WHEN IS AN ELECTORAL EXPENDITURE CAP JUSTIFIED? A CRITIQUE OF *UNIONS NSW V NEW SOUTH WALES*

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In the High Court decision of Unions NSW v New South Wales, the main issue was whether the expenditure cap of $500,000 imposed on third-party campaigners pursuant to section 29(10) of the Electoral Funding Act 2018 (NSW) was valid. It was held to be invalid because it impermissibly infringed the implied freedom of political communication. This commentary evaluates the different reasoning taken by the members of the Court. By suggesting a hypothetical example to test the reasoning of the judges, it is submitted that there remains some uncertainty regarding when an expenditure cap is justified. In terms of its precedential value, it will be argued that the plurality's approach demonstrates that the necessity stage of the structured proportionality analysis is not only a substantive test (ie, focusing on and evaluating the measure itself), but it can also be a procedural test to determine whether Parliament has expressly justified the necessity (ie, evaluating the steps taken to justify the measure). Further, it is argued that the necessity stage may be flexibly reframable as asking whether a limit is 'minimally impairing', depending on the situation.

I INTRODUCTION

In the High Court decision of *Unions NSW v New South Wales* ('*Unions NSW*')[1] the main issue was whether the expenditure cap of $500,000 imposed on third-party campaigners pursuant to section 29(10) of the *Electoral Funding Act 2018* (NSW) ('*EFA*') was valid. It was held to be invalid because it impermissibly infringed the implied freedom of political communication.

This commentary evaluates the different reasoning taken by the members of the Court and the precedential value of the case. By suggesting a hypothetical example (see Part III(A) below) to test the reasoning of the judges, it is submitted that there remains some uncertainty regarding when an expenditure cap is justified,

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1 (2019) 363 ALR 1 ('*Unions NSW*').

particularly because the judgement of Kiefel CJ, Bell and Keane JJ ('the plurality') did not explore the 'adequacy of balance' stage of the test.

This case is important in two ways. First, and in terms of its practical implications, it provides some insights on how the legislature can justify an electoral cap (though there is still some uncertainty). Second, and in terms of its precedential value, it builds on the three question test developed by *Brown v Tasmania* ('*Brown*')[2] and *McCloy v New South Wales* ('*McCloy*').[3] It will be argued that the plurality's approach demonstrates that the necessity test of the structured proportionality analysis is not only a *substantive* test (ie, focusing on and evaluating the measure itself), but it may also have a *procedural* aspect to determine whether Parliament has expressly justified the necessity (ie, evaluating the steps taken to justify the measure). Further, it is suggested that the necessity stage may be flexibly reframable as asking whether a limit is 'minimally impairing', depending on the situation.

II RELEVANT BACKGROUND

A The Change in the Amount of Cap

Section 29(10) of the *EFA* imposes a cap on electoral expenditure of $500,000 on third-party campaigners. By contrast, the cap for (1) political party endorsing candidates for the Legislative Council and candidates in up to 10 electoral districts for the Legislative Assembly, and (2) an independent group of candidates for the Legislative Council is $1,288,500 under sections 29(4) and (5) of the *EFA* respectively.[4] Previously, the cap for (1) third-party campaigners, (2) political party endorsing candidates for the Legislative Council and candidates in up to 10 electoral districts for the Legislative Assembly, and (3) an independent group of candidates was $1,050,000 under the now repealed *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('*EFEDA*').[5]

The cap for third-party campaigners was reduced for the purpose of preventing third-party campaigners from *drowning out* parties and candidates,[6] whereas the cap for political parties was increased to account for inflation.[7] The gap between the caps imposed on third-party campaigners and political parties has been justified on the grounds that third-party campaigners are usually concerned with only a few single political issues whereas political parties, aiming to form a government, have to address all issues.[8]

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2 (2017) 261 CLR 328 ('*Brown*').
3 (2015) 257 CLR 178 ('*McCloy*').
4 *Unions NSW* (n 1) 21 [74]. For clarity, it is helpful to note that the total cap for a party that endorses candidates in all 93 electoral districts at a general election is $11,429,700.
5 *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ss 95(4), (5), (10)(a) ('*EFEDA*'), as repealed by *Electoral Funding Act 2018* (NSW) s 157 ('*EFA*'); *Unions NSW* (n 1) 28–9 [104] (Nettle J), 57 [217], 58 [220] (Edelman J). It is again helpful to note that under the *EFEDA*, the total cap for a party that endorses candidates in all 93 electorates at a general election is $9.3 million: at 21 [74] (Gageler J).
6 *Unions NSW* (n 1) 11 [30]–[31], [38] (Kiefel CJ, Bell and Keane JJ), 31 [111] (Nettle J), 41 [153] (Gordon J).
7 Ibid 29 [105] (Nettle J).
8 Ibid 25–6 [89]–[90] (Gageler J).

