Ingmar Duldig and Jasmyn Tran***

PROPORTIONALITY AND PROTEST: *BROWN V TASMANIA* (2017) 261 CLR 328

I Introduction

The special case of *Brown v Tasmania* required the High Court of Australia to consider the constitutional validity of the *Workplaces (Protection from Protesters) Act 2014* (Tas) ('*Protestors Act*'), which enacted numerous anti-protesting provisions in relation to forestry land in Tasmania.[1] The plaintiffs, Dr Bob Brown and Ms Jessica Hoyt, contended that numerous provisions impermissibly burdened the implied freedom of political communication, and were therefore invalid. The majority[2] found all the impugned provisions invalid, whereas Gordon J partially dissented in finding only one provision invalid, and Edelman J fully dissented. The High Court was presented with an opportunity to clarify the relevant test for validity in implied freedom cases, particularly the relevance of structured proportionality testing as established in *McCloy v New South Wales*.[3] The case also presented the first opportunity in 20 years for the High Court to thoroughly examine how and in what contexts the implied freedom protects political communication that takes the form of protest. Conclusively, the test for validity remains the test established in *Lange v Australian Broadcasting Corporation*,[4] as restated, with a slim majority affirming proportionality testing as a viable analytical tool. Justice Gageler and Justice Gordon voiced reservations and concerns about proportionality testing, thus diminishing the ability for *Brown* to establish strong authority on the matter. Whether proportionality testing is suitable to the Australian constitutional system remains contested and is likely to be subject to continuous scrutiny. Meanwhile, the decision confirms that protest and physical assembly are protected by the implied freedom, although does not entirely explain when the freedom is enlivened.

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* Student Editor, *Adelaide Law Review*, University of Adelaide.

** Student Editor, *Adelaide Law Review*, University of Adelaide.

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1 (2017) 261 CLR 328 ('*Brown*').

2 Chief Justice Kiefel, Bell and Keane JJ delivered a joint judgment, and Nettle and Gageler JJ each delivered separate judgments.

3 (2015) 257 CLR 178 ('*McCloy*').

4 (1997) 189 CLR 520 ('*Lange*').

II Factual Background

The plaintiffs, Dr Bob Brown and Ms Jessica Hoyt, were at different times present in the Lapoinya Forest to protest and raise public awareness of logging. Both were directed to move by police who believed they were protesting in an area where doing so was prohibited by the *Protestors Act*. They were subsequently arrested and charged: Dr Brown was charged under s 8(1), while Ms Hoyt was charged under s 6(4). Although the charges were later dropped because of a lack of evidence that the plaintiffs had actually entered a prohibited area (and thus they were not in fact ever subject to the *Protestors Act*), the validity of the *Protestors Act* was challenged on the ground that it impermissibly burdened the implied freedom of political communication.

A *The Challenged Provisions*

A protestor is defined by the *Protestors Act* as a person engaging in a 'protest activity', on 'business premises' or in a 'business access area in relation to business premises', in the furtherance of a specified issue.[5] 'Business premises' includes any forestry land premises declared to be 'permanent timber production land' under the *Forest Management Act 2013* (Tas) ('*FMA*') where 'forest operations', including planting trees, quarrying, burning off and land clearing, are carried out.[6] A 'business access area' is land 'outside business premises', such as a footpath or road, that must be traversed to access the entrance or exit to a business premise.[7]

Section 6 prohibits any conduct that 'prevents, hinders or obstructs the carrying out of a business activity' or hinders access to an entrance or exit of the business premises or business access area if the protestor had actual or imputed knowledge that the action would have that effect.[8] Police officers have wide powers to direct a person or group to leave,[9] or physically remove them,[10] if the police officer 'reasonably believes' they are conducting protest activities in business premises or business access premises. The police have powers of arrest under s 13(1). Section 8(1) provides that a person must leave a business premises after being directed by a police officer, and must not re-enter that premises for four days. Part 4 deals with penalties.

While the constitutional validity of the *FMA* was not questioned, an understanding of its provisions was relevant to the question of the validity of the *Protestors Act*.[11]

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5 *Protestors Act* s 4.

6 Ibid ss 3, 5.

7 Ibid s 3.

8 Ibid ss 6(2)–(3).

9 Ibid ss 11(7)–(8).

10 Ibid s 13(3).

11 See *Brown* (2017) 261 CLR 328, 343–46 [18]–[31] (Kiefel CJ, Bell and Keane JJ), 443–49 [358]–[376] (Gordon J), 481–82 [490] (Edelman J).

