
Proportionality in Administrative Law and Its Application to Victoria's Proposed Pandemic Legislation

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This article describes the use of proportionality in United Kingdom and Australian administrative law. There remains uncertainty regarding use of the doctrine, particularly in Australia. The article defends proportionality on the basis it reflects the rule of law. Its flexibility is an asset. Arguments against proportionality are considered weak. The use of proportionality reflects a culture of justification for the use of government power in a way that impacts an individual's human rights, which reflects Australia's liberal democracy. The article then considers application of proportionality principles to Victoria's mooted pandemic laws. It finds that proportionality principles provide a more fertile ground for effective judicial review of the proposed extreme measures than Wednesbury unreasonableness.

I. INTRODUCTION

There is renewed interest in the concept of proportionality in Australian administrative law. The idea is traceable to Aristotle's *Nichomachean Ethics*.¹ It was referred to in *Magna Carta*.² In more modern times, it has been rationalised as part of the social contract,³ where individuals cede limited rights to government in return for government services like security, and protection of property rights. The extent to which rights are ceded to government is strictly limited, preservative of individual liberty,⁴ in a classic liberal idea. As such, it is compatible with the common law.⁵ The German concept of *Verhältnismäßigkeit*, or proportionality, reflects similar ideas.⁶ After briefly summarising past jurisprudence relating to proportionality, this article will consider its strengths and addresses its possible weaknesses, before applying proportionality analysis to Victoria's recent proposed pandemic legislation. It will be seen that use of proportionality, as opposed to alternatives, could significantly increase the prospects of successfully challenging government overreach.

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¹ “What is just, then, is what is proportionate, and what is unjust is what is counter-proportionate”: Aristotle, *Nichomachean Ethics*, Book V Ch 4 1131b, [20].

² *Magna Carta* (1215) regarding a fine for wrongdoing being proportionate.

³ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP, 2012) 176; William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) 125.

⁴ *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 545 (Edelman J); [2019] HCA 11.

⁵ *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 546 (Edelman J), 530 (rejecting Gageler J's view in the same case); [2019] HCA 11.

⁶ *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 788 (Lord Reed); [2013] UKSC 38; Carl Gottlieb Svarez, *Vortrage uber Recht und Staat* (Hermann Conrad and Gerd Kleinheyder eds, Cologne, 1960) 40: “only the achievement of a weightier good for the whole can justify the state in demanding from the individual the sacrifice of a less substantial good (provided) ... the difference in weights is not obvious, the natural freedom must prevail ... the (social) hardship ... to be averted through the restriction of the freedom of the individual has to be more substantial by a wide margin than the disadvantage to the individual (resulting) ... from the infringement.”

II. SUMMARY – PROPORTIONALITY IN UNITED KINGDOM AND AUSTRALIAN ADMINISTRATIVE LAW

United Kingdom (UK) courts have long recognised jurisdiction to review an administrative decision based on unreasonableness.⁷ This was often expressed as power being used arbitrarily⁸ or capriciously.⁹ In that context, an important principle was established in *Associated Provincial Picture Houses, Ltd v Wednesbury Corp (Wednesbury)*.¹⁰ The Court confirmed an administrative decision could be challenged based on “reasonableness”, but it was defined strictly, to mean the decision had to be so unreasonable no reasonable person could have made it.¹¹ It was not a question of the court stepping into the role of decision-maker and determining what it considered reasonable; rather it was a court’s determination a reasonable person *could* have reached the decision the authority did. It was a very high hurdle for a person challenging an administrative decision to overcome.¹²

Links between these cases and the rule of law are noted:

The judicial role (here) is very closely allied to the rule of law because it gives the judges a way of standing against arbitrary decision-making – and the rule of law, too, is opposed to arbitrary use of power. Understood in this way ... *Wednesbury* supports the rule of law.¹³

Of course, it is not necessary to limit this ground of review as narrowly as the court did in *Wednesbury* to reflect concern with arbitrary decision-making and the rule of law.

In the latter 20th century, prior to the *Human Rights Act 1998* (UK), some justices suggested proportionality might be applied to test the validity of administrative action.¹⁴ The *R v Barnsley MBC* court referred to the administrative measure interfering with a “common law right” to trade. The court in *CCSU v Minister for the Civil Service* referred to legitimate expectation of consultation, based on past practices.¹⁵ Implementation of the ECHR posed challenges. The Convention embraces proportionality analysis in protecting rights, providing limited ways in which laws can interfere with rights, pursuant to legitimate policy objectives. Inevitably, existing grounds of review in administrative law conflicted with the Convention. The matter was considered in a case where the UK Defence Department had a policy of discharging members of the military if they were homosexual and/or engaged in homosexual activity. Those discharged through such a policy challenged it on *Wednesbury* grounds.¹⁶

⁷ *Sharp v Wakefield* [1891] AC 173, 179 (Lord Halsbury LC); *Rooke’s Case* (1597) 5 Co Rep 99b, 100b; 77 ER 209, 210 (discretion bound by rule of reason and law, not “their wills and private affections”).

