30 Litigation notes

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In this issue

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Tasmanian onsite protest laws invalid

A majority of the High Court (Kiefel CJ, Bell and Keane JJ, Gageler and Nettle JJ; Gordon J dissenting in part and Edelman J dissenting) held that provisions of the *Workplaces (Protection from Protesters) Act 2014* (Tas) (the Protesters Act) which restrict onsite protest activities are invalid, because they impermissibly burden the implied freedom of political communication.

Brown v Tasmania
High Court of Australia, 18 October 2017
[2017] HCA 43; (2017) 261 CLR 328; 91 ALJR 1089

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Background

In 2014 the Tasmanian Parliament enacted the Protesters Act, being 'An Act to ensure that protesters do not damage business premises or business-related objects, or prevent, impede or obstruct the carrying out of business activities on business premises, and for related purposes'.

The Protesters Act generally prohibited a 'protester' from entering or doing an act on a 'business premises' if it prevents, hinders or obstructs the carrying on of a business activity (s 6(1)). A 'protester' is a person who is engaging in activity:

- that takes place on business premises or a business access area in relation to business premises, and
- is in furtherance of or for the purposes of promoting awareness of or support for an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue.

'Business premises' relevantly includes forestry land. A 'business access area' is an area reasonably necessary to enable access to the entrance/exit of business premises.

A police officer could direct a person (or group of persons) to leave business premises if the officer reasonably believed that the person or group had committed, was committing, or was about to commit an offence against the Act or to contravene s 6 (s 11). A direction could include a requirement that the person not commit an offence against the Act or contravene s 6 in the following 3 months. The making of such directions enlivened various obligations and offence provisions, including that a person not re-enter an area that they have been directed to leave within 4 days of the direction (s 8(1)). Police officers were also empowered to arrest a person who is on business premises (or a business access area) if the officer reasonably believed that the person was committing, or had in the previous 3 months committed, an offence against the Act in relation to the premises (or access area).

The plaintiffs' protests

The plaintiffs, Dr Brown and Ms Hoyt, were activists whose concerns include logging of Tasmanian forests. On separate occasions in January 2016 the plaintiffs entered Crown land near Lapoinya to protest or raise public awareness of planned logging in the Lapoinya Forest.

On 19 January 2016 Ms Hoyt entered Broxhams Road and from there walked onto Maynes Road. Both roads run through a forestry coupe and had been closed under the *Forest Management Act 2013* (Tas) (the Forest Management Act). A police officer directed Ms Hoyt to leave the area. She refused and the officer removed her to the edge of the coupe.

On 20 January 2016 Ms Hoyt returned to protest against logging in the coupe. She was arrested and released on bail. She later received an infringement notice alleging an offence under s 8 of the Protesters Act for her conduct on 19 January 2016 and was eventually charged under s 11(6) of the Protesters Act with failing to comply with a requirement made by a police officer.

On 25 January 2016 Dr Brown was on Broxhams Road, with 3 other people, observing the logging in the forest and filming for online publication. A police officer directed Dr Brown to leave the area. When Dr Brown failed to do so the officer arrested him for failing to comply with a direction. Dr Brown was subsequently charged with one count of failing to leave a business area contrary to s 8(1)(a) of the Protesters Act. He was released on bail on condition that he not be found in the coupe.

Dr Brown commenced proceedings in the High Court on 26 May 2016 challenging the validity of the Protesters Act. He was joined by Ms Hoyt on 7 July 2016.

Tasmania Police subsequently decided not to pursue the complaints and they were dismissed by the Magistrates Court upon the prosecutor tendering no evidence.

Constitutional issue

Tasmania ultimately conceded that the plaintiffs had standing to challenge the Protesters Act. The question for the High Court was whether the Act, either in its entirety or in its operation in respect of forestry land, was invalid because it impermissibly burdened the implied freedom of political communication contrary to the Commonwealth Constitution.

This was the first occasion for the High Court to consider and apply the test for whether a law infringes the implied freedom since the Court's decision in *McCloy v New South Wales* (2015) 257 CLR 178 (*McCloy*). In that case, a majority of the High Court had held that the test involves 3 stages, as follows (*McCloy* at 18):

Q1. Does the law effectively burden the freedom in its terms, operation or effect? If no, there can be no infringement of the implied freedom.

Q2. If yes to Q1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? ('Compatibility testing'.) If not, the law exceeds the implied limitation and is invalid.

Q3 If yes to Q2, is the law reasonably appropriate and adapted to advance that legitimate object? ('Proportionality testing'.) If no, the measure exceeds the implied limitation on legislative power.

Question 3 – proportionality testing – in turn has 3 elements, which are enquiries as to whether the law is justified as (i) suitable, (ii) necessary and (iii) adequate in its balance in the following senses:

- *suitable* – as having a rational connection to the purpose of the provision
- *necessary* – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom
- *adequate in its balance* – a criterion requiring a value judgment, consistent with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the law does not satisfy these criteria then the answer to Question 3 will be 'no' and the law will be invalid.

The High Court's decision

The High Court delivered 5 separate judgments. Chief Justice Kiefel and Justices Bell and Keane (the plurality) held, in a joint judgment, that the Protestors Act was invalid in its application to forestry land. Justices Gageler and Nettle wrote separate judgments, in which their Honours agreed with the plurality's conclusions. Justice Gordon, in contrast, held that the Protesters Act is valid in its application to forestry land, save for one provision. Justice Edelman held that the Protesters Act is entirely valid in its application to forestry land.

(1) The applicable test

In reaching their conclusion the plurality applied the *McCloy* test but slightly reformulated it to clarify that statutory purpose 'must be assessed for compatibility with the constitutionally prescribed system of government at this stage, but in practical terms the means adopted could not be' ([104]).

> '... the plurality applied the *McCloy* test but slightly reformulated it to clarify that statutory purpose "must be assessed for compatibility with the constitutionally prescribed system of government at this stage, but in practical terms the means adopted could not be".'

Justices Gageler ([155]), Nettle ([277]) and Gordon ([481]) all relevantly agreed that the test should be reformulated in this way. However both Gageler J and Gordon J expressed reservations about whether structured 3-stage proportionality testing is necessary or appropriate in every case:

- Justice Gageler emphasised that '*McCloy* does not elevate 3-staged proportionality testing to the level of constitutional principles'; rather, it is, at best, a tool of analysis. His Honour then observed that 'For my own part, I have never considered it to be a particularly useful tool' ([159]).
- Justice Gordon noted that the test remains the 2 questions identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ([471]). The *McCloy* test does not alter those questions ([472]); that test is a tool of analysis, not 'precedent-mandated analysis', and need not be applied in its entirely in every case ([473]).

(2) Does the Protesters Act burden the implied freedom? (*Lange* Stage 1 / *McCloy* Question 1)

Each of the majority judgments concluded that the Protesters Act burdens the implied freedom. In doing so, different views were expressed as to the relevance of pre-existing legal constraints on the ability to engage in at least some of the conduct regulated by the Protestors Act.

'... there is a need for activists to be able to protest onsite, so as to be able to communicate images of forest operations to the public at large ...'

The plurality accepted that the challenged provisions burdened political communication. Their Honours rejected Tasmania's submission that, where the Protesters Act does impose a burden on the freedom, it will only be slight [(105], [108]). The plurality instead largely accepted the plaintiffs' argument that there is a need for activists to be able to protest onsite, so as to be able to communicate images of forest operations to the public at large (at least while it is not practicable to deploy images taken by equipment such as drones flown overhead) ([106]).