Under the *FMA*, a 'forestry manager' can, by issuing verbal notices or erecting signs, designate an area as being prohibited from public entry.[12]

B *The Issues Before the High Court*

The defendant abandoned their challenge to the plaintiffs' standing.[13] Consequently, the primary issue before the High Court was whether the *Protestors Act* impermissibly trespassed on the implied freedom. This required the High Court to engage with the question of what the correct test for a breach of the implied freedom is, and in what contexts the implied freedom applies to assembly and protest.

III The Decision

By a 5:2 majority, the High Court held that numerous provisions,[14] including those mentioned above, were invalid. In reaching this conclusion, the Court diverged in its application of the restated implied freedom test.

A *The Implied Freedom Test*

In the absence of express individual rights, the High Court has implied a freedom of political communication from the structure of the Constitution, consistent with the maintenance and preservation of representative and responsible government.[15] The implied freedom is not an individual right nor is it absolute, but rather operates as a limit on legislative power.[16] A two-limb test was developed in *Lange*,[17] further refined in *Coleman v Power*,[18] to analyse whether a law impermissibly burdens the implied freedom. The first limb of the test was restated in *McCloy*:

> 1. Does the law effectively burden the freedom in its terms, operation or effect?
>
> If 'no', then the law does not exceed the implied limitation and the inquiry as to validity ends.[19]

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12 *FMA* ss 9, 21, 22, 23.

13 Tasmania, 'Submissions', Submission in *Brown v Tasmania*, H3/2016, 21 March 2017, [2].

14 *Protestors Act* ss 6(1)–(4), 8(1), 11(1)–(2), 11(6)–(8), 13, pt 4.

15 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 *('ACTV')*; *Nation Wide News v Wills* (1992) 177 CLR 1. See also *Lange* (1997) 189 CLR 520.

16 See, eg, *ACTV* (1992) 177 CLR 106, 150; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 125, 149, 162; *Lange* (1997) 189 CLR 520, 560; *Unions NSW v New South Wales* (2013) 252 CLR 530, 551, 554 *('Unions NSW')*; *McCloy* (2015) 257 CLR 178, 202.

17 (1997) 189 CLR 520, 567.

18 (2004) 220 CLR 1.

19 *McCloy* (2015) 257 CLR 178, 193–94 [2] (French CJ, Kiefel, Bell and Keane JJ).

The second limb has been subject to greater controversy, exacerbated by the majority judgment in *McCloy,* which imported a three-step proportionality methodology requiring analysis of suitability, necessity and adequacy in balance.[20] The reformulation was later critiqued for altering the 'traditional formulation',[21] thus *Brown* provided the High Court with an opportunity to clarify its position.

The plurality accepted the Attorney-General's invitation[22] to restate the latter part of the *Lange* test adopted by the majority in *McCloy*:[23]

> The commencing words of Questions 2 and 3 stated in *McCloy* should read:
>
> 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?[24]

In restating the test, the plurality clarified that compatibility testing of the purpose occurs prior to compatibility testing of means, which is incorporated in the later analysis of whether the law is appropriate and adapted.[25]

The submission by the Attorney-General for Queensland (intervening) that proportionality testing was not appropriate in Australia, and that *McCloy* should be reopened, was not accepted.[26] Instead, the plurality and Nettle J confirmed the use of proportionality testing as a useful *tool*, not a *test*, and affirmed that the *Lange* test, as restated, remains the core test in assessing validity.[27]

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20 Ibid 193–4 [2].

21 See *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 122 [294] (Gordon J).

22 Attorney-General (Cth), 'Annotated Submissions of the Attorney-General for the Commonwealth (Intervening)', Submission in *Brown v Tasmania*, H3/2016, 28 March 2017, 8 [26].

23 *McCloy* (2015) 257 CLR 178, 193–94 [2] (French CJ, Kiefel, Bell and Keane JJ).

24 *Brown* (2017) 261 CLR 328, 363–64 [104].

25 Ibid. Reference to 'responsible government' disappeared from the test as restated in *McCloy* (2015) 257 CLR 178*,* but was re-inserted by the plurality in *Brown*: at 363–64 [104].

26 Attorney-General (Qld), 'Annotated Submissions of the Attorney-General for the State of Queensland (Intervening)', Submission in *Brown v Tasmania,* H3/2016, 28 March 2017, 4 [12].

27 *Brown* (2017) 261 CLR 328, 368–69 [123]–[127] (Kiefel CJ, Bell and Keane JJ), 416–25 [277]–[295] (Nettle J).