⁸ *Leader v Moxton* (1773) 3 Wils KB 462, 467; 95 ER 1157, 1160 (Blackstone J); *Sharp v Wakefield* [1891] AC 173, 179 (Lord Halsbury LC); *MacBeth v Ashley* (1870–1875) LR 2 Sc 352, 360 (Lord Selborne); and relatedly, “partial and unequal” operation of administrative decisions (*Kruse v Johnson* [1898] 2 QB 91, 99–100).

⁹ *Slattery v Naylor* (1888) 13 App Cas 446, 453 (Lord Hobhouse).

¹⁰ In *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).

¹¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 230 (Lord Greene MR, for the Court).

¹² *Nottinghamshire CC v Secretary of State for the Environment* [1986] 1 AC 240, 248 described it as involving “a pattern of perversity or an absurdity of such proportions that the guidance could not have been framed by a bona fide exercise of political judgment (by the executive)” (Lord Scarman).

¹³ Timothy Endicott, “Why Proportionality Is Not a General Ground of Judicial Review” (2020) 1 *Keele Law Review* 1, 12.

¹⁴ *R v Barnsley MBC* [1976] 1 WLR 1052, 1058 (Lord Denning MR), 1063 (Sir John Pennycuik); *CCSU v Minister for the Civil Service* [1985] AC 374, 410 (Lord Diplock) (*CCSU*); *Brind v Secretary of State for the Home Department* [1991] 1 AC 696, 751 (Lord Templeman); *Backhouse v Lambeth LBC* (1972) 116 Sol Jo 802. In *CCSU* Lord Diplock added the mere fact power was derived from the common law rather than statute law did not immunise it from judicial review (410); Lord Roskill agreed (417). Judicial reviewability of non-statutory powers was confirmed in *R (Miller) v Prime Minister* [2020] AC 373; [2019] UKSC 41; Jeffrey Jowell and Anthony Lester, “Proportionality: Neither Novel nor Dangerous” in Jeffrey Jowell and Dawn Oliver (eds), *New Directions in Judicial Review: Current Legal Problems* (Fred B Rothman & Co, 1988).

¹⁵ *CCSU v Minister for the Civil Service* [1985] AC 374, 401 (Lord Fraser).

¹⁶ *CCSU v Minister for the Civil Service* [1985] AC 374, 411 (Lord Diplock).

Initially the government succeeded. These courts concluded the policy was not unreasonable.¹⁷ However some justices indicated that the greater the extent to which executive action interfered with human rights protected by the Convention the greater the required justification.¹⁸ This presaged a move towards proportionality. The decision was overturned by the European Court. It commented negatively on the standard of review applied, finding the test for unreasonableness was so high as to be contrary to proportionality analysis required under the Convention.¹⁹

Subsequently the House of Lords adopted proportionality analysis in the administrative law context, at least for Convention cases. It indicated proportionality analysis was “more precise and sophisticated” than traditional grounds of review.²⁰ It indicated that, while usually results obtained through traditional grounds of review and proportionality analysis would be identical, this was not always so.²¹ It emphasised proportionality analysis did *not* mean merits review.²² The democratic mandate of the legislature and Executive is recognised, practically translating to “margin of appreciation” for those bodies.²³ The UK court adopted a three stage proportionality test,²⁴ similar to Canada.²⁵ The House confirmed the greater the extent to which a measure impacted fundamental human rights, the greater the required justification.²⁶ This might involve the importance of the objective the government seeks to further with the impugned measure.²⁷ If a challenged measure unjustifiably discriminates against individuals/groups, it will likely fail proportionality analysis.²⁸ Proportionality was to be applied flexibly in context – a

¹⁷ *R v Ministry of Defence; Ex Parte Smith* [1996] QB 517.

¹⁸ *R v Ministry of Defence; Ex Parte Smith* [1996] QB 517, 554 (Sir Thomas Bingham, MR) and 564–565 (Thorpe LJ).

¹⁹ *Smith and Grady v United Kingdom* [1999] ECHR 72, [138].

²⁰ *R (Daly) v Home Secretary* [2001] 2 AC 532, 547 (Lord Steyn) (with whom Lords Bingham and Cooke agreed); [2001] UKHL 26.