The present cap of $500,000 was decided based on a recommendation made by an independent Expert Panel (appointed by the New South Wales Government) in a 2014 Report ('Expert Panel Report').[9] The figure of $500,000 was calculated by adding $100,000 to the highest amount spent by a single third-party campaigner preceding the 2011 election.[10] Importantly, the Expert Panel recommended that the level of third-party campaigner caps be reviewed after the 2015 election.[11] Further, in a 2016 Report by the Joint Standing Committee on Electoral Matters ('JSCEM'), it was recommended that Parliament consider whether the reduced cap was sufficient for third-party campaigners to reasonably present their case.[12] However, the recommended reviews were not conducted, and the $500,000 figure was directly adopted by Parliament without accounting for, firstly, the level of third-party expenditure for the 2015 election and, secondly, the rate of inflation since 2011. Ultimately, there was no consideration of whether a third-party campaigner could 'reasonably present its case' with an expenditure cap of $500,000.[13]

B The Dispute on the Implied Freedom of Political Communication

The cap was held to constitute a direct burden on political communication[14] because it 'directly affects the ability of third-party campaigners to engage in political communication'.[15] Specifically, '[it] effects a restriction on third-party campaigners' "electoral expenditure", thereby limiting the funds that a third-party campaigner may permissibly spend on goods and services such as advertisements, production and distribution of election material, internet, telecommunications and postage, and staffing'.[16]

It should be clarified that the dispute between the parties was not about the existence of the cap, or the fact that there was a difference between the limits imposed by the various caps.[17] In the view of the plurality, the dispute concerned whether the halving of the cap on third-party campaigners' electoral expenditure was necessary and therefore whether the burden on the implied freedom could be justified.[18]

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9 NSW Department of Premier and Cabinet, *Political Donations* (Final Report, December 2014) vol 1, 113 <https://www.dpc.nsw.gov.au/assets/media-news/95/attachments/611c3861d7/Volume_1_-_Final_Report.pdf>.

10 According to the Expert Panel, the highest amount spent by a third-party campaigner at the 2011 election was approximately $400,000: ibid 112.

11 *Unions NSW* (n 1) 30 [106] (Nettle J).

12 Ibid 10 [26] (Kiefel CJ, Bell and Keane JJ), citing Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel: Political Donations and the Government's Response* (Report No 1/56, June 2016) 49 [7.22].

13 Ibid 30 [107] (Nettle J).

14 Ibid 8 [15] (Kiefel CJ, Bell and Keane JJ), 38 [139] (Gordon J).

15 Ibid 38 [140] (Gordon J).

16 Ibid 38 [139].

17 Ibid 38 [141].

18 Ibid 8–9 [20].

III THE REASONING OF THE JUDGES

There were five different judgements: (1) Kiefel CJ, Bell and Keane JJ, (2) Gageler J, (3) Nettle J, (4) Gordon J, and (5) Edelman J. While all of the judgements held that the cap was invalid, their reasoning differed.

In determining whether the cap constitutes an impermissible burden on the implied freedom, all judges applied the three question test derived from *Brown* and *McCloy*:

1. Does the law effectively burden freedom of political communication?
2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?

All of the judges, except for Edelman J, held that the purpose of the legislation – to prevent 'drowning out' – was legitimate. However, as in *Brown*, all of the judges interpreted and applied the same test differently, especially the third question. Because of this, the guidance provided by each judgement is different, and there remains some uncertainty regarding when a cap is justified. This uncertainty is exemplified in the hypothetical example proposed below.

A A Hypothetical Example

To illustrate this uncertainty, it is helpful to first raise a hypothetical example which involves the dilemma of not having a sufficient cap, but the insufficiency is required to prevent drowning out. This example is used to illustrate how the Court's reasoning can be applied to resolve such problems. Assume the following where all figures are strongly supported by empirical evidence and reviews have been duly conducted by Parliament.