B *The Validity of the Protesters Act*

1 *The Plurality*

The joint judgment took the defendant to have accepted that the law burdens the freedom.[28] In affirming the *McCloy* proportionality methodology, the plurality engaged in the sequential analysis of suitability, necessity and adequacy in balance; however, the plurality concluded their analysis prior to reaching the final, and most controversial, step in the inquiry. As s 8 significantly diverged from the purpose of the *Protestors Act* by focusing solely on deterring the conduct of protesters,[29] and s 11 operated as a 'blanket exclusion', both provisions failed the test of suitability.[30] Section 6 and the remaining provisions passed the test of suitability, but failed the test of necessity,[31] which required consideration of 'alternative, reasonably practicable, means of achieving the same object' in a less restrictive way.[32] After comparing the operation of the *Protestors Act* with the pre-existing legal framework, namely the *FMA*, their Honours held that the *Protestors Act* 'operates more widely than its purpose requires' and was therefore not necessary.[33] The vagueness of the legislation was crucial to this finding. Due to the ambiguities inherent in the practical determination of where 'business premises' and 'business access areas' begin and end, their Honours held that it was possible for police officers to mistakenly remove lawful protestors who had not in fact entered land covered by the *Protestors Act*.[34] In *Brown*, it was not contested that both plaintiffs had been wrongfully arrested by police officers who mistakenly thought the plaintiffs were on land covered by the *Protestors Act*.[35]

2 *Justice Nettle*

Justice Nettle has previously refrained from having to 'delve into strict proportionality'.[36] However, in this instance, after determining the provisions to be both suitable and necessary,[37] his Honour concluded that the provisions were invalid on the basis that they failed the test of adequacy in balance. Setting a high threshold for whether a law was inadequate in balance, Nettle J noted that a provision that is both suitable and necessary should not be deemed inadequate in balance unless its burden is '"grossly disproportionate" to, or as otherwise going "far beyond", what can reasonably be

28 Ibid 359–60 [89] (Kiefel CJ, Bell and Keane JJ).

29 Ibid 371 [135].

30 Ibid 371 [135]–[136].

31 Ibid 371–73 [138]–[146].

32 Ibid 371–72 [139].

33 Ibid 372–73 [140]–[146].

34 Ibid 355–56 [73].

35 Ibid 360–61 [91].

36 *McCloy* (2015) 257 CLR 178, 259 [222].

37 *Brown* (2017) 261 CLR 328, 418–22 [281]–[289].

conceived of as justified in the pursuit of the legitimate purpose.'[38] Applying this test, Nettle J concluded the impugned provisions collectively provided 'very broad-ranging and far-reaching means',[39] which created a burden 'grossly disproportionate to the achievement of the stated purpose of the legislation'.[40] Given the interlinked nature of the provisions, severance was not an option.[41]

3 *Justice Gageler*

Justice Gageler ultimately found the provisions invalid, reaching this conclusion without recourse to proportionality testing. After characterising the burden as 'direct, substantial and discriminatory',[42] his Honour reiterated previous sentiments that the 'level of scrutiny appropriate' for a law that imposes a burden on the implied freedom lies along a 'spectrum'.[43] In the present case, Gageler J held that the provisions required 'very close scrutiny' as they 'operate in their terms to target action engaged in for the purpose of political communication' and impose a 'significant practical burden'.[44] Justice Gageler considered that the 'requisite analysis' involved examination of whether the impugned provisions had a 'compelling purpose' followed by an 'examination of whether the burden they impose on political communication in pursuit of such a purpose might be justified as no greater than is reasonably necessary to achieve such a purpose'.[45] His Honour found the provisions both narrower and broader than their legitimate purpose: the 'underinclusiveness' of ss 6 and 8, the immediate criminal consequence of ss 8(1) and 6(4), and the broad police discretion in ss 11 and 13.[46] Conclusively, the burden was 'greater than is reasonably necessary' and in fact 'nothing short of capricious'.[47]

4 *Justice Gordon*

Justice Gordon held that the provisions (save for s 8(1)(b)) were valid, resisting the adoption of strict proportionality testing. Consequently, Gordon J found it 'difficult to see how the provisions are not reasonably appropriate and adapted.'[48] Therefore, her Honour held that it was 'not necessary (or helpful) to consider' the tests of necessity

38 Ibid 422–23 [290], quoting *Davis v Commonwealth* (1988) 166 CLR 79, 99–100; *Nation Wide News v Wills* (1992) 177 CLR 1, 78, 101–2; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 324, 340.