²¹ Lord Steyn explained at least three differences: (1) proportionality might require the court to assess the balance struck by the decision-maker, not merely whether it was within the range of reasonableness; (2) it may invite attention to the relative weight given to particular interests; (3) the court might consider in proportionality analysis the extent to which the interference with rights met a pressing social need, and was proportionate to the aim pursued (547–548).

²² *R (Daly) v Home Secretary* [2001] 2 AC 532, 548 (Lord Steyn); [2001] UKHL 26; *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 771 (Lord Sumption, with whom Baroness Hale, Lords Kerr and Clarke agreed), 789 (Lord Reed); [2013] UKSC 38; *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, 1444 (Lord Kerr); [2015] UKSC 69 (*R (Keyu)*) (Lord Mance (with whom Lord Neuberger, Baroness Hale, and Lords Kerr and Hughes agreed), indicated he had expressed views regarding proportionality similar to those of Lord Kerr in *R (Keyu)*). This was a response to earlier criticism that proportionality involved merits review: *R v Home Secretary; Ex Parte Brind* [1991] 1 AC 696, 762 (Lord Ackner) and 766–767 (Lord Lowry); similarly *R (Keyu)*, 1409: “the move from rationality to proportionality ... would ... have potentially profound and far reaching consequences (involving) ... the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision maker has struck between competing interests ... and the weight ... accorded to each such interest” (Lord Neuberger). He concluded he could apply *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 or proportionality, depending on the issue; see similarly Paul Daly, *Understanding Administrative Law in the Common Law World* (OUP, 2021) 127–128.

²³ *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 771 (Lord Sumption, with whom Baroness Hale, Lord Kerr and Lord Clarke agreed), 795–796 (Lord Reed), 814 (Lord Neuberger); [2013] UKSC 38.

²⁴ (1) whether the objective of the legislation was sufficiently important to justify limiting a fundamental right; (2) whether the measures designed to meet the legitimate objective were rationally connected to it; and (3) whether the means by which the right were impaired were no more than reasonably necessary to achieve it: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Lord Clyde, for the PC). It subsequently added a question of fair balance between individual and community rights: *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 771 (Lord Sumption, with whom Baroness Hale and Lords Kerr and Clarke agreed), 805 (Lord Hope agreed); [2013] UKSC 38.

²⁵ *R v Oakes* [1986] 1 SCR 103, 139; similar to structured proportionality articulated by Barak, n 3, 3.

²⁶ *R (Daly) v Home Secretary* [2001] 2 AC 532, 541 (Lord Bingham, with whom Lords Steyn, Cooke, Hutton and Scott agreed); [2001] UKHL 26.

²⁷ *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 771 (Lord Sumption, with whom Baroness Hale and Lords Kerr and Clarke agreed), 789 (Lord Reed); [2013] UKSC 38.

²⁸ *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 773 (Lord Sumption, with whom Baroness Hale and Lords Kerr and Clarke); [2013] UKSC 38 (government unable to explain why its legislation was targeted at one bank, and the majority held the measure failed proportionality analysis).

court might accord greater deference to government decisions involving political or economic questions.²⁹

In *R (Daly) v Home Secretary*, Lord Cooke added *Wednesbury* was an “unfortunately retrogressive decision in English administrative law”.³⁰ Aronson described its standard as “lunatic”,³¹ Craig said the test was virtually impossible to meet in practice;³² Groves and Weeks state it is a test any competent government counsel could meet,³³ and current justices have (extra-judicially and judicially) disagreed with it.³⁴ At present, however, UK courts apply proportionality to cases where the ECHR is engaged,³⁵ but apply *Wednesbury* unreasonableness to cases involving purely domestic law.³⁶ This conflicts with earlier judgments of the United Kingdom Supreme Court (UKSC) which had rejected this bifurcation.³⁷

A. Development of Proportionality in Australian Administrative Law

Unreasonableness as a ground of judicial review appears in the *Administrative Decisions (Judicial Review) Act 1977* (Cth)³⁸ and State and Territory equivalents.³⁹ The High Court applied it.⁴⁰ The legislation is not a code, and administrative review can proceed under common law, the relevant statute, or s 75(v).⁴¹

Australian case law accepted unreasonableness (in the *Wednesbury* sense) as a ground for reviewing administrative action.⁴² Thus only rarely have administrative decisions been successfully challenged

²⁹ *Kennedy v Charity Commission* [2015] AC 455, 507–508 (Lord Mance, with whom Lords Neuberger and Clarke agreed); [2014] UKSC 20; *A v Secretary of State for the Home Department* [2005] 2 AC 68, 135 (Lord Hope), 160 (Lord Rodger); [2004] UKHL 56; *Daly*, n 22, 131–133.