To prevent the drowning out of a political party, there needs to be a gap of at least $X (eg, $400,000) between the cap for a political party and the cap for a third-party campaigner. A reasonably sufficient amount for a third-party campaigner to present its case would require $Y (eg, $800,000). There will be a dilemma if a sufficient cap for a political party is set at $Z (eg, $1,000,000), so that the gap of $X is not maintained. The present concern is how the Parliament can justify its cap in a sense acceptable to the courts.

Can Parliament set the cap for a third-party as an amount which is smaller than $Y (eg, $500,000), so drowning out is prevented but is insufficient? If Parliament is forced to set the cap to be sufficient at $Y (ie, $800,000), then the purpose of prevention of drowning out cannot be achieved *unless* the cap for a political party is increased to be at least $X + $Y (ie, $400,000 + $800,000 = $1,200,000) so the $X (ie, $400,000) gap is maintained. The hypothetical problem would be made more challenging where the cap is simply insufficient by a relatively small amount like $10,000–$50,000.

The hypothetical problem may occur in reality where the government can only feasibly achieve the aim of preventing drowning out at the expense of not having

a sufficient cap. In other words, this dilemma is about the inability to achieve both ends *at the same time*. To answer this question, the reasoning of the judges must be studied carefully.

B The Plurality

Although the plurality did not expressly quote the three question test as stated above, they considered all of its questions. Their Honours assumed that the purpose of the legislation to prevent 'drowning out' was legitimate.[19] Of relevance is the plurality's analysis of the third question. In *Brown*, the same plurality applied a three-staged structured proportionality analysis which considered the third question by reference to (1) suitability, (2) necessity, and (3) adequacy of balance. In the present case, the main issue for the plurality was (2): the *necessity* of the reduction. If the impugned provision which effectively burdened the implied freedom was not necessary, it would be invalid.[20] For clarity, the three 'questions' here refer to the overall test, whereas the three 'stages' refer to the structured proportionality analysis applied to the third question of the overall test.

To be necessary, the plurality held that the burden must be 'justified'. The plurality noted that this is contrary to usual practice as Parliament does not generally need to provide evidence to prove the basis for the legislation it enacts.[21]

The plurality then held that there was no basis for a halving of the cap previously allowed for third-party campaigners. This was partly because the Expert Panel Report's recommendation that the figure be checked against the expenditure for the 2015 election had not been done and, contrary to the recommendation made by the JSCEM in 2016, no enquiry as to what is in fact necessary to enable third-party campaigners reasonably to communicate their messages appears to have been undertaken.[22] Therefore, the burden was not justified as necessary.

1 Evaluating the Plurality's Reasoning: The Uncertainties

Was the plurality's reasoning based on a mere *procedural*[23] failure to review, or a *substantive* failure to have a sufficient cap?[24] Logically, the plurality may have intended both. Yet, the actual reasoning of the plurality suggests otherwise. This is because, had the plurality meant the latter, they could have simply invalidated

19 Ibid 12 [35]. '[If] any differential treatment is an illegitimate purpose in respect of caps on donations or electoral expenditure, the legislature would never be in a position to address the risk to the electoral process posed by such groups': at 12 [34].

20 Ibid 13–14 [42].

21 Ibid 14 [45].

22 Ibid 16 [53].

23 'Procedural' does not mean that the Parliament is subject to certain formal procedures to be followed. Instead, the meaning here is that the Parliament failed to consider the relevant questions and hence failed to justify the action.

24 For clarity, a *substantive* test is different from a *procedural* test because, for the former, the focus is on the cap alone (ie, whether the cap is justified, proportionate, etc) whereas, for the latter, the focus is on the Parliament.

the cap by asking whether the cap was sufficient (eg, by asking for empirical evidence), rather than considering what the Parliament had or had not procedurally considered.

Reversely, if the cap was sufficient, but the Parliament had failed to review its sufficiency, would it mean that the cap was still unjustified? These uncertainties on how a cap is to be justified demonstrates that the focus of the necessity test is not entirely clear.