39 *Brown* (2017) 261 CLR 328, 423–24 [292].

40 Ibid 425 [295].

41 Ibid 425–26 [296]–[297].

42 Ibid 389 [199].

43 Ibid 389–90 [201], citing *Tajjour v New South Wales* (2014) 254 CLR 508, 580 [151].

44 *Brown* (2017) 261 CLR 328, 390 [203].

45 Ibid 391 [206].

46 Ibid 394–97 [220]–[232].

47 Ibid 396–97 [230]–[232].

48 Ibid 464 [426].

or adequacy in balance.[49] Justice Gordon further warned that elevating 'necessity' and 'adequate in balance' as 'determinative' tests would mark 'a departure from the existing stream of authority'.[50]

Regarding the validity of the *Protestors Act*, Gordon J found that while the laws were directed specifically to protestors, the sections (other than s 8(1)(b)) only applied to conduct that was already unlawful. Justice Gordon focussed on the powers of the Forest Manager under the *FMA*, as well as the common law of nuisance and trespass.[51] Her Honour held that any protest prohibited by the *Protestors Act* would already either be unlawful under the *FMA*, or would amount to trespass on Crown land.[52] Justice Gordon therefore held that the laws were appropriate and adapted to serve a legitimate purpose. Additionally, in contrast to the opinion of the majority, Gordon J stated the potential misapplication of the provisions by police officers and the difficulty in identifying the geographical bounds of the *Protestors Act* was a matter of construction and application, therefore not relevant to the inquiry as to whether the *Protestors Act* is invalid for impermissibly burdening the implied freedom.[53]

In contrast, Gordon J held that s 8(1)(b) lacked an object compatible with the implied freedom. As s 8(1)(b) prohibits a person from entering a 'business access area' regardless of what they intended to do, the provision did not prohibit conduct that was already unlawful.[54] Further, the draconian nature of the penalties meant the provision was not appropriate and adapted to achieving any constitutionally permissible purpose.

5 *Justice Edelman*

Refraining from participating in the debate surrounding proportionality testing altogether, Edelman J considered the provisions valid in their entirety after engaging in a process of statutory interpretation.[55] Justice Edelman held that 'business access areas' and 'business premises' are to be construed narrowly as areas either marked by 'signs, barriers, or other notices prohibiting entry' or subject to an oral notice by a Forest Manager exercising their powers under the *FMA*[56]. On this construction, anyone entering 'business access areas' or 'business premises' to conduct a protest would already be criminally liable for doing so under the *FMA*. In this way, his

49 Ibid 464 [427]–[428].

50 Ibid 478 [479].

51 Ibid 451 [379].

52 Ibid 443 [357].

53 Ibid 428–29 [307], 442–43 [356], 458–59 [408]. This opinion was echoed by Edelman J: at 488 [509].

54 Ibid 429 [310].

55 Ibid 480–82 [487]–[492], 488–502 [510]–[555].

56 Ibid 481–82 [490]; see *FMA* ss 21, 22, 23.

Honour dissented as to the interpretation of the *Protestors Act* by the majority of the Court.

Justice Edelman advocated that the fundamental role of Australian Courts is to construe legislation and engage in methods of statutory interpretation to resolve issues of uncertainty and vagueness.[57] As such, his Honour reiterated that the United States doctrine of vagueness has no equivalent in Australian constitutional law.[58]

IV Comment

The decision in *Brown* has implications on both a theoretical and practical level. The High Court's engagement, or lack thereof, with the analytical tool of strict proportionality in implied freedom cases was illuminated in the respective judgments. Likewise, while the decision confirms that the implied freedom protects political communication that takes the form of protest, the potential limits on the operation of the implied freedom in this context remain uncertain.

A *Structured Proportionality*

Incorporating proportionality testing into cases involving the implied freedom has been applauded for enhancing transparency, and providing 'welcome development' within an area 'plagued by confusion'.[59] Proportionality has a long history of relevance in the law, with fundamental developments galvanised by international scholars and the German constitutional system.[60] However, whether it is suited to Australia's constitutional context is debatable.

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57 *Brown* (2017) 261 CLR 328, 479–81 [484]–[487].

58 Ibid 486–88 [505]–[509]. See also ibid 469–70 [447]–[448] (Gordon J), 373–74 [147]–[151] (Kiefel CJ, Bell and Keane JJ).