Justice Gageler also held that the Protesters Act burdened political communication and considered that '[n]othing ... turns on whether or not a protestor has a legally enforceable right to enter or remain on [the relevant land]' ([189]). In reaching that conclusion his Honour observed that McHugh J's suggestion in *Levy v Victoria* (1997) 189 CLR 579 that the implied freedom may not have been burdened in a case where protesters did not have a legal right to enter a particular area 'needs to be treated with caution' ([186]), stating ([188]):

> The considerations identified in *Lange* which support the implication of freedom of political communication cannot justify confining its protection to political communications in which persons seeking to communicate have a legally enforceable right to engage ... the impact of any given law on political communication (and in turn on electoral accountability for the exercise of legislative and executive power) lies in the incremental effect of that law on the real-world ability of a person or persons to make or to receive communications which are capable of bearing on electoral choice. Therein lies its relevant burden.

Justice Gageler further held that the Protesters Act imposed a burden that 'can be expected to fall in practice almost exclusively on on-site political protests' and, in particular, those directed to environmental issues ([193]). His Honour therefore characterised the burden as 'direct, substantial and discriminatory' ([199]).

Justice Nettle emphasised that 'the implied freedom of political communication is not a licence to commit trespass to land or chattels' ([262]). However, the police power under s 11 to direct a protester to leave business premises, the prohibition in s 8 on re-entering a premises following such a direction, and the substantive prohibitions on protest in s 6 together comprise 'a substantial restriction on otherwise lawful protest activities' ([269]).

Justice Gordon accepted that the impugned provisions burdened the freedom ([396]). However, her Honour held that the impugned provisions prescribed norms and punished classes of conduct already regulated by the wider legal framework, and therefore imposed only an 'incremental burden' on the freedom by making what was 'otherwise unlawful the subject of criminal sanction or increased penalties' ([398], [411]). In this case, therefore, the incremental burden was 'small' and this focused and calibrated the assessment of constitutional validity ([411]).

Justice Edelman in dissent held that the Protesters Act applies only to conduct that is already unlawful and, accordingly, did not burden the implied freedom ([556]-[557]). His Honour described this conclusion as 'unassailable' ([558]). Although Tasmania had conceded, in its written submissions, that the Protesters Act may burden the implied freedom, Edelman J described this as 'no real concession at all', holding that on the facts of this case there was no burden ([565]).

(3) Does the Protesters Act have a legitimate purpose? (*Lange* Stage 2 / *McCloy* Question 2)

None of the judges who considered the issue held that the purpose of the Protesters Act was illegitimate. (Justice Edelman, having concluded that the Protesters Act imposed no burden, did not need to consider the purpose of the Act.)

The plurality emphasised that the purpose of the Protesters Act was most clearly discerned from the prohibition provisions (ss 6 and 7) which were directed towards the harm that particular kinds of protest activities may cause to businesses ([99]). The purpose of the Protesters Act was not to deter protesters generally but 'the protection of businesses and their operations, here forest operations, from damage and disruption from protesters who are engaged in particular kinds of protests' ([101]). This purpose could not be said to incompatible with the freedom ([102]).

'The purpose of the Protesters Act was not to deter protesters generally but "the protection of businesses and their operations, here forest operations, from damage and disruption from protesters ..." '

Justice Gageler held that, because the Protesters Act operates in its terms to target political communication and imposes a significant practical burden on the communication of a particular political viewpoint, the impugned provisions demand 'very close scrutiny' ([203]). His Honour was critical of Tasmania's argument that the purpose of the Protesters Act was to ensure that protesters do not prevent, impede, hider or obstruct the carrying out of business activities, because constraining the conduct of protesters cannot be a legitimate end in itself. However, the Attorney-General for Victoria offered a different account of the purpose of the law, being to protect business from serious interference, which Gageler J held was 'plausible' ([217]).

In contrast, Nettle J accepted that 'the purpose of ensuring that protesters do not substantively prevent, impede or obstruct the carrying out of business activities on business premises and do not damage business premises or business-related objects is a purpose compatible with the system of representative and responsible government' ([275]).

Justice Gordon held that the object of the Protesters Act was to protect forestry operations from protesters but only where the protest activity prevented, hindered or obstructed business activity or caused damage on business premises or in areas necessary to access business premises. It followed that the purpose of the Protesters Act was no more incompatible with the constitutionally prescribed system of representative and responsible government than the 'pre-existing wider legal

framework alongside which the Protesters Act, in its operation in relation to forestry land, sits, and within which it operates' ([413]).

(4) Is the Protesters Act reasonably appropriate and adapted to advancing a legitimate object in a manner compatible with the maintenance of the constitutionally prescribed system of government? (*Lange* Stage 2 / *McCloy* Question 3)

The majority judgments analysed whether the Protesters Act is 'reasonably appropriate and adapted' in somewhat different ways.

- The plurality and Nettle J applied the *McCloy* test, but reached different conclusions.
- Justice Gageler, having indicated that he did not regard that approach as particularly useful, asked a single more general question and reached the same conclusion as the plurality.
- Justice Gordon assessed whether the impugned provisions are reasonably appropriate and adapted to serve a legitimate end, applying the Lange questions without the structure of the third stage of the *McCloy* test. However her Honour reached a different conclusion from the plurality and Gageler J on all but one of the impugned provisions.

(a) Is the law suitable?

The plurality held that the prohibitions in s 6 of the Protesters Act clearly reflected the statutory purpose ([134]). Section 11(6) was held to be a necessary element of the offences created by contraventions of s 6(1), (2) and (3) and was also suitable ([137]). In contrast, s 8(1)(b) and s 11(7) and (8) could not be said to share the statutory purpose, as the plurality inferred that these provisions were directed solely to bringing protests to an end or deterring protesters ([135], [136]). Accordingly, these provisions failed the test of suitability.

In contrast, having held that the Protesters Act has a legitimate purpose, Nettle J concluded that the Act as a whole has a rational connection with that purpose ([281]).

(b) Is the law a reasonably necessary measure to achieve the purpose?

The plurality held that the question whether a law is 'reasonably necessary' did not necessitate a 'free-ranging enquiry' as to whether the legislature should have made different policy choices; instead, it involves 'determining whether there are alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect on the freedom' ([139]). In the present case, after comparing the Protestors Act to the Forest Management Act, the plurality concluded that the Protesters Act went 'far beyond' what its purpose required, and thus failed the test of necessity ([146]).

'... the Protesters Act went "far beyond" what its purpose required, and thus failed the test of necessity.'

Justice Nettle reached a different conclusion. His Honour held that a law will fail the test of necessity if there is such an obvious and compelling alternative that will impose a significantly lesser burden on the implied freedom 'as to imply that the impugned law was enacted for an ulterior purpose incompatible with the constitutional prescribed system of representative and responsible government' ([282]). That was for the plaintiff to prove ([288]), and they had failed to do so ([289]).

(c) Is the law adequate in its balance?

Having concluded that the Protesters Act failed the test of necessity, the plurality did not proceed to the third element of *McCloy* Question 3 – strict proportionality balancing.

Justice Nettle did undertake that analysis. His Honour summarised the Protestors Act as allowing a protester to be excluded from a location on the basis that a police officer has formed 'a reasonable, but plausibly mistaken' belief that the protester is contravening, or is about to contravene, or has previously contravened, s 6; and for the officer to add a requirement that protester not do so or commit an offence under the Protesters Act for the following 3 months. That was 'on any view of the matter a far-reaching means of attempting to achieve the stated purposes of the Protesters Act' ([292]). Justice Nettle held that the relative importance of the Protesters Act was lessened by the provisions of other legislation and common law causes of action which protect against disruption of forestry activities and, as a result, ss 11(1) and (2), 8(1)(b) and 11(6), (7) and (8) are 'grossly disproportionate' and not appropriate and adapted to a legitimate purpose ([295]). Whilst ss 6(1), (2) and (3) did not greatly increase existing restrictions on protest activities and do not of themselves infringe the implied freedom, they were, however, practically inseverable from the provisions which do infringe the freedom and therefore also invalid ([296]).