Nettle J's analysis lends support to the view that a proper justification is procedural, because his Honour's reasoning did not consider whether the cap was sufficient. Rather, Nettle J focused on the fact that Parliament did not clearly and convincingly demonstrate why the reduction was necessary and not excessive.[25] In requiring a 'demonstration', Nettle J was similarly concerned with the *procedural* aspect of justification. Only Gageler J and Gordon J's reasoning required sufficiency (excluding Edelman J who stopped at the purpose stage).

The third stage of the structured proportionality test, the adequacy of balance, was not explored by the plurality. If the necessity stage only entails a procedural aspect on the facts, an insufficient cap may have been valid so long as it also passed the adequacy stage. The adequacy of balance stage concerns whether a limit is 'manifestly excessive by comparison to the demands of legitimate purpose'.[26] For example, it may be argued that unless the cap is grossly insufficient, it might be possible to pass the third stage (see further analysis regarding the relationship between the adequacy and necessity stages in Part IV(B)(2) below). This may occur where the Court thinks highly of the benefits and importance of the goal[27] (eg, one of the benefits has been identified as maintaining a level-playing field).[28] In any event, it is not possible to derive a conclusion with certainty regarding how the Court would decide under the adequacy stage, particularly because the adequacy test is a 'value judgment' which has been criticised for its lack of guidance.[29] This lack of judicial guidance on how balancing will be conducted adds to the uncertainty regarding when a cap is justified.

Applying the plurality's approach to the hypothetical problem above, the goal of preventing drowning out *may* (without certainty) be able to take precedence over (minor) insufficiency (depending on the third stage of the structured proportionality analysis).

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25 *Unions NSW* (n 1) 32–3 [116]–[117].

26 *Brown* (n 2) 422–3 [290] (Nettle J).

27 In *McCloy* (n 3), the issue was whether the prohibition regarding political donations unduly burdened the implied freedom of political communication. In the adequacy of balance stage, French CJ, Kiefel, Bell and Keane JJ held that although 'reducing the funds available to election campaigns there may be some restriction on communication', it is 'more than balanced by the benefits' because it enhances 'equality of access to government' by 'removing the risk and perception of corruption': at 220–1 [93]. However, it is to be noted that the plurality in *Unions NSW* (n 1) 'observed that a cap on electoral expenditure is a *more direct* burden on political communication than one on political donations': at 8 [15] (emphasis added). How this will affect the adequacy consideration is not known with certainty.

28 *Unions NSW* (n 1) 11 [31] (Kiefel CJ, Bell and Keane JJ), 25–6 [90] (Gageler J), 32 [113] (Nettle J).

29 *Brown* (n 2) 376–7 [160] (Gageler J). The adequacy test 'is too open-ended, providing no guidance as to how the incommensurables to be balanced are to be weighted or as to how the adequacy of their balance is to be gauged': at 377 [160].

C Nettle J

Despite holding the cap to be invalid, Nettle J's approach appears more supportive of the legislative goal of preventing drowning out. First, *even in the absence* of evidence that the cap was sufficient for third-party campaigners,[30] Nettle J was of the view that it 'is *conceivable* that the new cap and its relativities with the caps imposed on parties and candidates is within the range'.[31] According to Nettle J, a political level playing field is comprised of an acceptable range of differences between the cap for political parties and third-party campaigners, and Parliament can make selections within the range. In this way, Nettle J would seem to allow the goal to be achieved even where the cap is insufficient. This is because Nettle J's focus is on whether the cap is within the 'range' *for ensuring level playing field*, rather than on whether the cap is sufficient per se.

Nettle J held the cap to be invalid because Parliament did not consider whether a cut of as much as 50 per cent was required.[32] In other words, Nettle J was concerned with the failure to gather evidence to establish 'the appropriate relativity'.[33] It was not about sufficiency.

Applying Nettle J's approach to the hypothetical problem above, the goal of preventing drowning out *may*[34] take precedence over (minor) insufficiency (on the assumption that the level playing field is not disrupted and hence within the range).

D Gageler J

In *Brown*, Gageler J did not deem the plurality's three-staged proportionality analysis to be suitable in considering the third question of the test.[35] Similarly, in this case, Gageler J did not apply the three-staged test and instead solely relied on the concept of 'reasonably appropriate' (ie, the notion used in the third question itself).

