered as buttressing: *Brown* at [548] (Gordon J).

34. The prohibition of that type of conduct *would* be consonant with the explicit object in s 185A of protecting the safety and wellbeing, and respecting the privacy and dignity, of persons accessing abortion clinics. But those provisions are not the impugned
10 provision. The impugned provision is sub-part (b) of the definition of "prohibited behaviour" in s 185D of the Victorian Act.

35. The State of Victoria at VS[26]-[27] contends that the impugned provision was required to be enacted because "the law as it existed at that time was not adequate to protect women and staff", which is an alternative way of saying that there was a need to regulate *otherwise peaceful and lawful conduct in a public space.*

36. To be clear, the impugned provision (sub-part (b)) is a provision criminalising *peaceful* conduct (assembly, communication and protest) that cannot be characterised under sub-parts (a), (c) and (d) of the definition of "prohibited behaviour" in s 185D of the Victorian Act. Although it is behaviour otherwise peaceful (and lawful[31]), if it might
20 lead to feelings or a state of mind on the part of someone accessing an abortion clinic of "distress or anxiety," that behaviour is now subject to criminal conviction and penalty.

37. It follows that the real object of the impugned provision is the protection of those accessing abortion clinics from experiencing "distress and anxiety". If "distress and anxiety" are meant in a psychologically clinical sense, then an argument could be had that such a purpose is significant in a public interest sense, and *might* be a legitimate purpose in the *Lange* sense (at least if those words were preceded by a qualifying word like "serious"[32]).

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[30] See Hessler article, above.

[31] *Fertility Control Clinic v Melbourne City Council* (2015) 47 VR 368

[32] *Monis* at 168-169 (Hayne J), 196-197 (Crennan, Kiefel and Bell JJ); *Coleman v Power* (2004) 220 CLR 1 at 54 [105] (McHugh J); 78-79 [199] (Gummow and Hayne JJ), 91 [238]-[239] (Kirby J); see also FCCS[13a] and [25], arguing for the colloquial construction (and therefore in support of the

38. But if those words are to be construed (as the Magistrate construed them[33]) in a colloquial or at least in a non-clinical or non-technical sense (in the sense, say – to give just one example of the range of emotions and psychological states that falls short of the seriousness required for clinical recognition - that a university student can be anxious about an immanently-released exam result, and distressed upon learning the result), then such a purpose is not merely insufficiently substantial, it is plainly illegitimate in the *Lange* sense.[34]

39. *Competing 'rights' in the public square:* The Freedom is not a personal right but an immunity that protects an individual's freedom from government restriction or prohibition and executive enforcement.[35] That immunity leaves open the protection of individual rights and freedoms by the common law.[36] At the risk of excessive Hohfeldianism,[37] a desire for linguistic clarity would convert a language of 'rights' of citizens when gathering in the 'public square',[38] that is, in public spaces like footpaths in this instance, into 'privileges' or 'freedoms', and such freedoms (not being rights in the strictest sense) can conflict, and often do conflict without the any (or any need for) state intervention.[39]

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40. For example, with reference to the cases currently before the Court, while pickets and vigils near abortion clinics may cause "distress and anxiety" to some of those seeking access to abortion clinics (that consequence indeed is one of the purposes of any

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Magistrate's construction in the criminal proceeding below) of the words "distress and anxiety", and differing from the construction of those words contended for by the State of Victoria in VS[60].

33 CAB[295]

34 *Monis* at 134 [74] (French CJ, Heydon J agreeing), 173-175 [214]-[223] (Hayne J)

35 *Brown* at [185] and the references therein (Gageler J)

36 For just one example, *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [5] (Simpson J); see also (for a summary of the common law and protests), Gotsis, *Protests and the Law in NSW*, Parliamentary Briefing Paper 07/2015, available at: https://www.parliament.nsw.gov.au/researchpapers/Pages/protests-and-the-law-in-nsw.aspx

37 Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal 16 (1913); see also Zines, *The High Court and the Constitution* (2015) (6th ed) at pp 585-586

38 O'Neill, *Disentangling the Law of Public Protest*, 45 Loyola Law Review 411 (1999) at 418ff ("The Public Forum Doctrine")

39 A person's 'right' (more accurately, a general law freedom) to smoke on a public footpath (whatever distress that causes another) can co-exist with another person's 'right' (more accurately, a general law 'freedom') to scold that smoker for the act of smoking. While state parliaments have regulated the act of smoking in public by – for example - creating 'buffer' zones around building-entrances in which smokers are barred from smoking, it does not need stating that protesting and smoking are not constitutionally-valued as similar activities.

protest, but especially of location-protests), the Court can judicially know (and in any event can infer from the evidence before it) that the fact of those seeking abortions can cause "distress and anxiety" on the part of those who gather to picket and make vigil.[40]

41. The Victorian and Tasmanian legislatures have chosen to privilege the feelings or states of mind of those accessing abortion clinics over the feelings and states of mind of those peacefully picketing abortion clinics. But if there must be a privileging, the Australian Constitution insists on the reverse privileging.

42. Constitutionally, the freedom to protest in the public space (within accepted and uncontentious bounds) is constitutionally privileged over the freedom to be able to
10 access abortion clinics free of (additional) feelings of "distress and anxiety".

PART VI: ESTIMATE OF TIME

43. If leave is granted, LibertyWorks would rely on these written submissions, and, if the Court feels it would be of additional assistance, on oral submissions (or no more than 15 minutes).

Date: 20 July 2018

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[40] See the Cooper affidavit at [16]