59 Shipra Chordia, 'Proportionality and McCloy v New South Wales: Close but Not Quite?' on Australian Public Law (1 March 2016) <https://auspublaw.org/2016/03/proportionality-and-mccloy/>; see also Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27 *Public Law Review* 109, 123.

60 For a summarised history of the development of proportionality see Justice Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 86–8. The development of strict proportionality is often attributed to influential jurist, Aharon Barak: see Mason, above n 59, 111. For Aharon Barak's seminal work, see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Doran Kalir trans, Cambridge University Press, 2012) [trans of: מידתיות במשפט - הפגיעה בזכות החוקתית והגבלותיה [Proportionality in the Law: The Violation of the Constitutional Right and its Restrictions] (first published 2010)].

1 *A Different Constitutional Context*

Whilst proportionality tests have assumed a useful place in other areas of Australian law including criminal law and sentencing theory,[61] Australia has refrained from elevating proportionality testing, particularly strict proportionality, to the status of a constitutional principle.[62] Justice Gageler in the present case described it as '*a tool* of analysis, not [a] constitutional *principle*.'[63] His Honour has previously expressed that he is 'not convinced that one size fits all' in that the 'standardised' tests of suitability and necessity would not be appropriate to all laws which impose a restriction on the implied freedom.[64] This concern was echoed in the present case by Gordon J, who further stated that the approach 'does not reflect the common law method of legal reasoning'.[65]

The High Court has acknowledged that this analytical method 'has been developed and applied in a significantly different constitutional context.'[66] Justice Gordon elaborates upon this reservation, noting proportionality testing has been employed in countries that have express individual rights; however, Australia does not have a bill of rights.[67] This point was also reflected in the Attorney-General for Queensland's submission that proportionality testing is 'not an apt test' given Australia does not have 'prescribed human rights'.[68] As noted above, the implied freedom is neither an absolute nor individual right, and these foundational propositions demonstrate the 'importance of adopting criteria that are "sufficiently focused adequately to reflect the reasons for the implication of the constitutional freedom"'.[69] Justice Gordon cautioned that recognising the 'balancing' stage of proportionality as the 'most important', as is the case in some international jurisdictions,[70] would 'mark a fundamental shift in the nature of the inquiry' in Australia.[71]

[61] See Kiefel, above n 60, 85.

[62] Compared to other constitutional countries including Canada, New Zealand and Germany: Kiefel, above n 60, 86.

[63] *Brown* (2017) 261 CLR 328, 376 [158] (Gageler J) (emphasis added).

[64] *McCloy* (2015) 257 CLR 178, 235 [142].

[65] *Brown* (2017) 261 CLR 328, 477 [476] (Gordon J), citing *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 73–4 [109] (Gageler J).

[66] *Brown* (2017) 261 CLR 328, 466 [433] (Gordon J), quoting *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 199 [38] (Gleeson CJ) ('*Mulholland*').

[67] *Brown* (2017) 261 CLR 328, 466 [433].

[68] Attorney-General (Qld), 'Annotated Submissions of the Attorney-General for the State of Queensland (Intervening)', Submission in *Brown v Tasmania,* H3/2016, 28 March 2017, 2 [6].

[69] *Brown* (2017) 261 CLR 328, 466 [433] (Gordon J), quoting *McCloy* (2015) 275 CLR 178, 236 [145] (Gageler J).

[70] *McCloy* (2015) 257 CLR 178, 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

[71] *Brown* (2017) 261 CLR 328, 467 [437].

2 *Importing Value Judgments*

The element of 'value judgment' which strict proportionality necessarily encompasses was of significant concern to Gordon J.[72] Her Honour was of the mind that 'it remains unclear just *how* the value judgments that are a part of the balancing task described in *McCloy* are to be made'.[73] Arguably, the lack of guidance is simply due to the modernity of this analytical tool in implied freedom cases — it has only recently been afforded legitimacy in *McCloy* and *Brown*. In the present case, Nettle J is the only member of the Court to engage with applying the test of strict proportionality, and thus provides the only authoritative guidance as to its application.[74] Given the common law 'proceeds incrementally' it is realistic that 'one should not expect a single judgment to provide all the answers.'[75] However, in absence of such guidance, value judgments 'risk overstepping the boundaries of [the Court's] supervisory role', contrary to the very value the implied freedom seeks to protect — representative and responsible government.[76]