(d) Justice Gageler – the Protesters Act imposes a burden that is greater than is reasonably necessary

Justice Gageler held that the impugned provisions impose a burden on the implied freedom that is greater than is reasonably necessary to achieve the purpose of the law, and therefore the provisions are invalid ([232]). In reaching that conclusion, his Honour held that the impugned provisions are both under- and over-inclusive: under-inclusive because the Protesters Act does not cover activity in a forest that might be equally as disruptive to business as protesters; and over-broad because the Act gives police a wide discretion to give directions, with serious criminal consequences for their breach, which are 'nothing short of capricious in their temporal duration ... and nothing short of punitive in their geographical coverage and intensity' ([230]). That was compounded by the power of a police officer to choose, when issuing a direction under s 11, to add a requirement that a person not commit an offence or contravene s 6(1), (2) or (3) within 3 months of the date of the direction, so as effectively to increase the penalty for such further contraventions ([231]).

'... the impugned provisions impose a burden on the implied freedom that is greater than is reasonably necessary to achieve the purpose of the law, and therefore the provisions are invalid.'

(e) Justice Gordon – the incremental burden imposed by the Protesters Act is reasonably appropriate and adapted (except s 8(1)(b))

Justice Gordon held that the only burden requiring justification was the incremental burden imposed by the provisions ([419]). In contrast to the majority her Honour concluded that, with the exception of s 8(1)(b), the impugned provisions did no more than regulate the time, place and manner of 'a particular and narrowly confined form of political communication' ([420]). In this context, with the exception of s 8(1)(b), all the impugned provisions were 'explained and justified by the Protesters Act's reasonable pursuit of a legitimate end' ([425], [439]). Subsection 8(1)(b), which prohibits re-entering a business premises within 4 days of being directed to leave, was invalid, as it went beyond the legitimate object of the Protesters Act and had no rational connection to that object ([440]).

The Commonwealth's legal team

AGS (Simon Thornton, Niamh Lenagh-Maguire, and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General, Dr Stephen Donaghue QC, Perry Herzfeld and Julia Watson as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2017/43.html

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High Court upholds safe access zones

In 2 cases heard together the High Court unanimously upheld the validity of State laws which prohibit abortion-related communications (and other behaviour) in a 'safe access zone' around premises at which abortions are provided.

In the first case, Ms Clubb challenged the validity of s 185D of the *Public Health and Wellbeing Act 2008* (Vic) (the Victorian Act). A majority of the Court (Kiefel CJ, Bell and Keane JJ, and Nettle J) considered that the burden on freedom of political communication imposed by that provision was justified by reference to its legitimate purposes, including the protection of the safety, wellbeing, privacy and dignity of persons accessing lawful medical services. Justices Gageler, Gordon and Edelman also held that the challenge should be dismissed, but did not determine the validity of the prohibition because it was not established that Mrs Clubb's conduct involved political communication.

In the second case, Mr Preston challenged s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (the Tasmanian Act). The High Court held unanimously that the burden imposed by the protest prohibition was justified by reference to its legitimate purposes, which included the protection of the safety, wellbeing, privacy and dignity of persons accessing premises at which abortions are provided and ensuring unimpeded access to lawful medical services.

Clubb v Edwards; *Preston v Avery*
High Court of Australia, 10 April 2019
[2019] HCA 11; (2019) 93 ALJR 448

Background

The appellants, Ms Clubb and Mr Preston, are activists opposed to abortion on religious grounds. They were each convicted of offences under 'safe access zone' laws in force in Victoria and Tasmania respectively, and each appealed their conviction(s) to the relevant State Supreme Court.

Aspects of the appeals were removed into the High Court and heard in September 2018. The Attorneys-General of the Commonwealth, Victoria, Queensland, South Australia, Western Australia, New South Wales and the Northern Territory intervened, together with The Castan Centre for Human Rights Law, The Fertility Control Clinic, The Human Rights Law Centre and LibertyWorks Inc having leave to make written submissions as amici curiae.

Ms Clubb's conviction under the Victorian Act

Part 9A of the Victorian Act is headed 'Safe access to premises at which abortions are provided'. Section 185D makes it an offence for a person to engage in 'prohibited behaviour within a safe access zone'. A 'safe access zone' is 'an area within a radius of 150 metres from premises at which abortions are provided' (s 185B(1)). '[P]rohibited behaviour' is relevantly defined to mean:

> communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety ...

(Communication by an employee or other person who provides services at premises at which abortion services are provided is not prohibited behaviour.)

On 4 August 2016, while within the 'safe access zone' surrounding the East Melbourne Fertility Control Clinic, Ms Clubb approached and spoke to a man and woman entering the clinic and attempted to hand them a pamphlet. Ms Clubb was charged with an offence against s 185D of the Victorian Act for engaging 'in prohibited behaviour namely communicating about abortions with persons accessing premises at which abortions are provided, whilst within a safe access zone, in a way that is reasonably likely to cause anxiety or distress'.

In the Magistrates Court of Victoria, Ms Clubb argued that she had no case to answer on the evidence and that s 185D is invalid because it infringes the implied freedom of political communication. The Magistrate held that s 185D is valid because it does not impose an effective burden on *political* communication, in effect, because communications concerning abortion are not 'political'. After dismissing Ms Clubb's no case submission, the Magistrate convicted Ms Clubb.

Mr Preston's convictions under the Tasmanian Act

Section 9 of the Tasmanian Act is titled 'Access zones'. Like the Victorian Act, s 9(2) of the Tasmanian Act makes it an offence to 'engage in prohibited behaviour within an access zone'. An 'access zone' is 'an area within a radius of 150 metres from premises at which terminations are provided' (s 9(1)). '[P]rohibited behaviour' is relevantly defined as (emphasis added):

> a *protest* in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided ...

The word 'protest' as it appears in s 9(1)(b) is not defined.

Mr Preston was charged in relation to several separate incidents in which he stood outside the Specialist Gynaecology Centre, within the access zone, holding a placard and handing out flyers. For each occasion, Mr Preston was charged with an offence against s 9(2) of the Tasmanian Act for 'being within an access zone engaging in prohibited behaviour in that [he] conducted a protest in relation to terminations, which could be seen by a person ... accessing or attempting to access the premises [at] which terminations are provided'.

In the Magistrates Court of Tasmania Mr Preston argued that s 9(2) of the Tasmanian Act is invalid because it infringes the implied freedom of political communication. The Magistrate accepted that s 9(2) imposes an effective burden on political communication but concluded that the law was valid because it has a legitimate purpose and that the burden imposed is proportionate to that purpose. The Magistrate convicted Mr Preston of all 4 charges.

The High Court's decision

Chief Justice Kiefel and Bell and Keane JJ (the plurality) delivered a joint judgment, holding that the challenged provisions of the Victorian and Tasmanian Acts are valid. Justice Nettle agreed in a separate judgment.

Justices Gageler, Gordon and Edelman each delivered separate judgments in which they held that it was not necessary or appropriate to determine the validity of s 185D of the Victorian Act, because Ms Clubb had not established that the conduct for which she had been charged involved political communication in the constitutional sense. In contrast, their Honours held that it was necessary to decide the validity of s 9(2) of the Tasmanian Act and found that section to be valid.

