IN THE HIGH COURT OF AUSTRALIA

Case No. H3/2016

***BROWN & ANOR v TASMANIA* [2017] HCA 43; (2017) 91 ALJR 1089; 349 ALR 398**

Before: Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ.

Date of Judgment: 18 October 2017

Case Note

What forms of communication can be characterised as relevant discourse on matters of public importance for the purposes of the implied freedom of political communication recognised in the Commonwealth Constitution? How does a Court resolve the antinomy of the achievement of legitimate government objectives on the one hand and the protection of constitutional rights on the other?

The facts

Brown v Tasmania[1] involved a challenge to State legislation aimed at preventing protesters from undertaking activities on or near business premises. Dr Bob Brown, former leader of the Australia Greens, was protesting in the Lapoinya Forest in north west Tasmanian for the purpose of raising public and political awareness about logging in State forests. He was arrested and charged under the *Workplaces (Protection from Protesters) Act 2014* (Tas) (**Act**) after he refused to leave the area.

The principal question for determination in *Brown* was whether the Act was invalid because it impermissibly burdened the freedom of political communication implied in the Commonwealth Constitution.

[1] [2017] HCA 43; (2017) 91 ALJR 1089; 349 ALR 398 (***Brown***).

The legislation was ostensibly enacted to ensure that "protesters" did not cause damage or obstruct relevant business activities whilst carrying out "protest activities". A "protest activity" was defined as an activity that takes place on "business premises" or access areas in support of an opinion in respect of, relevantly, a political or environmental issue.[2]

On the day of his arrest, Dr Brown stood on a cleared road in the forest and called upon the relevant Minister to protect the trees. The police directed him to leave the area. He failed to move on and was arrested.

Dr Brown challenged the validity of the Act on the basis that it burdened the implied freedom of political communication. The implied freedom is recognised as being indispensable to the exercise of political sovereignty by the people of Australia because *inter alia* sections 7, 24 and 128 of the Constitution create a system of representative and responsible government where the people are given a free and informed choice as electors.[3]

The test for validity of laws that burdens the implied freedom of political communication

The implied freedom protects the free expression of political opinion, including peaceful protest.[4] However, it is not an absolute freedom and may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government.

In Australia, the only basis for invalidation of a law at the threshold is where it serves no legitimate purpose.[5] Tasmania submitted that the Act's legitimate purpose was to prevent people from damaging property connected with a business.[6] Whilst this was a discernible

[2] The definition of "business premises" applied to places where protests might affect activities which involved economic interests, including those of a government entity (in this case, Forestry Tasmania), and included "forestry land".

[3] *Lange v ABC* (1997) 189 CLR 520 at 557-562.

[4] *Levy v Victoria* (1997) 189 CLR 579. Whilst there is no separately recognised, free standing "freedom of association", it exists as an corollary of the freedom of political communication: *Tajjour v NSW* (2014) 254 CLR 508 at [95],[143],[244]; *Wainohu v New South Wales* (2011) 243 CLR 181 at [112].

[5] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568.

[6] *Brown v Tasmania* [2017] HCA 43 at [105] (Kiefel CJ, Bell & Keane JJ).

object of the legislation, an effect of the Act was also to stultify the effectiveness of protests and thus to burden the freedom of political communication.[7]

When faced with a law that burdens political communication in this way, the Court must test whether the burden can be justified in terms of pursuing a legitimate end by means compatible with the system of representative and responsible government.[8] The test has undergone modification from the time when it existed as a two-limb inquiry in *Lange v Australian Broadcasting Corporation.*[9] The relevant inquiry in *Lange* was expressed as follows:

(i) First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

(ii) Second, if the law effectively burdens that freedom, is the law 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.[10]

In *McCloy v New South Wales*, a majority of the Court addressed the formulation of the "reasonably appropriate and adapted" test in the second limb of the *Lange* formulation and introduced a "structured proportionality" analysis involving three stages: suitability (or rational connection), necessity, and adequacy of balance.[11] The majority in *McCloy* justified the introduction of proportionality testing on the basis that it was not enough for validity that the legislative provisions are compatible with the system of representative government, because if the freedom is impaired then the constitutional system of government will likely suffer. Thus, the validity of the provisions must also be justified. Proportionality testing was therefore a

[7] *Brown v Tasmania* [2017] HCA 43 at [118] (Kiefel CJ, Bell & Keane JJ); Tasmania conceded the Act imposed only a "slight burden" on political communication (at [105]).