3 *An Inevitable Test?*

Departure from the original *Lange* test in favour of a test incorporating proportionality was arguably 'inevitable'.[77] The High Court has previously stated consideration of what is 'appropriate and adapted' is synonymous with an inquiry of proportionality, suggesting its adoption is not a novel idea.[78] Further, scholars have argued the second limb of the *Lange* test is 'conceptual[ly] equivalent' to a proportionality test, thus the Court in both *McCloy* and *Brown* have expressed a previously implicit test[79] — proportionality is 'in-built' to the very concept of 'appropriate and adapted'.[80] The test

72 Ibid 464–68 [429]–[438].

73 Ibid 465–66 [432] (emphasis added).

74 Ibid 422–25 [290]–[295].

75 Murray Wesson, 'McCloy, Proportionality and the Doctrine of Deference' on Australian Public Law (3 March 2016) <https://auspublaw.org/2016/03/mccloy-proportionality-and-the-question-of-deference/>.

76 *Brown* (2017) 261 CLR 328, 466 [434] (Gordon J).

77 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 671.

78 *Lange* (1997) 189 CLR 520, 567 fn 272: the High Court held there was 'little difference between the test of "appropriate and adapted" and the test of proportionality.' Chief Justice Gleeson considered 'whichever expression is used, what is important is the substance of the idea it is intended to convey': *Mulholland* (2004) 220 CLR 181, 197 [32].

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

80 Mason, above n 59, 114.

of proportionality as adopted in *McCloy* was justified humorously by French CJ and Bell J in *Murphy v Electoral Commissioner*, where their Honours stated 'the adoption of that approach in *McCloy* did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law' but rather provided 'a mode of analysis applicable to some cases … but not necessarily all'.[81] The High Court in the present case reflects a similar qualification that proportionality testing is merely a tool of analytical assistance, with the ultimate test of validity still being the *Lange* test as restated.[82]

Arguably, the very *recognition* of the implied freedom assumes that 'value-laden reasoning' will eventually result.[83] The freedom was implied from the structure of the Constitution to preserve representative and responsible government, which are core values of Australian democracy. Therefore, at least the analytical methodology of proportionality testing ensures value judgments are defined, confined and 'rule-like'.[84] Perhaps the High Court should focus on developing guidelines and criteria for applying proportionality in the Australian context so as to address the concerns of Gordon and Gageler JJ. This was a recommendation foreshadowed by Justice Kiefel (as her Honour then was) when she proposed 'greater acceptance of proportionality as a general principle in constitutional law [might arise] if it is seen as applied to the attainment of something approaching a constitutional objective'.[85]

B *Implications for Protest*

While the decision in *Brown* has theoretical implications with respect to the *Lange* test, the practical ramifications of the decision in terms of the protection of protest must also be considered.

1 *Protest and Assembly as Political Communication*

The decision of where political communication will be articulated is itself often highly political.[86] The location of a protest may be closely connected to its message, to the extent that physical assembly itself constitutes political communication.[87] Therefore, free assembly is often crucial for political communication which takes the form of protest to be effective.[88] Protests use locations of political significance as a

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81 (2016) 261 CLR 28, 52–53 [37].

82 *Brown* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ).

83 Stone, above n 77, 708.

84 As suggested by Stone: ibid 704.

85 Kiefel, above n 60, 92–3.

86 See John Parkinson, *Democracy and Public Space: The Physical Sites of Democratic Performance* (Oxford University Press, 2012) 147.

87 *Brown* (2017) 261 CLR 328, 383 [182] (Gageler J).

88 See, eg, Daniel McGlone, 'The Right to Protest' (2005) 306 *Alternative Law Journal* 274; John Eldridge and Tim Matthews, 'The Right to Protest after *Brown v Tasmania*' on Australian Public Law (2 November 2017) <https://auspublaw.org/2017/11/the-right-to-protest-after-brown-v-tasmania/>.

platform for communication.[89] Given that there is no general right to participate in a protest at common law,[90] political communication expressed via protest is vulnerable to curtailment by statute (and, it seems, pre-existing rules of common law).[91] *Brown* represents one of the few cases since *Levy v Victoria*[92] where the validity of laws regulating protests and political assembly have been challenged. A majority of the High Court in *Brown* held that the chosen location for a protest can be central to the influence of the political communication expressed by that protest.[93] The High Court also confirmed that laws directed to restricting protest can fall foul of the implied freedom. In doing so, the High Court approved statements in *Levy* that political communication extends to non-verbal, expressive conduct and political assembly.[94]

However, the particular idiosyncrasies of the impugned legislation in *Brown* mean that one must be careful when considering the broader implications of the decision for protests. The main reason for the plaintiffs' success was that there was great uncertainty as to when the provisions of the *Protestors Act* would be validly enlivened.[95] The invalidity of the *Protestors Act* stemmed from the arbitrariness of decisions to be made by a police officer in determining whether the person is in a protected area and is a protestor, rather than the mere fact that the provisions prohibited protest. In fact, protecting a business from hindrance by protestors was held to be a legitimate legislative purpose.[96] Therefore, while the particular legislation in *Brown* was found to have impermissibly burdened the implied freedom, the decision does not represent any grand statement on freedom of assembly and protest.