Threshold issue – should the High Court determine whether the Victorian Act burdens the implied freedom

The Commonwealth submitted that it would be inappropriate for the High Court to determine whether the Victorian Act impermissibly burdens the implied freedom in the *Clubb* appeal because there was no evidence that Mrs Clubb's conduct actually involved political communication (relying on *Knight v Victoria* (2017) 261 CLR 305 at [32]–[33]). The Commonwealth argued that, even if the Victorian Act were held to burden the implied freedom impermissibly in some areas of its application, s 185D could be read down so as not to apply to communications about governmental or political matters.

Plurality and Nettle J – High Court should decide the validity of Victorian Act

The plurality accepted the Commonwealth's submission that communication about abortion is not necessarily constitutionally protected political communication ([29]):

> A discussion between individuals of the moral or ethical choices to be made by a particular individual is not to be equated with discussion of the political choices to be made by the people of the Commonwealth as the sovereign political authority. That is so even where the choice to be made by a particular individual may be politically controversial.

Likewise, Nettle J observed that 'a communication directed to persuading a woman as to whether or not to abort her pregnancy is not a political communication but a communication concerning an entirely personal matter…' ([252]).

' "… a communication directed to persuading a woman as to whether or not to abort her pregnancy is not a political communication but a communication concerning an entirely personal matter…" '

The plurality also accepted that it would 'ordinarily be inappropriate as a matter of practice for the Court to determine a question as to the validity of a statute by reference to the Constitution where doing justice in the case did not require it' ([36]). However, the plurality held that 3 features of Ms Clubb's case warranted the Court dealing with the matter as an exception to this general practice:

1) 'the line between speech directed towards agitating for legislative change, or changes in the attitude of the executive government to the administration of a law, and speech directed to the making of a moral choice by a citizen may be very fine where politically contentious issues are being discussed' ([37])
2) there was an 'obvious' likelihood that a question will arise in future about the intersection between the Victorian Act and the implied freedom ([38])

3) since Ms Clubb also disputed whether the Victorian Act could be read down in the event that it exceeded the power of the Victorian Parliament, considerations of judicial economy did not favour adhering to the practice in this case ([39]).

More directly, Nettle J stated that 'the suggestion that the *Clubb* appeal should be resolved [at the threshold question] has little to commend it' ([231]). Justice Nettle held that Ms Clubb had a direct and immediate interest in the question of whether s 185D is an unjustified burden on the freedom of political communication and thus an infringement of the implied freedom ([232]). His Honour further held that there were constructional problems in resolving the appeal by assuming, without deciding, that s 185D could if necessary be read down ([233]–[237]) and little practical advantage to doing so ([238]–[242]).

Gageler, Gordon and Edelman JJ – High Court should not determine validity of Victorian Act

Justices Gageler, Gordon and Edelman each held that it was unnecessary to decide Ms Clubb's constitutional challenge and accordingly concluded that the Court should not decide it (see [135]–[138] (Gageler J); [329]–[349] (Gordon J); [410]–[414] (Edelman J)).

Their Honours each addressed the way in which a court should deal with legislation that is said to impermissibly to infringe a constitutional limitation but which might have valid operations that could be preserved:

- Justice Gageler noted that severance can ordinarily be addressed as a threshold issue. Accordingly, if the facts of a particular case are not shown to involve political communication, and if the statute is severable to the extent that it applies to political communication, 'it is worse than nonsensical to require a court to step through each of the three stages of the [constitutional] analysis only to dismiss the challenge on the basis that the statute has a valid severable application to the circumstances of the case' ([146]).
- Justice Gordon similarly observed that where a plaintiff does not mount a positive case that they were engaged in political communication, it is necessary to start by asking whether the impugned provision is able to be read down ([334]). If it can, 'no further analysis is required in order to dismiss a challenge to the constitutional validity of the impugned law', that being the 'judicially prudent' approach ([336]).
- Justice Edelman agreed the appeal should be decided on the basis of this 'threshold question'. His Honour, however, differed as to the 'nomenclature in this area', and drew a distinction between reading down, severance and 'partial disapplication' ([414]). Reading down, according to his Honour, involves preferring an interpretation that renders a provision constitutionally valid over one which would render it invalid ([416]). Where reading down is not possible, the doctrine of severance permits court to strike down part of a statute while leaving the remainder operative ([418]). And 'partial disapplication' involves confining the operation of a statute to so much of its operation as is constitutionally valid ([423]–[424]). Statutory rules of construction (such as s 15A of the *Acts Interpretation Act 1901* (Cth) and s 6(1) of the *Interpretation of Legislation Act 1984* (Vic)) direct courts to engage in these 3 constructional exercises unless a contrary intention appears in the impugned legislation ([426]). Here, the Victorian Act could not be read down or severed, but could be partially disapplied if necessary, meaning that 'there is no good reason to adjudicate upon [its] validity' ([443]).

Section 185D of the Victorian Act is valid: Kiefel CJ, Bell and Keane JJ, and Nettle J

The plurality and Nettle J applied the test for validity 'as explained in *McCloy v New South Wales* [(2015) 257 CLR 178] and *Brown v Tasmania* [(2017) 261 CLR 328]' and known as structured proportionality analysis to hold that s 1985D of the Victorian Act is valid.

As to the first 2 steps in that analysis, their Honours held that:

- The Victorian Act imposes a burden on political communication ([43]). Justice Nettle noted that s 185D imposes a qualitatively significant burden on the implied freedom, even if in quantitative terms most anti-abortion protest is not 'political communication' in a constitutional sense ([255]).
- The Victorian Act has a legitimate purpose. Both judgments emphasised the centrality of the Act's concern with the 'dignity' of members of the people of the Commonwealth (see the plurality at [60] and Nettle J at [258]).

As to the 3rd step, being whether the Victorian Act is reasonably appropriate and adapted to advancing a legitimate end in a manner compatible with the constitutionally prescribed system of government, the plurality and Nettle J held that the law is suitable, necessary and adequate in its balance:

- *Suitability*: the plurality held that Ms Clubb's arguments 'seriously exaggerate the effect of the prohibition on the implied freedom' ([77]) and that, in particular, her contention that anti-abortion communication is most effective when it occurs near an abortion clinic was not supported by any evidence ([81]). Their Honours then held that the impugned law has a rational connection to the statutory purpose of promoting public health and protecting the privacy and dignity of women accessing abortion services ([84]–[85]). Justice Nettle agreed that the proscription of prohibited behaviour within a radius of 150 metres of premises at which abortions are provided is rationally connected to the achievement of the purpose of securing the health and wellbeing of women accessing those premises ([276]).

> '... the impugned law has a rational connection to the statutory purpose of promoting public health and protecting the privacy and dignity of women accessing abortion services.'

- *Necessity*: the plurality rejected Ms Clubb's argument that the law did not need to apply to non-violent protest in order to achieve its legislative purpose, holding that 'the legislative judgment that activities falling short of intentional intimidation, harassment, threatening behaviour or physical interference in terms of personal violence were also capable of deterring unimpeded access to clinics cannot be said to impose an unnecessary burden upon the implied freedom' ([90]. Justice Nettle held that a law is only 'unnecessary' if Parliament's selection lies beyond the range of what could reasonably be regarded as necessary. That may be the case where a party seeking to impugn the law can point to an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom ([266]). In this case, Ms Clubb failed to identify such an alternative ([291]).
- *Adequacy of balance*: the plurality held that the limited interference with the implied freedom brought about by s 185D is not manifestly disproportionate to the objectives of the Victorian Act ([102]). Justice Nettle held that a law will only fail the 'adequacy of balance' step if in pursuing its legitimate purpose it imposes a burden

on the implied freedom of political communication that is grossly disproportionate, is manifestly excessive or otherwise goes far beyond what can reasonably be conceived of as justified ([272], [293]), which was not the case with the Victorian Act ([293]).