[8] *Tajjour v New South Wales* (2014) 254 CLR 508 at [151] (Gageler J).

[9] (1997) 189 CLR 520; the test was subsequently modified in *Coleman v Power* (2004) 220 CLR 1; then *McCloy v NSW* (2015) 257 CLR 178, and again in *Brown*.

[10] In *Coleman v Power* (2004) 220 CLR 1, the second limb of the *Lange* test was modified so that the phrase "in a manner" replaced the phrase "the fulfilment of" in that limb: (eg) at [92] (McHugh J).

[11] *McCloy v NSW* (2015) 257 CLR 178 at [79] (French CJ, Kiefel, Bell & Keane JJ); The Court in *Lange*, however, had said that "there is little difference between the test of "reasonably appropriate and adapted" and the test of proportionality": at p.572, footnote 70; see also *Richardson v Forestry Commission* (1988) 164 CLR 261 at 310 (Gaudron J). The language of "appropriate and adapted" as a constitutional test had its origins in the decision of Marshall CJ in *McCulloch v Maryland* 17 US 316 at 421 (1819).

useful "tool of analysis for ascertaining the rationality and reasonableness of the legislative restriction".[12]

Brown, in turn, is notable principally because of the manner in which the Court grappled with the issue of how to subject the Act to proportionality testing.

Proportionality testing

From its origins in Europe, proportionality analysis has diffused throughout global legal systems to become a constitutional standard for rights adjudication.[13] Proportionality analysis in this sense is a doctrinal construct that reconciles principles which conflict or are in tension with other interests. Principles are norms that require realisation "to the greatest extent possible given the legal and factual possibilities".[14] The determination of the appropriate degree of satisfaction of one principle relative to the requirements of another is brought about by a process of balancing and optimisation.[15]

The notable exception to the global diffusion of proportionality analysis is the USA. The United States Supreme Court employs a system of tiered scrutiny whereby different levels of review are applied depending on the category of right or interest in question.[16] This categorical, rules-based approach to rights protection eschews the concept of balancing once the nature and scope of the right has been defined. Some rights are identified as fundamental, for example the protection of content-based political speech. Government measures which infringe such fundamental rights are subjected to "strict scrutiny" analysis. Government measures subjected to strict scrutiny analysis will be constitutional only "if they are narrowly tailored to further

[12] *McCloy v NSW* (2015) 257 CLR 178 at [68] (French CJ, Kiefel, Bell & Keane JJ).

[13] Specifically, the German Federal Constitutional Court: Eg., BVerfG Dec. 15, 1965, BVerfGE 19, 342 (348-49); Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review* (Groningen: Europa Law Publishing, 2013) at 91; see also A. Stone Sweet & J. Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73 for an account of the diffusion of proportionality analysis.

[14] Hence principles are optimisation requirements. By contrast, "rules" as norms are definitive commands (such as requirement to obey a speed limit).

[15] Robert Alexy, *A Theory of Constitutional Rights* (J. Rivers trans., Oxford University Press 2002) (1986) at p.50.

[16] The idea of a hierarchy of rights scrutiny springs from the decision in *US v Carolene Products Company* 304 US 144 at p.152, footnote 4 (1938) where it was suggested that the strong presumption of constitutionality that applied to legislation was not warranted when the legislation appeared on its face to violate a provision of the Bill of Rights, or restricted ordinary political processes, or was directed at discrete and insular minorities.

compelling governmental interests".[17] Less strict standards of review apply as if the underlying rights involved were arrayed on a sliding scale of importance.

As will be seen, four members of the Court in *Brown* applied a form of structured proportionality analysis analogous to the trans-substantive European-based framework.[18] Two members of the Court, however, applied a calibrated test which involved some of the features of the US-based categorical approach.

The approaches to structured proportionality testing in Brown

In *Brown*, the State of Tasmania submitted that *McCloy* should be re-opened and overruled to the extent that it required three stage proportionality testing.[19] A majority of the Court rejected that submission. However, the approach to structured proportionality taken in *McCloy* was further refined.