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89 See Beth Gaze and Melinda Jones, *Law, Liberty, and Australian Democracy* (LawBook, 1990) 115.

90 See, eg, *Duncan v Jones* [1936] 1 KB 218, 222 (Hewart CJ).

91 See the discussion of the limits placed by tort law on the protests in question in *Brown* (2017) 261 CLR 328: at 364 [107] (Kiefel CJ, Bell and Keane JJ), 408–9 [259] (Nettle J), 451 [379]–[380] (Gordon J). See also Edelman J's refusal to consider developing the common law to accommodate protest actions: at 506 [563].

92 (1997) 189 CLR 579 ('*Levy*'). *Levy* concerned the entrance onto prohibited hunting areas by a protestor who did not hold a licence. He intended to collect the carcasses of ducks, which had been shot by hunters, for use in a performative protest. In six separate judgments, the High Court found that any burden on the implied freedom placed by the regulation was reasonably appropriate and adapted to protecting public safety: at 599 (Brennan CJ), 608–9 (Dawson J), 614–15 (Toohey and Gummow JJ), 619–20 (Gaudron J), 627 (McHugh J), 647–48 (Kirby J).

93 *Brown* (2017) 261 CLR 328, 367 [117] (Kiefel CJ, Bell and Keane JJ), 387 [191] (Gageler J), 400 [240] (Nettle J).

94 Ibid 383 [182] (Gageler J), 407–8 [258] (Nettle J), 461 [415] (Gordon J). The plurality took the defendant to have conceded that the law burdened the implied freedom and thus did not need to discuss whether the implied freedom extended to assembly and protest: at 359–60 [89].

95 Ibid 355–56 [73] (Kiefel CJ, Bell and Keane JJ).

96 Ibid 363 [101] (Kiefel CJ, Bell and Keane JJ), 414–15 [275] (Nettle J).

Since the invalidity of the *Protestors Act* was largely due to the vagueness of its provisions, *Brown* arguably provides little guidance as to how courts will decide future cases where laws seek to hinder protests in future. Based on the discussion that follows, it seems that better drafted legislation banning assembly and protest for similar purposes may be found to be valid.

2 *Potential Limits on the Use of the Implied Freedom in Protest Cases*

The implied freedom does not entail a substantive right: it is a limit on legislative power.[97] This necessarily means it does not afford the same protections of speech as analogous constitutional protections, which have the character of rights. The decision in *Brown* arguably places two further restrictions on the use of the implied freedom in protest cases.

First, there is support for the proposition that if the actions prohibited by legislation would amount to tortious conduct regardless, then the legislation cannot be regarded as burdening the implied freedom.[98] Although Gageler J, drawing on *Lange*,[99] noted that the common law may need to grow with, and be modified by, the implied freedom,[100] this was not approved in any other judgment. Indeed, Edelman J found it unnecessary and inappropriate to develop the common law to allow people to trespass and commit nuisance in the name of a political cause,[101] while Gordon J found that no inconsistency existed between the laws of trespass and nuisance and the implied freedom.[102] Given that protests often deliberately obstruct business and government operations,[103] the lack of desire to allow these torts to grow with the implied freedom in this respect may limit the use of the implied freedom in protecting protests.

Second, the plurality, and Gageler and Edelman JJ referred[104] to McHugh J's proviso in *Levy* that if protestors did not have a right to be at the protest site, the implied

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97 See, eg, ibid 360 [90] (Kiefel CJ, Bell and Keane JJ), 430 [313] (Gordon J), 502–3 [557] (Edelman J).

98 Ibid 364 [107] (Kiefel CJ, Bell and Keane JJ), 408–9 [259] (Nettle J), 451 [379]–[380] (Gordon J).

99 *Lange* (1997) 189 CLR 520.

100 *Brown* (2017) 261 CLR 328, 385–86 [188] (Gageler J).