Tasmanian Act is valid – a unanimous decision

Although there were some substantive differences in drafting between the Victorian and Tasmanian Acts, to a large extent the plurality and Nettle J's analyses of the Victorian Act translated directly to the Tasmanian Act. The plurality noted that the case for invalidity might be stronger in relation to the Tasmanian Act because that Act lacks an objects clause and because s 9(2) prohibits political communication in the form of protest, irrespective of whether it is likely to cause distress or anxiety. In that sense 'it might also be said that the Victorian legislation is an example of an obvious and compelling alternative measure less intrusive upon the implied freedom' ([117]). However, those differences did not warrant a different result in the *Preston* appeal.

Whilst Gageler J and Gordon J also upheld the validity of the Tasmanian Act, their Honours declined to apply a structured 3-stage proportionality analysis and instead maintained their positions in *McCloy* and *Brown*.

Justice Gageler held that the communication prohibition in the Tasmanian Act imposes a direct, substantial and discriminatory burden on political communication (accepting the argument that the Act imposes a greater burden on anti-abortion communication than on pro-choice communication) ([174]). Such a burden can only be justified if it satisfies 2 conditions ([184]):

1) The purpose of the prohibition 'needs to be more than just constitutionally permissible; it needs to be compelling'.
2) The prohibition needs to be closely tailored to the achievement of that purpose; 'it must not burden the freedom of political communication significantly more than is reasonably necessary to do so'.

'The purpose of ensuring that women can access abortion services in an atmosphere of privacy and dignity "is unquestionably constitutionally permissible and, by any objective measure, of such obvious importance as to be characterised as compelling".'

Justice Gageler held that the Tasmanian Act satisfied both conditions. The purpose of ensuring that women can access abortion services in an atmosphere of privacy and dignity 'is unquestionably constitutionally permissible and, by any objective measure, of such obvious importance as to be characterised as compelling' ([197]). The imposition of a 150-metre access zone was 'close to the maximum reach that could be justified as appropriate and adapted to achieve the protective purpose of facilitating access to those premises in a manner compatible with maintenance of the constitutionally prescribed system of government' but nevertheless was valid because it left enough opportunity for other protests meaningfully proximate to the premises ([213]).

In marked contrast to Gageler J, Gordon J held that the burden imposed by the Tasmanian Act is insubstantial, non-discriminatory and content-neutral ([371]–[375]). It has a legitimate purpose of ensuring that people have safe and unobstructed access to medical services ([381]). Taken together, these features of the Act led Gordon J to conclude ([386]–[387]):

> The Protest Prohibition, in its legal effect and practical operation, effects an insubstantial and indirect burden on political communication; it regulates the time, place and manner of protest in relation to a particular subject matter (terminations) and of a particular amplitude ("able to be seen or heard …"); and it does so for an identified and legitimate end … No other conclusion can be drawn than that the Protest Prohibition is reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government.

Justice Edelman applied the structured 3-stage *McCloy–Brown* proportionality test to the Tasmanian Act, at least in part so as to provide clarity about why the Tasmanian Act was upheld while the law challenged in *Brown* had been declared invalid ([407]–[408]). His Honour observed that '[s]tructured proportionality testing provides an analytical, staged structure by which judicial reasoning can be made transparent' ([408]).

Justice Edelman held that the purpose of the Tasmanian Act, discerned from its text and context, is legitimate ([459]) and that 'the effect of the protest prohibition can easily be seen as rationally connected with those purposes' ([474]). As to the whether the burden imposed by the Tasmanian Act is necessary, in the *McCloy–Brown* sense, Edelman J held ([486]):

> a law with the same purpose as the protest prohibition, but that imposed a significantly lesser burden upon the freedom of political communication, could have been enacted. However, despite the depth and width of the burden, it is unlikely that the purposes of the Reproductive Health Act could have been served to the same or a similar extent without imposing a burden that was similarly deep and wide. At the least, the possibility that the purposes could be so served by alternative means is neither obvious nor compelling.

In assessing whether the Tasmanian Act is adequate in its balance, Edelman J emphasised that, although the burden imposed on the freedom of political communication is potentially deep and wide, the purpose of prohibiting protest in this context was of great importance to the Parliament and served the integral purposes of the Act as a whole ([499]). Given the importance of the purpose sought to be achieved, the magnitude of the burden could not be said to be in 'gross and manifest disproportion' to it ([501]) and the test of adequacy of balance was therefore satisfied.

The Commonwealth's legal team

AGS (Andrew Buckland, Simon Thornton and Niamh Lenagh-Maguire from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General, Dr Stephen Donaghue QC, Craig Lenehan and Celia Winnett as counsel.

Text of the decision is available at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA//2019/11.html

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Reduced cap on electoral expenditure by third party campaigners invalid

The High Court unanimously held invalid a New South Wales law reducing the cap on electoral expenditure by third party campaigners in a State election campaign, finding that it impermissibly burdened the implied freedom of political communication.

Unions NSW v New South Wales
High Court of Australia, 29 January 2019
[2019] HCA 1; (2019) 93 ALJR 166

Background

The *Electoral Funding Act 2018* (NSW) (the EF Act) relevantly limits expenditure on State electoral campaigns by candidates, political parties and third-party campaigners in the 6 month period prior to polling day for a general State election (and at certain other times).

The EF Act repealed and replaced the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (the EFED Act), which had been considered by the High Court in *Unions NSW v New South Wales* (No 1) (2013) 252 CLR 530 and *McCloy v New South Wales* (2015) 257 CLR 178 (*McCloy*). The EF Act is very similar to the EFED Act, which also capped electoral expenditure by (among others) third-party campaigners and now caps expenditure on local government elections as well as State elections.

However, the EF Act relevantly made 2 significant changes:

1. The cap on the amount that third-party campaigners are permitted to spend on electoral campaigning was reduced from $1,288,500 to $500,000 (s 29(10)).
2. It became unlawful for a third-party campaigner to act in concert with another person or persons during the capped expenditure period to incur electoral expenditure that exceeds the cap applicable to the third-party campaigner (s 35(1)). A person 'acts in concert' with another person if the person acts under an agreement with the other person to campaign in support or opposition to the election of a particular party or candidate (s 35(2)).

Political parties, in contrast, are able to spend $122,900 multiplied by the number of electoral districts in which the party endorses a candidate, or $1,288,500 for parties that endorse candidates in a group for election to the Council but do not endorse any candidates for election to the Assembly or do not endorse candidates in more than 10 electoral districts.

Unions NSW, a peak body of NSW unions, and various other trade union bodies commenced proceedings challenging the validity of ss 29(10) and 35 on the ground that the provisions impermissibly burden the implied freedom of communication on political and governmental matters.

The Attorneys-General of the Commonwealth, Queensland, Western Australia and South Australia intervened in the case in support of NSW. The Commonwealth's submissions focused on the permissibility of caps on electoral expenditure generally and argued that there may be legitimate reasons to differentiate between third parties and political parties and candidates when determining the amount of expenditure caps. The Commonwealth did not make specific submissions regarding the validity of the impugned provisions of the EF Act.

The UNSW Grand Challenge on Inequality and the NSW Liberal Party, were refused leave to intervene or appear as amicus curiae.

The High Court's decision

Chief Justice Kiefel and Bell and Keane JJ (the plurality) delivered a joint judgment, holding that s 29(10) is invalid and finding it unnecessary to decide the validity of s 35. In separate judgments, Gageler J, Gordon J and Nettle J agreed with the orders in the joint judgment. Justice Edelman held that both ss 29(10) and 35 are invalid.