The plurality (Kiefel CJ, Bell & Keane JJ) and Nettle J applied the analytical framework adopted in *McCloy*, with some variation. Whilst it was accepted that the 'purpose' of the law must be compatible with the constitutionally prescribed system government, the testing of compatibility of the 'means' was deferred to a later stage of the test. The analysis of the measures the law adopts to achieve its purpose now feeds into question of whether the law is relevantly appropriate and adapted.[20]

Gageler J rejected proportionality testing. His Honour was of the view that the second stage of proportionality testing (necessity) could be too prescriptive, and the third stage (adequacy of balance) was, by contrast, too open-ended and provided no guidance as to how "the incommensurables to be balanced are to be weighted or as to how the adequacy of their balance is to be gauged".[21] Rather than an "all-encompassing algorithm", Gageler J advocated an analytical framework more redolent of the US approach, whereby the measure of the

[17] *Grutter v Bollinger* 539 US 306 at 326 (2003).

[18] *Brown v Tasmania* [2017] HCA 43 at [278] (Nettle J).

[19] *Brown v Tasmania* [2017] HCA 43 at [124] (Kiefel CJ, Bell & Keane JJ).

[20] *Brown v Tasmania* [2017] HCA 43 at [104], (Kiefel CJ, Bell & Keane JJ), [277] (Nettle J); *cf McCloy v NSW* (2015) 257 CLR 178 at [67] (French CJ, Kiefel, Bell and Keane JJ).

[21] *Brown v Tasmania* [2017] HCA 43 at [160] (Gageler J).

justification would need to be calibrated to the nature and intensity of the burden.[22] That is, the level of scrutiny may vary in intensity depending on whether it (eg) discriminates facially against persons engaged in political communication, as opposed to a blanket prohibition.[23]

As the Act discriminated between protesters and other persons, Gageler J was of the view that to be justified as reasonably appropriate and adapted to advance a legitimate purpose, the purpose of the Act needed to be "compelling" and its provisions had to be "closely tailored to the achievement of that purpose".[24]

Gordon J was also critical of proportionality testing. Her Honour noted that Sir Anthony Mason had described structured proportionality and the balancing that it entails as "a rather cumbersome edifice which at the end of the day, at the last step, delivers nothing more than a value judgment".[25]

Notwithstanding the criticisms, all judges (except Edelman J who did not deal with proportionality) rejected the application to re-open *McCloy* on the basis that proportionality analysis is not a test of validity, but rather exists as a tool of analysis that is not necessarily applicable in every case.[26]

The test for validity after Brown

Brown modifies the *Lange-Coleman-McCloy* test as follows:

(i) First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

[22] *Brown v Tasmania* [2017] HCA 43 at [164] (Gageler J).

[23] *Brown v Tasmania* [2017] HCA 43 at [205] (Gageler J).

[24] In the sense that the burden the provisions impose on political communication in pursuit of the purpose can be seen to be no greater than is reasonably necessary to achieve it*: Brown v Tasmania* [2017] HCA 43 at [205] (Gageler J); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 (Mason CJ).

[25] *Brown v Tasmania* [2017] HCA 43 at [430] (Gordon J) citing Sir Anthony Mason, "The use of proportionality in Australian constitutional law" (2016) 27 *Public Law Review* 109 at 121.

[26] *Brown v Tasmania* [2017] HCA 43 [125]-[131] (Kiefel CJ, Bell & Keane JJ), [159] (Gageler J), [290] (Nettle J), [473] (Gordon J).

(ii) Second, is the purpose of the law is legitimate (in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government)? This is called "compatibility testing".[27]

(iii) Third, is the law reasonably appropriate and adapted to advance that legitimate purpose (in a manner that is compatible with the constitutionally prescribed system of representative and responsible government)? This is called "proportionality testing".

The third question involves determining whether the restriction which the legislation imposes on the freedom is justified.[28] The question *may* be answered using a three-stage, structured proportionality test.[29] The structured proportionality test involve an analysis of whether the law is:

(a) Suitable - as having a rational connection to the purpose of the provision;

(b) Necessary - in the sense that there is no obvious and compelling alternative means of achieving the same purpose which has a less restrictive effect on the freedom; and

(c) Adequate in its balance - whether the extent of the restriction imposed by the law is outweighed by the importance of the purpose it serves. This criterion may ultimately require a value judgment.

If the law does not meet these criteria of proportionality testing, then the answer to question 3 will be 'no' and the law will exceed the implied limitation on legislative power.[30]

[27] In *Coleman v Power* (2004) 220 CLR 1, the second limb of the *Lange* test was modified so that the phrase "in a manner" replaced the phrase "the fulfilment of" in that limb: (eg) at [92] (McHugh J).