101 Ibid 506 [563].

102 Ibid 451 [380].

103 See, eg, Georgie Burgess, 'Police Called in as Protesters Disrupt Logging Operations in Tarkine Region', *ABC* (online), 5 February 2018 <http://www.abc.net.au/news/2018-02-05/protesters-halt-logging-operations-in-tarkine/9397836>; Peter S Burton, 'Hugging Trees: Claiming *de Facto* Property Rights by Blockading Resource Use' (2004) 27 *Environmental and Resource Economics* 135.

104 *Brown* (2017) 261 CLR 328, 364–65 [108] (Kiefel CJ, Bell and Keane JJ), 383–84 [183] (Gageler J), 503–4 [559] (Edelman J).

freedom may not arise.[105] Justice Edelman also cited *Mulholland*,[106] where it was found that the implied freedom could only be enlivened where there is a pre-existing statutory or common law right to do the action.[107] Justice Gageler argued that *Mulholland* and McHugh J's proviso merely show that the implied freedom does not arise where another valid law already prohibits the action.[108] Meanwhile the plurality[109] declined to express an opinion on the application of these issues. Therefore, it is unclear which view of McHugh J's proviso and the *Mulholland*[110] decision will prevail. However, a majority of the judgments proceeded on the basis that whether a pre-existing right existed was relevant to whether the implied freedom was burdened.[111] Given this, it seems that the existence of an independent right to engage in particular conduct may be a factor in the determination of whether the implied freedom will be invoked.

As Kirby J noted in dissent in *Mulholland*, the requirement to prove an independent right to engage in political communication would greatly limit the protections afforded by the implied freedom.[112] This restriction would be particularly burdensome on political communication which takes the form of protest. One can generally be taken to have the 'right' to engage in other conduct from which political communication can arise, such as using the postal service,[113] or donating to political parties.[114] Conversely, political protests often take place specifically in areas where the protestors have no express right to be present — such as private property — or where access has been prohibited by legislation. The lack of an express common law right to protest[115] poses a further limitation. In fact, given the ease with which the right to access formerly public places can be restricted via privatisation[116] and

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105 *Levy* (1997) 189 CLR 579, 622, 625–26 (McHugh J).

106 (2004) 220 CLR 181.

107 *Brown* (2017) 261 CLR 328, 504 [560].

108 Ibid 384 [186].

109 Ibid 364–65 [108].

110 *Mulholland* (2004) 220 CLR 181.

111 *Brown* (2017) 261 CLR 328, 365 [110] (Kiefel CJ, Bell and Keane JJ), 400–2 [241]–[243] (Nettle J), 503–4 [559] (Edelman J).

112 *Mulholland* (2004) 220 CLR 181, 276 [279].

113 *Monis v The Queen* (2013) 249 CLR 92.

114 *Unions NSW* (2013) 252 CLR 530.

115 *Duncan v Jones* [1936] 1 KB 218, 222 (Hewart CJ); McGlone, above n 88, 275, quoting *Campbell v Samuels* (1980) 23 SASR 389, 393 (Zelling J).

116 See, eg, Eldridge and Matthews, above n 88; Stuart Boyd, '"I Thought it was Public Space": The Impact of Privatisation of Public Space' (2006) 19(1) *Parity* 14; Claudio De Magalhães and Sonia Freire Trigo, 'Contracting out Publicness: The Private Management of the Urban Public Realm and its Implications' (2017) 115 *Progress in Planning* 1.

legislation,[117] it would seem that an application of Edelman J's reasoning would mean the implied freedom would protect an ever-diminishing number of protests.

V Conclusion

The invalidity of numerous anti-protesting legislative provisions in *Brown* has reiterated the value of the implied freedom. The High Court took the opportunity to restate the *Lange* test for validity of laws in implied freedom cases, with a narrow majority endorsing proportionality testing as a viable analytical tool in conjunction with the foundational restated *Lange* test. However, the limited engagement with the application of strict proportionality by the High Court challenges the stability and predictability of the place of proportionality testing in implied freedom cases. Likewise, the decision confirms that the implied freedom protects protest; however, the dissenting judgments suggest significant potential limitations on the use of the implied freedom in this context. Namely, the application of the torts of negligence and nuisance, and the potential requirement to show an independent right to engage in the prohibited conduct loom as restrictions on the use of the implied freedom in protest cases. Therefore, although the decision in *Brown* illuminates the ongoing relevance of the implied freedom, deeper analysis demonstrates theoretical and practical nuances, which render the judgment less impactful than it might first seem.

[117] *Brown* (2017) 261 CLR 328, 481–2 [490]–[491], 504–5 [560]–[561] (Edelman J), 459–60 [410]–[411] (Gordon J).