(1) Expenditure caps burden the implied freedom

The parties accepted that the expenditure caps imposed by the EF Act effectively burden freedom of political communication ([15], [108]). The plurality observed that caps on expenditure are a more direct burden on political communication than caps on political donations and that reducing the third-party expenditure cap by half meant that the EF Act imposed a greater burden than the EFED Act ([15]).

(2) Compatibility testing – is the purpose of the law compatible with the maintenance of the constitutionally prescribed system of government?

The plaintiffs argued that s 29(10) did not have a legitimate purpose. They contended that the purpose of the provision was to privilege the voices of political parties by enabling them to spend more than third-party campaigners on electoral campaigns. However, the plaintiffs also accepted that EF Act builds on the broader purposes of the EFED Act – namely, levelling the political playing field, limiting the political 'arms race' and preventing some political voices from being drowned out by others – which they conceded are legitimate ([30]–[31]). Their complaint was really, therefore, about the particular purposes for which s 29(10) reduced the third-party expenditure cap.

(a) Plurality assumed a legitimate purpose of preventing voices being drowned out

To determine that purpose, the plurality examined the material that had informed the enactment of the EF Act, including the report of an independent expert panel delivered to the NSW Government in 2014 (the Expert Panel Report) and the report of the NSW Parliament's Joint Standing Committee on Electoral Matters, published in 2016 (the JSCEM Report). The Expert Panel Report recommended that the third-party expenditure cap be cut to $500,000 to prevent third parties dominating electoral campaigns. There were, however, references in the Expert Panel Report to the proposition that political parties and candidates should have a 'privileged' position in electoral campaigns because they are engaged directly in the electoral contest.

The JSCEM Report recommended that, before reducing the third-party expenditure cap in line with the Expert Panel Report, the NSW Government consider whether there was evidence that $500,000 would afford third-party campaigners a reasonable opportunity to present their case to the electorate. The plurality noted, however, that '[n]o material has been placed before the Court which suggests that such an analysis was undertaken' ([26]).

Ultimately the plurality assumed in favour of NSW that s 29(10) had the legitimate purpose of preventing the drowning out of voices by the distorting influence of money ([38]). Instead, their Honours focused on the issue that they considered was 'clearly determinative' of the validity of the provision – 'namely whether the further restrictions which s 29(10) places on the freedom can be said to be reasonably necessary and for that reason justified' ([35]).

(b) Justice Gordon assumed legitimate purposes, including privileging candidates

Justice Gordon also proceeded on the assumption that the provisions had one or more legitimate purposes. However unlike the plurality, her Honour assumed that those purposes included giving a privileged position to candidates, and that that was a legitimate purpose consistent with the system of representative and responsible government ([146]).

(c) Justices Gageler and Nettle found legitimate purpose of promoting level playing field and preventing voices being drowned out

'... his Honour accepted that s 29(10) served the purpose of the EF Act in establishing a scheme of expenditure that is "fair", in the sense of creating a "level playing field".'

Justice Gageler observed that 'where, as here, legislation includes an express statement of statutory objects, identification of legitimate purpose must start with the objects so stated'. In that case, 'an additional object that is not only unexpressed but also constitutionally impermissible should not lightly be inferred' ([79]). With that in mind, his Honour accepted that s 29(10) served the purpose of the EF Act in establishing a scheme of expenditure that is 'fair', in the sense of creating a 'level playing field' ([82]). Justice Gageler further held that, because an important 'functional distinction' between parties and third-party campaigners can in principle justify the imposition of lower caps for the latter group ([90]), the question whether a particular difference in caps is valid cannot be determined without further analysis ([84]). In particular, it will depend on whether 'the amount of each cap can be justified on the basis that each amount is reasonably appropriate and adapted to advance the objective of substantive fairness in a manner compatible with maintenance of the constitutionally prescribed system of representative and responsible government' ([91]).

Justice Nettle also held that s 29(10) had a legitimate purpose ([110]). His Honour reasoned that, although an object of the provision was to 'privilege' parties relative to third-party campaigners, Parliament's purpose in doing so was to give better effect to the purpose of 'preventing voices being drowned out by the powerful' ([109]).

(d) Justice Edelman – impugned provisions had incompatible purpose of privileging parties

In contrast, Edelman J distinguished between laws that have the *effect* of quietening or silencing some political voices and a law that has the *purpose* of doing so ([179]):

Many laws have a justified effect of burdening the freedom of political communication but this does not mean that further analysis is needed before concluding that a law that has the purpose of burdening the freedom is illegitimate ... it is an error to conflate purpose with effect by reasoning that because an effect of quietening or silencing some might be justified, therefore a purpose of quietening or silencing some can be legitimate.

Justice Edelman rejected NSW's argument (which he also attributed to the Commonwealth) that 'the constitutionally distinct position of candidates legitimises the pursuit of legislative objectives that select candidates and political parties for distinctive treatment relative to others who are not directly engaged in the electoral contest and who cannot be elected to Parliament or form government' ([180]).

'Many laws have a justified effect of burdening the freedom of political communication but this does not mean that further analysis is needed before concluding that a law that has the purpose of burdening the freedom is illegitimate ... it is an error to conflate purpose with effect by reasoning that because an effect of quietening or silencing some might be justified, therefore a purpose of quietening or silencing some can be legitimate.'

Justice Edelman then held that, in addition to the legitimate purpose of preventing the drowning out of political voices, ss 29(10) and 35 had an additional, illegitimate, purpose and were 'were the product of a considered legislative decision to adopt a purpose to privilege political parties and candidates' ([221]). His Honour accepted the plaintiffs' submission that the purpose of the provisions was to 'shut down' protected speech, and held that this purpose cannot coexist with the implied freedom. It was therefore unnecessary for Edelman J to further analyse the provisions in order to determine that they were invalid.

Section 29(10) is invalid – the burden it imposes had not been justified

The remainder of the Court held that s 29(10) is invalid because it is not reasonably appropriate and adapted to advancing a legitimate purpose (whether accepted or assumed) in a manner consistent with the maintenance of the constitutionally prescribed system of government.

The plurality rejected NSW's argument that preferential treatment of candidates and political parties is justified because they have a constitutionally distinct position relative to others who are not seeking election or to form government. Their Honours held that ([40]):

'The plurality rejected NSW's argument that preferential treatment of candidates and political parties is justified because they have a constitutionally distinct position relative to others who are not seeking election or to form government.'

> [t]he requirement of ss 7 and 24 of the Constitution that the representatives be 'directly chosen by the people' in no way implies that a candidate in the political process occupies some privileged position in the competition to sway the people's vote simply by reason of the fact that he or she seeks to be elected. Indeed, to the contrary, ss 7 and 24 of the Constitution guarantee the political sovereignty of the people of the Commonwealth by ensuring that their choice of elected representatives is a real choice, that is, a choice that is free and well-informed.

For the plurality, s 29(10) failed at the 'necessity' limb of the structured proportionality analysis adopted in *McCloy*. NSW had failed to justify the selection of a $500,000 cap on third-party expenditure as necessary to prevent the drowning out of other voices, in the sense of showing that there were no less restrictive means of achieving that object, and so the provision was held invalid ([53]). Justices Nettle and Gordon reasoned to similar effect, concluding that it was impossible for the Court to be persuaded that the extent of the cut to third-party expenditure was necessary (see Nettle J at [118] and Gordon J at [149]–[153]).