Gageler J did not think it necessary to consider whether third-party campaigners were marginalised whilst the political parties were privileged by having a reduction in the cap of the former.[36] Rather, a cap is justified by ensuring that the 'amount is reasonably appropriate'.[37]

To be 'reasonably appropriate', a cap must be '*sufficient* to allow a third-party campaigner to be reasonably able to present its case to voters'.[38] Thus, Gageler J's

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30 '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': *Unions NSW* (n 1) 28 [101] (Gageler J).

31 Ibid 32 [115] (emphasis added).

32 Ibid 33 [118].

33 Ibid 33 [117].

34 It is more likely that Nettle J's approach will allow the goal of preventing downing out to take precedence over insufficiency than the approach of the plurality.

35 *Brown* (n 2) [160]. See also Joshua Forrester, Lorraine Finlay and Augusto Zimmerman, 'Finding the Streams' True Sources: The Implied Freedom of Political Communication and Executive Power' (2018) 43(2) *University of Western Australia Law Review* 188, 190.

36 *Unions NSW* (n 1) 23–4 [84].

37 Ibid 26 [91].

38 Ibid 28 [102] (emphasis added).

simple analysis shows that his Honour's focus is solely on the sufficiency of the cap itself (a question of fact), rather than on whether the Parliament has taken steps to ensure the cap is sufficient (a procedural question). This is further evidenced by the fact that Gageler J was the only judge who expressly considered whether the cap was 'self-evident' or has 'been shown' to be sufficient.[39]

Applying Gageler J's approach to the hypothetical problem above, the goal of preventing drowning out *cannot* take precedence over any insufficiency. It must be sufficient.

E Gordon J

Gordon J would require there to be 'sufficient evidence that a third-party campaigner could reasonably present its case with an expenditure cap of $500,000'.[40] Thus, sufficiency would be a prerequisite to justify a cap. However, Gordon J's approach is not identical to Gageler J or the plurality's approach.

Similar to the plurality's approach, Gordon J's criteria for justification was focused on the actions taken by Parliament procedurally to justify a cap. Thus, Gordon J was not examining whether the cap was sufficient (ie, a question of fact against the cap itself), but instead required Parliament to ensure that the cap was sufficient using evidence (ie, a question of whether the Parliament has procedurally done something). By contrast, Gageler J's approach simply asks whether the cap is sufficient.

Applying Gordon J's approach to the hypothetical problem above, the goal of preventing drowning out *cannot* take precedence over insufficiency.

F Edelman J

Edelman J was the only judge who considered the purpose of the legislation to be illegitimate. In other words, his Honour reached a conclusion at the second question without proceeding to the third question of the test. Given that Parliament reduced the cap without justification, the rational *inference* was that Parliament must have 'acted with the additional purpose, not merely the effect, of quietening the voices of third-party campaigners relative to political parties and candidates'.[41] A law which has an *aim* to impair the freedom of political communication required by representative and responsible government will 'always be illegitimate'.[42] Having an *aim/purpose* is different from a law having a legitimate purpose but having the same *effect*.[43] It would be helpful to understand Edelman J's analysis of section 29(10) in light of section 35 of the *EFA* (which will not be considered here), because Edelman J seems to hold that they jointly reveal an illegitimate purpose.

It is also interesting to note that Edelman J would not simply take the purpose as *stated* in the legislative preparatory materials (eg, the Expert Panel Report). On the assumption that 'the legislature is a body that acts rationally and not without

39 Ibid 28 [101].
40 Ibid 41 [153].
41 Ibid 59 [222]. See also 42–3 [158].
42 Ibid 46 [173].
43 Ibid 48–9 [179].

any rhyme or reason'[44], Parliament must have had an additional purpose when acting without sufficient justification.[45]

IV IMPLICATIONS AND TAKEWAYS

A Uncertainty and Implications for the Legislature

The safest way to justify a cap is to have *Parliament*[46] ensure it is sufficient for a third-party campaigner to present its case. To achieve the goal of preventing drowning out, the legislature should also prepare evidence to justify cutting the cap. Having different caps for third-party campaigners and political parties is permissible.[47] However, there remains some uncertainty regarding what kind of evidence would be acceptable to the Court. Would empirical evidence be sufficient, or would other type of evidence be required (eg, sociological and normative studies that are qualitative in nature)?