³⁰ *R (Daly) v Home Secretary* [2001] 2 AC 532, 549; [2001] UKHL 26.

³¹ Mark Aronson, “The Growth of Substantive Review: The Changes, Their Causes and Their Consequences” in John Bell, Mark Elliott and Jason Varuhas (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016).

³² Paul Craig, “The Nature of Reasonableness Review” (2013) 66 *Current Legal Problems* 131, 161 (“there can be no pretence of any meaningful substantive oversight and it is difficult to think of a single real case in which the facts meet this (*Wednesbury*) standard”); Paul Craig, “Proportionality, Rationality and Review” [2010] *New Zealand Law Review* 265, 276.

³³ Matthew Groves and Greg Weeks, “Substantive (Procedural) Review in Australia” in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart Publishing, 2015) 149.

³⁴ Steven Rares, “Judicial Review of Administrative Decisions: Should There be a 21st-Century Rethink?” (2015) 22 *AJAL* 157, 158–159; Jeffrey Jowell and Anthony Lester, “Beyond *Wednesbury*: Substantive Principles of Administrative Law” [1987] *Public Law* 368.

³⁵ *R (on the Application of Elan-Core) v Secretary of State for the Home Department* [2021] UKSC 56, [65] (Lord Reed for the Court).

³⁶ *R (on the Application of Friends of the Earth and Others) v Heathrow Airport Ltd* [2021] UKSC 52, [119] (Lord Hodge and Lord Sales, with whom Lord Reed, Lady Leggatt and Lord Leggatt agreed).

³⁷ *Kennedy v Information Commissioner* [2015] AC 455, 508 (Lord Mance, with whom Lords Neuberger and Clarke agreed), 533 (Lord Sumption agreed); [2014] UKSC 20. In *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, 1446; [2015] UKSC 69 Lord Kerr held proportionality should be applied in situations where a fundamental right was not involved, albeit more loosely; similarly Craig, “Proportionality, Rationality and Review”, n 32, 271–272 and Jeffrey Jowell and Anthony Lester, “Proportionality and Unreasonableness: Neither Merger Nor Takeover” in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart Publishing, 2015) 55.

³⁸ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(2)(g).

³⁹ *Judicial Review Act 1991* (Qld) ss 20(e), 23(g); *Judicial Review Act 2000* (Tas) ss 17(2)(e), 20(g); *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 5(1)(e), 5(2)(g).

⁴⁰ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 388 (Mason CJ), 392 (Dawson J), 408 (Toohey J); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 645 (Crennan and Bell JJ); [2010] HCA 16.

⁴¹ *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 77 ALJR 1165, 1184 (Kirby J); [2003] HCA 30.

⁴² *Local Board of Health of City of Perth v Maley* (1904) 1 CLR 702, 712 (Griffith CJ, with whom Barton and O’Connor JJ agreed); *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353, 363 (Dixon J); *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 388 (Mason CJ), 392 (Dawson J) 408 (Toohey J); *Judicial Review Act 1991* (Qld) ss 20(e), 23(g); *Judicial Review Act 2000* (Tas) s 17(2)(e), 20(g); *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 5(1)(e), 5(2)(g).

on such grounds.⁴³ Some suggest it is confined to cases involving the exercise of discretion, as opposed to other cases such as where there is a duty to act, or where the exercise of jurisdiction depends on particular facts said to be lacking.⁴⁴

A potentially broader application of the unreasonableness ground, through use of proportionality, appeared in the High Court's *Minister for Immigration and Citizenship v Li*.⁴⁵ There a Ministerial delegate had refused the applicant's visa request, because information supporting the request was not genuine. The applicant sought to challenge the decision in the Migration Review Tribunal. While these proceedings were on foot, she sought an extension of time to obtain further information to support her request. The Tribunal refused, confirming the delegate's decision. The applicant successfully appealed on unreasonableness grounds.