Justice Gageler largely accepted that there are functional differences between parties and candidates and third-party campaigners that warrant their being subject to different expenditure caps ([87]–[90]) and seemingly accepted that there is a central constitutional role for candidates and political parties ([87]). However, Gageler J emphasised that a court must 'pronounce a burden on political communication imposed by the legislation to be unjustified, unless the court is satisfied that the burden is justified' ([95]). His Honour focused on whether the reduced third-party expenditure cap afforded a meaningful opportunity for third parties to participate in political discourse ([101]):

> To be justified as no more than is reasonably necessary to achieve a level playing field for all participants in political discourse during an election period, the amount of the cap must, at the very least, leave a third-party campaigner with an ability meaningfully to compete on the playing field … It is not self-evident, and it has not been shown, that the cap set in the amount of $500,000 leaves a third-party campaigner with a reasonable opportunity to present its case.

Justice Gageler was not persuaded that s 29(10) was valid because, in the absence of evidence, 'it is not possible to be satisfied that the cap is sufficient to allow a third-party campaigner to be reasonably able to present its case to voters' ([102]).

The Commonwealth's legal team

AGS (Simon Thornton, Niamh Lenagh-Maguire, Shona Moyse and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General, Dr Stephen Donaghue QC, Craig Lenehan and Chris Tran as counsel.

Text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2019/1.html

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The APS Code of Conduct does not infringe the implied freedom

The High Court unanimously held that the Australian Public Service (APS) Code of Conduct requirement that APS employees behave at all times in a way that upholds the APS Values and the integrity and good reputation of the APS does not infringe the constitutionally implied freedom of political communication. In doing so, the Court emphasised the constitutional importance of an effective and apolitical APS and confirmed that even anonymous comments made by APS employees can amount to a breach of the Code of Conduct.

The High Court set aside the decision of the Administrative Appeals Tribunal (AAT) that the termination of Ms Banerji's employment invalidly infringed the implied freedom and was therefore not 'reasonable administrative action' within the meaning of s 5A(1) of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act).

Comcare v Banerji
High Court of Australia, 7 August 2019
[2019] HCA 23; (2019) 93 ALJR 900; 287 IR 302

Background

Ms Banerji is a former employee of the Commonwealth Department of Immigration and Citizenship (the Department). While employed by the Department between 2006 and 2012, Ms Banerji posted over 9,000 tweets on Twitter, many of which criticised members of the Government and Opposition, the Government's immigration policy and her supervisor. Her Twitter account, @LaLegale, did not identify her name or where she worked. Following an investigation, the Department determined that her use of Twitter had breached the Code of Conduct – in particular, the requirement that an APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the employee's agency and the APS. The Department terminated Ms Banerji's employment as a sanction for her breach of the Code of Conduct, pursuant to s 15 of the *Public Service Act 1999* (PS Act).

Ms Banerji suffered a psychological injury as a result of the termination of her employment. She claimed compensation under the SRC Act. Comcare accepted the termination caused her injury but refused her claim on the basis that the termination was 'reasonable administrative action taken in a reasonable manner', for which compensation is not payable under ss 5A(1) and 14 of the SRC Act.

Ms Banerji sought merits review of Comcare's decision in the AAT. The only question before the AAT was whether the termination of Ms Banerji's employment fell outside

the exclusion in the SRC Act, having regard to the implied freedom of political communication. After the AAT found in Ms Banerji's favour, Comcare appealed the AAT's decision to the Federal Court. The Commonwealth Attorney-General intervened and removed the appeal to the High Court. In the High Court, the Commonwealth Attorney-General made submissions which were adopted by Comcare.

The *Public Service Act 1999*

The PS Act regulates the management of the APS. Its main objects include (s 3) establishing an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public. It pursues this object in part through the Code of Conduct, which at the relevant time included (in s 13(11)) the requirement that:

> An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.

The APS Values in turn included, in s 10(1)(a), the value that:

> the APS is apolitical, performing its functions in an impartial and professional manner.

Section 15(1) of the PS Act provides for a range of discretionary penalties for breach of the Code of Conduct to be imposed by the relevant Agency Head. The penalties include termination of employment (s 15(1)(a)). Breach and sanction decisions are both subject to judicial review, as well as merits review by the Merit Protection Commissioner (MPC). Decisions to impose a sanction of termination under s 15 cannot be reviewed by the MPC but can be the subject of an unfair dismissal application to the Fair Work Commission.

The High Court's decision

Chief Justice Kiefel and Bell, Keane and Nettle JJ (the plurality) delivered a joint judgment, holding that the challenged provisions of the PS Act are valid. In separate judgments, Gageler, Gordon and Edelman JJ reached the same conclusion.

The High Court proceeded on the basis that Ms Banerji had accepted that, but for the implied freedom, she had contravened s 13(11) of the PS Act and failed to uphold the APS Values and the integrity and good reputation of the APS ([27], [110]). This was critical to the way most members of the Court approached Ms Banerji's implied freedom of political communication argument. Because she accepted that she had breached s 13(11), Ms Banerji's argument was, in effect, that Parliament could not legislate to require APS employees to uphold the APS Values and the integrity and good reputation of the APS at all times, which the plurality described as a 'remarkable proposition' ([27]).

'The Court characterised the overarching purposes of the PS Act as being to ensure the maintenance and protection of an apolitical public service that is skilled and efficient in serving the national interest.'

Purpose of the PS Act

Central to the reasoning of all justices was the purpose and constitutional significance of the PS Act. The Court characterised the overarching purposes of the PS Act as being to ensure the maintenance and protection of an apolitical public service that is skilled and efficient in serving the national interest ([30], [100], [142], [189]). The plurality held that ss 10(1)(a) and 13(11) of the PS Act are directed at achieving this overarching purpose by realising the following more specific objectives ([34]):

- ensuring that the government has confidence in the ability of the APS to provide high-quality, impartial and professional advice
- ensuring that the APS will faithfully and professionally implement Government policy, irrespective of APS employees' individual personal political beliefs and predilections
- ensuring that management and staffing decisions within the APS are capable of being made on a basis that is independent of the party political system, free from political bias and uninfluenced by individual employees' political beliefs.

History and constitutional significance of an apolitical APS

The Court noted the long tradition of an 'apolitical public service that is skilled and efficient in serving the national interest', which had applied throughout the history of the Commonwealth and in the colonies and the United Kingdom prior to federation ([31], [154], [203]–[206]).

'The apolitical nature of the APS has *constitutional* significance.'

The apolitical nature of the APS has *constitutional* significance. Both s 64 of the Constitution (which provides for the establishment of departments of state) and s 67 (which provides for the appointment and removal of officers of the Executive other than ministers) attest to the APS as a 'significant' constituent part of the system of representative and responsible government ([31]). Justice Gageler described the object of an apolitical public service as 'framed to enhance' the practical operation of the system of responsible government prescribed by those constitutional provisions ([67]). Similarly, Gordon J called an apolitical public service a 'defining characteristic of the system of representative and responsible government for which the Constitution provides' ([155]), and Edelman J referred to it as 'one foundation of the constitutional scheme of responsible government' ([203]).

Whether communication breaches the Code of Conduct is a question of fact and degree

Whether conduct is in breach of s 13(11) will in each case be a question of fact and degree ([26], [93], [140], [182]). Relevant factors include the employee's seniority and level of responsibility, the subject matter of the communication, the audience, and the circumstances in which it was made ([93], [140]). According to Edelman J, there are 6 factors of particular significance in determining whether s 13(11) was infringed:

- the seniority of the public servant
- whether the comment concerns matters for which the person has direct duties or responsibilities, and how the comment might impact upon those duties or responsibilities
- the nature of the comment – that is, whether it was vitriolic criticism or objective and informative policy discussion
- whether the public servant intended, or could reasonably have foreseen, that the communication would be disseminated broadly
- whether the public servant intended, or could reasonably have foreseen, that the communication would be associated with the APS
- if so, what the public servant expected, or could reasonably have expected, an ordinary member of the public to conclude about the effect of the comment upon the public servant's duties or responsibilities ([183]).