[28] *Brown v Tasmania* [2017] HCA 43 at [123] (Kiefel CJ, Bell & Keane JJ).

[29] Discussed in *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [37] (French CJ & Bell J).

[30] The second and third levels of proportionality testing necessarily involve qualitative or normative analysis. To apply these levels presupposes the identification of particular interests deemed worthy of protection from undue government regulation: Kirk, Jeremy, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21(1) *Melbourne University Law Review* 1 at 27.

The decision in Brown

As to question one of the test, six justices found that the law was a burden on political communication.[31] The police officers who arrested and removed Dr Brown were unable to correctly determine whether he was on business premises or in a relevant access area. As a result of this error, Dr Brown's opinions about logging were silenced.[32]

As to question two of the test, the majority found that Act was legitimate in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[33]

Although the purpose of the Act was found to have met the requirements of the compatibility test, the majority considered that the measures it adopted to achieve that purpose placed a burden on the freedom that required further justification. This directed the analysis to the third question: whether the Act was reasonably appropriate and adapted (that is, the proportionality stage of the calculus).

As to question three of the test, the majority found that the law was not reasonably appropriate and adapted to advance its legitimate purpose.[34] A notable feature of the Act was that it applied only to protesters. Others who remained on land where forest operations were taking place were not subject to the Act or its consequences.

A law which imposes a discriminatory burden typically requires a strong justification.[35] However, this does not mean the law will always be found to be unconstitutional. In *McCloy v NSW*, for example, the impugned legislation imposed caps on political donations made by certain groups such as property developers. That legislation, although discriminatory, was not considered to impose a substantial burden on the freedom of communication because its effects

[31] *Brown v Tasmania* [2017] HCA 43 at [95] (Kiefel CJ, Bell & Keane JJ), [199] (Gageler J), [270] (Nettle J), [396] (Gordon J).

[32] *Brown v Tasmania* [2017] HCA 43 at [91] (Kiefel CJ, Bell & Keane JJ); The Court eschewed resort to the "chilling effect" doctrine in US First Amendment jurisprudence: *Brown v Tasmania* [2017] HCA 43 at [151] (Kiefel CJ, Bell & Keane JJ), [262] (Nettle J), [457] (Gordon J).

[33] *Brown v Tasmania* [2017] HCA 43 at [102] (Kiefel CJ, Bell J and Keane J), [213] (Gageler J), [275] (Nettle J).

[34] *Brown v Tasmania* [2017] HCA 43 at [152] (Kiefel CJ, Bell J and Keane J), [233] (Gageler J), [295] (Nettle J), [442] (Gordon J).

[35] *McCloy v NSW* (2015) 257 CLR 178 at [222] (Gageler J); *cf* [119]-[122] (Kiefel CJ, Bell J and Keane J).

were indirect, whereas its direct effects served to enhance political speech by removing the risk of corruption and undue influence in State politics.

The fact that protesters were singled out under the Act was explained by the history of protests in Tasmania. The powers of arrest and the offences created were therefore directed at preventing harm to forest operations. However, some of the provisions of the Act had the effect of deterring protesters from being in certain areas on pain of arrest or penalty even though they did not present any threat of damage or disruption.

Keifel CJ, Bell & Keane JJ described measures adopted in the Act to deter protesters as effecting a "significant burden" on the freedom of political communication which went "far beyond those reasonably necessary for its purpose".[36] More generally, the Act was "likely to deter protest of all kinds and that is too high a cost to the freedom given the limited purpose of the Protesters Act".[37]

In the application of proportionality testing, the plurality found that the Act was not necessary (being the second stage of the proportionality test). This was because less restrictive cognate State forestry legislation existed[38], and there was no indication why that legislation had been ineffective to prevent damage or disruption to forest operations.[39] Thus there existed less restive means to achieve the same purpose.

Gageler J was of the view that the burden was "greater than is reasonably necessary to protect Forestry Tasmania" from conduct that seriously interfered with the carrying out of forest operations.[40] His Honour noted that the trigger for removal of a protester under the Act was the police officer's belief which, although reasonable, might be wrong. The removal would, however, still be lawful.[41] In those circumstances, his Honour was of the view that the exercise of discretion and the criminal consequences which flowed from that exercise went well beyond

[36] *Brown v Tasmania* [2017] HCA 43 at [118], [146] (Kiefel CJ, Bell J and Keane J).