The above conclusion presumes that (1) prevention of drowning out can be *perfectly* achieved whilst (2) ensuring that third-party campaigners have a sufficient cap. This commentary raises a hypothetical example (see Part III(A) above) where the two aims cannot be achieved simultaneously. In such circumstances, the guidance provided by the judges' approaches leads to different conclusions. Applying the judges' approaches to the hypothetical problem above, the goal of preventing drowning out (1) *may* (the plurality and Nettle J) or (2) *cannot* (Gageler J and Gordon J) take precedence over having an insufficient (in a minor way) cap. The uncertainty is heightened by the fact that the plurality did not consider the 'adequacy of balance' stage, therefore making it difficult to predict how the plurality would balance the two (see Part III(A)(1) above). If the plurality were to hold that an insufficient cap is balanced, the cap would be valid under the plurality's approach, but invalid under Gageler J and Gordon J's approaches. Furthermore, the extent to which a cap must be sufficient is unknown. In light of such uncertainties, the legislature may face challenges in amending the invalid cap.

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44 Ibid 42–3 [158].

45 Ibid 58 [219]. See also 46 [172]. Edelman J's approach is an interesting one because the previous understanding was that there were only two main approaches to determine the objective, being either broad or narrow. The narrow approach would simply focus on the objective revealed by the words and operation of the statute whereas the broad approach would additionally consider the Parliament's wider social objective: see Larissa Welmans, 'Section 18C and the Implied Freedom of Political Communication' (2018) 44(1) *University of Western Australia Law Review* 21, 41–3. Here, by contrast, Edelman J's approach (arguably a more stringent version of the broad approach) infers the objective and political motives from the circumstances beyond legislative materials.

46 A sufficient cap may not in itself be enough because a procedural aspect to the necessity test will require Parliament to ensure that the cap is sufficient and demonstrate this sufficiency using evidence. See the analysis of Gordon J's judgment in Part IIIE.

47 *Unions NSW* (n 1) 25–6 [90] (Gageler J), 38 [141] (Gordon J).

B Notable Precedential Value

1 Alternative Formulation of the Necessity Test

The necessity stage of the third question has previously been framed as a *substantive* test, asking whether 'there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom'.[48] However, this case illustrates that there are two more aspects to the necessity stage. Further, the phrase 'compelling alternative' is not mentioned by the plurality at all. Then, what does the necessity test entail in this case?

First, the plurality considered a more fundamental question of necessity: a *procedural* element which requires the Court to consider whether Parliament has expressly justified the necessity. In other words, the Court should not simply ask whether the limit is necessary (a substantive test), but too whether the necessity of the cap has been demonstrated by Parliament (a procedural test). It would not be illogical to extend the same procedural requirement to the suitability stage and the adequacy of balance stage, by requiring Parliament to have expressly considered and justified them.

Second, it is suggested that the necessity test may be reframable to ask whether the limit is 'no more than is necessary' (ie, 'minimal impairment'). The plurality expressly states that the concept of minimal impairment (as established in Canada) is analogous to the requirement of reasonable necessity.[49] This concept of *minimal* impairment is supportable and consistent doctrinally because, in *McCloy*, the plurality held that the necessity test is to ensure the impugned measure fulfils 'the legislative purpose with the *least* harm to the freedom'.[50] Clearly, through the use of similar words ('least' and 'minimal'), the concept of minimal impairment is highly comparable and relevant. Whilst there does not seem to be any real difference between them,[51] it (1) helps us to understand the necessity test through a possible alternative formulation, and (2) illustrates the potential comparability between this aspect of the test in Australia and Canada.

Furthermore, the traditional substantive necessity test (of asking whether there is a compelling alternative) would be inappropriate on the facts. Hord is critical of the necessity stage (in a slightly different context) as, for him, it 'is questionable whether it is appropriate to consider alternatives under the constitutional mandate given Parliament's broad discretion to design the electoral system. In any event,

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48 *McCloy* (n 3) 195 [3] (French CJ, Kiefel, Bell and Keane JJ). See also Forrester, Finlay and Zimmerman (n 35) 190; Samuel J Murray, 'The Public Interest, Representative Government and the "Legitimate Ends" of Restricting Political Speech' (2017) 43(1) *Monash University Law Review* 1, 21.

49 *Unions NSW* (n 1) 16 [52]–[53].

