

# What will constitute a legitimate interference with rights?

## Bropho v State of Western Australia

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A RECENT DECISION OF THE full Federal Court in *Bropho v State of Western Australia*<sup>1</sup> has created the opportunity to reconsider the operation of s.10 of the *Racial Discrimination Act 1975* (Cth) (RDA).

In *Bropho* it was decided that in relation to the right to own property, it was not inconsistent with s.10 of the RDA to limit that right in accordance with the legitimate public interest to protect the safety and welfare of women residing at the reserve in question.

The decision suggests that some forms of differential treat-

ment resulting from the operation or effect of a state law will be permissible, namely, those that achieve a "legitimate and non-discriminatory public goal".<sup>2</sup>

### Section 10

Section 10(1) of the RDA is unique in discrimination law around the country. It is concerned with the operation and effect of laws rather than with making the actions of individuals unlawful.

Importantly, state legislation may be found to be inconsistent with s.10 of the RDA, and therefore invalid because of the operation of s.109 of the Constitution, if a person of one race does not enjoy a right to the same extent as someone of a different race because of the operation or effect of the state law.

Until now, the approach

taken to s.10 has generally been one of 'formal equality', such that any differential treatment created by a law is likely to be discriminatory, but that s.10 of the RDA is not breached if the law amounts to a special measure under s.8 of the RDA.<sup>3</sup>

the administrator were racially discriminatory.

His Honour noted that in considering whether a law is inconsistent with s.10, regard may be had to the reasonableness of the law in question.<sup>5</sup> He held that the Reserves Act and the actions taken under

**"The decision of the full court in Bropho suggests that some forms of differential treatment resulting from the operation or effect of a state law will be permissible."**

### Bropho

In 1994, Reserve 43131 was designated for the use and benefit of Aboriginal people and a management order placed the care, control and management of the reserve with the members of the Swan Valley Nyungah Community (SVC).

In response to concerns about sexual and other abuse of women and children on the reserve, the *Reserves (Reserve 43131) Act 2003* (WA) was introduced. Among other things, the Reserves Act removed the power of care, control and management of the reserve from the SVC and placed it with an administrator who was empowered to make direction in relation to the reserve.

The appointed administrator prohibited entry to the reserve without his authority and ordered some residents to leave. However, many residents, alerted to the issues, had already left the reserve by the time that the order was made.

Bella Bropho, a member of the SVC and a former resident of the reserve, complained that the Reserves Act interfered with the enjoyment and exercise of her human rights and fundamental freedoms, including the right to own property.

it were both reasonable and proportionate.<sup>6</sup> His Honour concluded, however, that even if he had formed the view that the Act was in some way inconsistent with s.10 of the RDA, the entirety of the Reserves Act was a special measure and was therefore valid.<sup>7</sup>

His Honour also found that the applicants had no right of ownership over the reserve, and that any right they did have was in the nature of a statutory responsibility pursuant to the management order.

The full Federal Court unanimously dismissed the applicant's appeal.

### Right to own property

How should the 'right to own property' be interpreted under s.10?

The full Federal Court disagreed with the trial judge's approach to property rights and held that the "right to own property alone as well as in association with others"<sup>8</sup> should be interpreted in light of international jurisprudence rather than being restricted to "ownership of kind analogous to forms of property which have been inherited or adapted from the English system of property law or conferred by statute".<sup>9</sup>

In particular, the full court had regard to the jurisprudence of the Inter-American Court of Human Rights, which recognises the proprietary rights in

### Decision at first instance

At first instance,<sup>4</sup> the trial judge found that neither the



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several Latin American indigenous communities.

### Rights are not absolute

However, the full court held that the right to own property is not absolute.<sup>10</sup> It noted that, "it has long been recognised in human rights jurisprudence that all rights in a democratic society must be balanced against other competing rights and values, and the precise content of the relevant right or freedom must accommodate legitimate laws of, and rights recognised by, the society in which the human right is said to arise".<sup>11</sup>

While some caution needs to be exercised in applying that statement to all human rights,<sup>12</sup> the court held that, in relation to the right to own property, it was not inconsistent with s.10 to limit that right in accordance with the legitimate public interest to protect the safety and welfare of women residing at the reserve in question.

The court stated that "no property right, regardless of its source or genesis, is absolute in nature and no invalid diminution of property rights occur where the state acts in order to achieve a legitimate and non-discriminatory public goal".<sup>13</sup>

The court also noted, however, that it will always be a question of degree in determining the extent to which the content of a universal human right is modified or limited by legitimate laws and rights recognised in Australia. Its reasoning was not "intended to imply that basic human rights protected by the [RDA] can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory".<sup>14</sup>

On the basis of this reasoning, the full court held that the Reserves Act was not inconsistent with s.10 of the RDA. Given this finding, there was no need to consider whether the Reserves Act amounted to a special measure.

### Conclusion

The application of the *Bropho* decision in relation to rights other than property rights remains to be seen as well as the application of the "legitimate and non-discriminatory public goal" proviso.

Careful consideration will need to be given in determining what will constitute a 'legitimate' interference with rights in order to ensure that s.10(1) remains an effective protection against racially discriminatory laws.<sup>15</sup> □

### ENDNOTES

1. [2008] FCAFC 100 (Ryan, Moore and Tamberlin JJ). The Australian Human Rights Commission was granted leave to intervene in these proceedings by the High Court on 15 November 2007. The Commission's written submissions are available at: [humanrights.gov.au/legal/submissions\\_court/intervention/bella\\_bropho.html](http://humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html).
2. *Gerhardy v Brown* (1985) 159 CLR 70 83.
3. See, for example, the approach taken in *Gerhardy v Brown* (1985) 159 CLR 70, 113-114 (Wilson J), 131 (Brennan J). This aspect of the Court's reasoning has been the subject of academic commentary: see Sarah Pritchard, "Special Measures", in *Racial Discrimination Act 1975: A Review*, Race Discrimination Commissioner, 1995; Wojciech Sadurski, "*Gerhardy v Brown* v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't", (1986) 11 *Sydney Law Review* 5.
4. *Bropho v Western Australia* [2007] FCA 519 (Nicholson J).
5. *Ibid* [544]-[551].
6. *Ibid* [551].
7. *Ibid* [580].
8. Contained in article 5(d)(v) of the International Convention on the

Elimination of All Forms of Racial Discrimination.

9. [2008] FCAFC 100 [78].

10. *Ibid* [80].

11. *Ibid* [81].

12. Given that some rights, including the rights to life, to be free from torture and to be free from slavery are non-derogable rights (see article 4(2) of the International Covenant of Civil and Political Rights) and therefore cannot be balanced against other competing rights and values.

13. [2008] FCAFC 100 [83].

14. *Ibid* [82].

15. The Commission understands that the applicant has sought special leave to appeal the full court's decision to the High Court. Suggestions as to how legitimacy may be assessed are also discussed in the Commission's written submissions in the matter of *Morton v Queensland Police Service* D75/2008, an appeal to the Townsville District Court concerning laws restricting the possession of alcohol on Palm Island. The Commission was granted leave to make submissions in the matter as amicus curiae: [humanrights.gov.au/legal/submissions\\_court/intervention/2008/20081003\\_alcohol\\_palm.html](http://humanrights.gov.au/legal/submissions_court/intervention/2008/20081003_alcohol_palm.html). □