[37] *Brown v Tasmania* [2017] HCA 43 at [145] (Kiefel CJ, Bell J and Keane J).

[38] *The Forest Management Act 2013* (Tas).

[39] *Brown v Tasmania* [2017] HCA 43 at [142] (Kiefel CJ, Bell J and Keane J).

[40] *Brown v Tasmania* [2017] HCA 43 at [232] (Gageler J).

[41] *Brown v Tasmania* [2017] HCA 43 at [225] (Gageler J).

protecting the operations of Forestry Tasmania and "could not even be described as using a blunt instrument to achieve that purpose".[42]

Unlike the plurality, Nettle J did not conclude that the Act was unnecessary for the purposes of the second stage of the proportionality test.[43] His Honour went into the final stage of proportionality testing and assessed whether the Act was adequate in its balance.

Nettle J was of the opinion that the burden was "grossly disproportionate" to the achievement of the stated purpose of the legislation[44]. As was the case with Gageler J, Nettle J was of the view that the breadth of the provisions of the Act placed the freedom to lawfully protest on forestry land "at the mercy of police officers' attempts to apply the Protesters Act and thereby risk the free exchange of communication on the undoubtedly political issue of the environment".[45] On this basis, Nettle J held that the impugned sections of the Act were not appropriate and adapted to the legitimate purpose of ensuring that protesters did not hinder the carrying out of forest operations.[46]

Gordon J dissented in part. Her Honour found that, save for once section of the Act, the impugned provisions were justified as a reasonable pursuit of a legitimate end, namely to protect the property of businesses from conduct that hindered or obstructed business activity or caused damage on business premises.[47] The section which stood in a different category was that which provided that a person must not enter premises within four days after having been directed by a police officer to leave. Why there was a four-day time limit imposed was not apparent, and the prohibition was imposed irrespective of what the person intended to do by way of conduct in the area. Her Honour therefore found that the section did not prohibit conduct for a legitimate purpose other than the suppression of political communication.[48]

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[42] *Brown v Tasmania* [2017] HCA 43 at [228] (Gageler J).

[43] *Brown v Tasmania* [2017] HCA 43 at [289] (Nettle J).

[44] *Brown v Tasmania* [2017] HCA 43 at [295] (Nettle J).

[45] *Brown v Tasmania* [2017] HCA 43 at [294] (Nettle J).

[46] *Brown v Tasmania* [2017] HCA 43 at [295] (Nettle J).

[47] *Brown v Tasmania* [2017] HCA 43 at [425] (Gordon J).

[48] *Brown v Tasmania* [2017] HCA 43 at [440]-[442] (Gordon J).

Edelman J dissented. His Honour considered that "it is at least arguable" that the conduct of protesting on business premises could be unlawful as trespass, or by way of the tort of causing loss by unlawful means.[49] On this basis, his Honour found that no burden was imposed by the Act because the consequences imposed by the legislation operated upon independently unlawful conduct. The constitutional area of immunity from legal control did not, in Edelman J's view, extend to persons whose conduct was independently unlawful.[50]

Conclusion

The freedom of political communication does not confer a personal right.[51] It operates only to the extent necessary for the effective operation of the system of representative and responsible government established by the Constitution and as a limitation on legislative and executive power. However, as was seen in *Brown*, legislation which unjustifiably impacts upon a person's ability to engage in political communication or government protests may be invalidated on constitutional grounds.

Brown is an important decision as it modifies the test used to assess the legitimate restrictions that can be placed on constitutional guarantees. The analytical methodology used to balance a legitimate end with the means used to achieve that end remain a matter of some disagreement between the members of the Court. However, a clear majority has now emerged that has embraced structured proportionality as the appropriate doctrinal framework for evaluating legislation which effects a burden on a constitutional right.[52]

Thomas J. Dixon
State Chambers
20 March 2018

[49] *Brown v Tasmania* [2017] HCA 43 at [554] (Edelman J).

[50] *Brown v Tasmania* [2017] HCA 43 at [567] (Edelman J) citing *Lange v ABC* (1997) 189 CLR 520 at 560.

[51] *Brown v Tasmania* [2017] HCA 43 at [262] (Nettle J); [465] (Gordon J).

[52] *McCloy v NSW* (2015) 257 CLR 178 at [74] (French CJ, Kiefel, Bell & Keane JJ).