50 *McCloy* (n 3) 217 [82] (emphasis added).

51 Under Canadian laws, the 'inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal"': *Carter v Canada (Attorney General)* [2015] 1 SCR 331 [102]. See also Charles-Maxime Panaccio, 'The Justification of Rights Violations: Section 1 of the Charter', in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 657, 662. This concept is thus similar and highly comparable to the Australian necessity test, which asks whether there is an 'obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom': *McCloy* (n 3) 195 [2].

judicial assessment of alternatives is difficult in light of the complexity of the electoral system'.[52] On the facts, it would not be easy for the Court to consider the hypothetical question of whether there is any alternative to prevent drowning out, other than to reduce the cap. It would have been more difficult given that Parliament has not accounted for the procedural consideration at all. Therefore, the plurality's evaluation from the procedural perspective is persuasive. It is logical to consider whether Parliament has supported the reduction with evidence. This case thus shows that the structured proportionality analysis is not rigid and can fit different circumstances.

Surely, the procedural aspect of the necessity analysis would not always be relevant in all circumstances in future cases, just like the Court has not applied the 'compelling alternative' formulation of the necessity test in this case. It would depend on the circumstances of the case. For example, if Parliament does not fail to review the cap, the *substantive* aspect of the necessity test would play a greater role.

Therefore, when the conventional 'compelling alternative' test is applied to a new cap, the Court may ask whether there is a more compelling *extent* of reduction than the newly designed one. In this regard, it would be best practice for Parliament to take Appleby and Olijnyk's suggestion that 'considering alternatives as part of the parliamentary deliberative process may contribute not only to enhanced legislative deliberation on constitutional norms, but also to a richer form of constitutional "dialogue" between the court and Parliament'.[53]

2 The Relationship between the Necessity Test and the Adequacy of Balance Test

Does the reformulation of the necessity test to (1) include a *procedural* aspect, and (2) determine the minimal impairment, add anything more to the structured proportionality analysis? At first instance, whilst they enrich the necessity test itself, it would seem that they do not add anything more because they are already covered by the adequacy of balance test. Although the plurality did not consider the adequacy stage, this matter is important for understanding how the reformulation functions.

The adequacy test is similar to these reformulations because both of them focus on the *extent* of the reduction. In *McCloy*, the plurality formulated the adequacy test to 'whether the *extent* of this restriction is *reasonable*' by reference to 'the importance of the purpose and the benefit sought to be achieved'.[54] In *Brown*, the plurality considered necessity in the sense of whether a measure 'goes far beyond

52 Brendan Hord, '*Murphy v Electoral Commissioner*: Between Severance and a Hard Place' (2017) 39(3) *Sydney Law Review* 399, 423.

53 Gabrielle Appleby and Anna Olijnyk, 'Parliamentary Deliberation on Constitutional Limits in the Legislative Process' (2017) 40(3) *University of New South Wales Law Journal* 976, 981.

54 *McCloy* (n 3) 219 [87] (emphasis added). The formulation of the adequacy stage by other judges uses different wording. For example, Nettle J in *Brown* (n 2) asks whether a measure is 'manifestly excessive'/'grossly disproportionate': at 422–3 [290].

those reasonably necessary for its purpose'.[55] In other words, the Court inquires as to whether its *extent* was *reasonably necessary*.[56] Asking whether the impairment is minimal is inquiring as to the extent.

However, it is argued that the adequacy test does not cover those aspects because it analyses the *extent* from a different perspective. Ultimately, the adequacy test is a balancing exercise, but the necessity test is not. The adequacy test asks 'whether the *extent* of the restriction imposed by the impugned law [is] *outweighed by the importance of the purpose* it served'.[57] It is 'a value judgment'[58] which asks whether the impugned provision would result 'in a societal net loss'.[59]

By contrast, the necessity test is not a balancing exercise (and hence it does not compare with the *importance* of the purpose). Instead, it merely considers whether the extent of reduction is required to achieve the purpose. It is not a value judgment.

To put the matter in another way, whether a cap has to be insufficient in order to prevent drowning out is logically a question of necessity (perhaps to be supported by studies); whereas whether the cap has to be sufficient (given the considerations on the implied freedom) is arguably more appropriately addressed as a value judgment question under the adequacy stage.