PS Act applies to anonymous conduct

Ms Banerji had sought to argue in the High Court that, properly construed, the Code of Conduct did not apply to 'anonymous conduct'. The Court declined to entertain that argument because it differed fundamentally from the way in which the case had been put in the AAT ([23]). In any event, the Court accepted that there is no bright-line exclusion of anonymous communications from the requirement to at all times uphold the integrity and good reputation of the APS within the meaning of the impugned provisions (plurality at [23]) and the value that the APS is apolitical, impartial and professional (see [105] (Gageler J); [160] (Gordon J); [201] (Edelman J)).

'... there is no bright-line exclusion of anonymous communications from the requirement to at all times uphold the integrity and good reputation of the APS ...'

In that respect the plurality held that there is 'no reason to suppose' that anonymous communications cannot fail to uphold the integrity and good reputation of the APS ([23]). There was an 'obvious' risk that the identity and employment details of a person who anonymously posted material online – and, in particular, on social media websites – would be revealed, as borne out by the facts of the case ([24]). If the employee's identity is revealed, the communications would cause serious disruption in the workplace and raise questions about that employee's ability to work professionally, efficiently and impartially. Moreover, even if the employee is never identified, harsh and extreme criticism of Government policies and administration is, in itself, apt to cause damage to the good reputation of the APS ([24]; cf [105]).

'There was an "obvious" risk that the identity and employment details of a person who anonymously posted material online – and, in particular, on social media websites – would be revealed, as borne out by the facts of the case.'

Plurality and Edelman J: structured proportionality analysis

The Commonwealth had conceded that s 10(1) in combination with s 13(11) imposed an effective burden on the implied freedom. This concession was 'rightly made' ([29], [105]), with Edelman J describing the burden as 'deep and broad' ([166]). The question was whether that burden was justified.

The plurality and Edelman J held that it was, by applying structured proportionality analysis. Echoing an observation he made in *Clubb v Edwards*; *Preston v Avery* [2019] HCA 11 (*Clubb*) at [408], Edelman J said that ([188]):

'Structured proportionality testing promotes transparent reasoning in the application of an abstract constitutional implication. It requires the court to confront directly the suitability, reasonable necessity and adequacy in balance of laws that impose a burden upon political communication.'

Structured proportionality testing promotes transparent reasoning in the application of an abstract constitutional implication. It requires the court to confront directly the suitability, reasonable necessity and adequacy in balance of laws that impose a burden upon political communication.

Applying that structured proportionality analysis, the plurality and Edelman J held that the PS Act provisions were suitable, necessary and adequate in their balance:

- *Suitability*: the plurality and Edelman J found that the provisions were a rational means of achieving the specific objectives of maintaining and protecting an apolitical and professional public service ([34], [192]).
- *Necessity*: their Honours rejected Ms Banerji's argument that an obvious and compelling alternative to the impugned provisions would be to exclude anonymous communications from their scope of application because in that case they would 'cease to operate as a deterrent against a significant potential source of damage' ([36], [201]).
- *Adequacy in balance*: the plurality held that a law will be adequate in its balance 'unless the benefit sought to be achieved by the law is *manifestly* outweighed by its adverse effect on the implied freedom' ([38], emphasis added). Here the PS Act, including the procedures for assessment of the nature and gravity of contravention of s 13(11), was 'plainly' adequate in its balance. In reaching that conclusion, the plurality did not decide whether the range of penalties that could be imposed under s 15 was relevant to the analysis (by affecting the 'quantitative extent of the burden' imposed by the PS Act) but proceeded on the assumption that it was ([39]). To that extent it was relevant that a decision maker was required to exercise the s 15 discretion reasonably, and s 15 could only render an employee liable to a penalty that is proportionate to the nature and gravity of their misconduct ([40]). Further, decisions under s 15 were subject to statutory procedural fairness requirements, merits review, judicial review and, in the case of termination, redress under Pt 3.2 of the *Fair Work Act 2009* (Cth) ([41]).

  Justice Edelman similarly considered a law would only fail at this stage of the analysis if there was a 'gross imbalance' between the importance of the law and the magnitudes of the burden. Section 13(11), read in light of the sanctions in s 15(1), was far from exhibiting this imbalance ([205]).

Gageler and Gordon JJ did not apply the structured proportionality analysis but reached the same conclusion

Consistently with their positions in *McCloy v New South Wales* [2015] HCA 34, *Brown v Tasmania* [2017] HCA 43 and, most recently, *Clubb*, Gageler J and Gordon J each declined to apply a structured 3-stage proportionality analysis in determining whether the impugned provisions are valid.

Justice Gageler considered the burden on political communication imposed by the impugned laws to be substantial and directly targeted at political communication ([90]). As such, it required 'close scrutiny responding to a compelling justification' ([97]). His Honour held that the impugned provisions were justified as laws reasonably appropriate and adapted to achieve their identified object of establishing an apolitical public service, on the basis of 3 considerations. First, s 13(11) is a 'statutory incident of a relationship of employment', with the worst consequence for breach being the possibility of termination. Secondly, the APS Value in s 10(1)(a) is 'tailor made' to the object of an apolitical APS ([104]). Thirdly, a decision maker is required to act reasonably and accord procedural fairness when determining and sanctioning a breach of the APS Code of Conduct, with provision for review of those decisions ([106]). In considering the application of the Code of Conduct to anonymous communications, Gageler J observed that trust and confidence in the APS 'cannot exist without assurance that partisan political positions incapable of being communicated with attribution will not be communicated anyhow under the cloak of anonymity' ([105]).

Justice Gordon likewise emphasised that ss 10(1)(a) and 13(11) were not self-executing: they were only given legal 'teeth' through a determination of breach. They were targeted to a select group of people – APS employees –and the content of the burden they imposed was transparent. Unlike Gageler J, however, Gordon J characterised the law as not directly targeted at political communication. Rather, her Honour said it was targeted at a person's conduct and, in particular, conduct which failed to uphold the APS Values or the integrity or reputation of the APS. Whether any particular political communication was caught would depend on an evaluative judgment based all relevant factors ([138]–[141]). In these circumstances, and because the *only* purpose of the relevant provisions of the PS Act and the executive action taken in relation to Ms Banerji was the maintenance of an apolitical public service of integrity and good reputation, Gordon J considered that the laws were justified ([156]–[161]).

Impugned laws were valid in all of their operations

The Court thus decided the case on the basis that the impugned laws were valid in all of their operations. None of the justices had cause to consider whether the scope of the discretion conferred by the provisions needed to be read down in order to ensure that the laws were within constitutional power ([46], [96], [166], [207]–[209]; cf *Wotton v Queensland* (2012) 246 CLR 1 at 14).

The plurality, Gageler and Edelman JJ also expressly rejected Ms Banerji's submission that the implied freedom is an essential mandatory consideration in the exercise of the discretion under s 15 and that a decision maker's failure to consider the implied freedom thus constitutes a jurisdictional error which vitiates the decision ([44], [52], [208]). Whilst both Gageler J ([52]) and Edelman J ([211]) described the respondent's argument as involving an element of 'conceptual confusion', the plurality did not rule out that the implied freedom may be a relevant consideration in the exercise of the discretions under other legislation, depending on the terms of that legislation ([45]).

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AGS (Fiona Dempsey and Bradley Dean from AGS Dispute Resolution) also acted for Comcare, with Brenda Tronson as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA//2019/23.html

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