V THE CAUSE OF THE UNCERTAINTY

The academic questions that follow are why and how the application of the three question test create the uncertainties and differences in approaches. On the one hand, the three question test yields sufficient protection for the implied freedom of political communication. Further, it generates consistent conclusions, evidenced by the fact that all judges held the cap to be invalid. On the other hand, when the judges' approaches are applied to the hypothetical example, different results may be yielded.

The present case reinforces the fact that the application of the test can generate some divergence among the judges. Whilst the purpose of preventing drowning out has been accepted/assumed to be legitimate, the test is still largely discretionary (regarding how to frame the third question). The approaches of the plurality and Gageler J are particularly noteworthy because they form the strongest contrast in their application of the third question. In the plurality's view, whether a limit is 'reasonably appropriate' depends on whether it is 'necessary' (and other requirements); whereas Gageler J simply asks whether the limit is 'reasonably appropriate' without relying on the plurality's structured proportionality analysis.

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55 *Brown* (n 2) 373 [146].

56 Ibid.

57 Robert French AC, 'The Globalisation of Public Law: A Quilting of Legalities' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 231, 242. See also *McCloy* (n 3) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

58 *McCloy* (n 3) 195 [2]. Given it is a value judgment, 'reasonable minds may differ': Eric Chan, 'A Proportionate Burden: Revisiting the Constitutionality of Optional Preferential Voting' (2017) 42(1) *University of Western Australia Law Review* 57, 95.

59 Welmans (n 45) 52.

It is this difference which is key to the different results yielded by the hypothetical example.

Essentially, the plurality does not rely on the notion of 'reasonably appropriate' as a test, but instead replaces it with 'necessity' (or the 'structured proportionality analysis') as the guiding notion. Therefore, the plurality's necessity test and Gageler J's 'reasonably appropriate' test are, in substance, slightly different aspects to the third question.

The test of minimal impairment would arguably inevitably give marginally more weight to the objective of the limit,[60] because the thrust of the necessity test has already presumed (especially after passing the second question regarding legitimacy) the objective *has to be achieved*, as long as the limit is in the least infringing manner.[61] As such, the final conclusion regarding validity would be left to the adequacy of balance stage, which is most contested for being uncertain. In any event, the starting point of the balancing stage is based on the purpose/objective. Thus, it may be arguable that the whole analysis might be slightly inclined towards objective.

By contrast, Gageler J's test independently reviews the appropriateness of the limit. Gageler J's approach is best understood as simply inquiring as to whether the limit is reasonably appropriate *in light of* its effect on the implied freedom of political communication. Thus, Gageler J's approach would inevitably yield slightly different results than the plurality's *objective*-inclined approach.

(This above attempt to explain the differences in the approaches is only trying to explain the present case. The same explanation may or may not be applicable to other cases).

VI CONCLUSION

The three question test has always been the subject of academic debate. Not only is the third question controversial as in this case, other questions in the test have commonly been criticised as 'uncertain of application'.[62] Perhaps Murray is right in arguing that every time there is a difficult case on the implied freedom of political communication, the judges' applications and approaches will remove 'some confusion, but also [lay] the groundwork for continued uncertainty in other respects'.[63]

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60 Canadian scholarship on minimal impairment supports this view. 'Minimal Impairment implies that the attainment of the state's objectives is not, to any extent, put into question': Panaccio (n 51) 662.

61 For clarity, one should note that the necessity test is not asking whether the *objective* is necessary, but instead asks whether the *chosen measure* (and its extent) is necessary.

62 Welmans (n 45) 21 (criticising the uncertainty caused by the first question on the difficulty of construing the objective and the third stage of the third question that it is not easy to apply the 'adequacy of balance'). See also Murray (n 48), who makes similar criticisms, and Shireen Morris and Adrienne Stone, 'Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards*; *Preston v Avery*' (2018) 40(3) *Sydney Law Review* 395, 407, noting 'the difficulties inherent in predicting the outcome of proportionality analysis'.

63 Murray (n 48) 2.

In any event, this case is inevitably another landmark decision alongside *Brown*, *Lange v Australian Broadcasting Corporation*[64] and *McCloy*, and is another helpful illustration of the application of the three question test. Its precedential value on the necessity test should not be ignored.

64 (1997) 189 CLR 520.