The Court applied a default rule of statutory interpretation that Parliament intended exercises of administrative discretion be bounded by requirements of reasonableness.⁴⁶ French CJ equated "unreasonableness" with a decision that was arbitrary or capricious,⁴⁷ and/or contrary to the purposes for which the power was given.⁴⁸ In this way, the principle engaged the rule of law, disfavouring arbitrary exercise of government power. He emphasised unreasonableness review was not merits review or disagreement with the decision.⁴⁹ He connected proportionality with unreasonableness review, noting "a disproportionate exercise of an administrative discretion ... may be characterised as ... unreasonable (because) it exceeds ... what is necessary for the purpose it serves".⁵⁰

The joint reasons indicated dissatisfaction with *Wednesbury* reasonableness:

Wednesbury is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational ... decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene M.R. be taken to have limited unreasonableness in this way in ... *Wednesbury*.⁵¹

They noted Gummow J had (in citing Allars) agreed one example of unreasonableness was exercise of power disproportionate to its scope.⁵² He had concluded the administrative action taken there was not tainted by a "disproportionately arbitrary manner (so) as to attract (*Wednesbury*) review".⁵³ The joint reasons added "an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached".⁵⁴ It framed an unreasonable decision as one lacking evident and

⁴³ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377 (Gageler J); [2013] HCA 18; Caron Beaton-Wells, "Judicial Review of Migration Decisions: Life after S157" (2005) 33 *Federal Law Review* 141, 152.

⁴⁴ *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 77 ALJR 1165, 1179 (McHugh and Gummow JJ); [2003] HCA 30; compare *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J); *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, [20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); [2009] HCA 39; Mark Aronson, "Unreasonableness and Error of Law" (2001) 24 *UNSW Law Journal* 315, 319.

⁴⁵ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.

⁴⁶ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350–351 (French CJ), 362 (Hayne, Kiefel and Bell JJ), 370 (Gageler J); [2013] HCA 18.

⁴⁷ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351; [2013] HCA 18.

⁴⁸ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 349; [2013] HCA 18.

⁴⁹ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351; [2013] HCA 18.

⁵⁰ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 352; [2013] HCA 18.

⁵¹ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364 (Hayne, Kiefel and Bell JJ); [2013] HCA 18.

⁵² *Fares Rural Meat and Livestock Co v Australian Meat and Livestock Corp* (1990) 96 ALR 153, [49]. The others involved capricious use of power to obtain a desired result, and illegitimate discrimination.

⁵³ *Fares Rural Meat and Livestock Co v Australian Meat and Livestock Corp* (1990) 96 ALR 153, [49].

⁵⁴ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 366; [2013] HCA 18; for criticism Leighton McDonald, "Rethinking Unreasonableness Review" (2014) 25 *PLR* 117, 132–133.

intelligible justification.⁵⁵ Gageler J applied *Wednesbury* and did not refer to proportionality.⁵⁶ Obviously, the decision is significant in that all but one judge applied proportionality to determine reasonableness of administrative action. Because it is presumed in the statute granting the decision-maker power that it will be exercised reasonably, exercise of the power tainted by disproportionality confounds this implication. It will thus be beyond power.⁵⁷ However, there has been little use of *Minister for Immigration and Citizenship v Li* and lack of articulation of how proportionality might be applied within unreasonableness⁵⁸ though it was subsequently referred to in the context of administrative law.⁵⁹ Proportionality has been applied in determining validity of powers exercised under delegated legislation.⁶⁰ A recent example of the use of (structured) proportionality in this context is *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry (Brett Cattle Co)*.⁶¹

III. CONSIDERATION OF ASPECTS OF PROPORTIONALITY

A. Congruence with Rule of Law

There has been a long struggle to curb excesses of executive power. There was a time when it was believed that the exercise of executive power was above the law; at this time executive power was being exercised by the monarch.⁶² However, over time, the supremacy of the law over executive power was established in the case law⁶³ and other legal instruments. Important legal milestones in this journey include *Magna Carta 1215* (Eng), *Bill of Rights 1689* (Eng) and the *Petition of Rights Act 1628* (Eng).

Leading constitutional philosopher of the 19th Century, Albert Venn Dicey, described the essence of British constitutionalism, which obviously heavily influenced Australian constitutionalism, by reference to the rule of law.⁶⁴ Relevantly for present purposes, the rule of law is antithetical to arbitrary exercise of power or wide discretionary authority being exercised by the government.⁶⁵ He indicated that individual rights were the basis of British constitutionalism.⁶⁶

⁵⁵ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367; [2013] HCA 18.

⁵⁶ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 373; [2013] HCA 18.

⁵⁷ McDonald, n 54, 128; *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, [289]; [2020] FCA 732: “of course, it is a jurisdictional error for a Minister (or other official of the Commonwealth) to make a decision that is unreasonable or irrational”; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 564–565 (Gageler J); [2018] HCA 30; *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); [2009] HCA 39.

⁵⁸ Greg Weeks and Matthew Groves, “The Enduring Mystery of Minister for Immigration and Citizenship v Li” (2017) 24 AJAL 145, 146–147. Proportionality was briefly considered regarding unreasonableness in *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [77] (Allsop CJ, Robertson and Mortimer JJ); [2014] FCAFC 1.

⁵⁹ *McCloy v New South Wales* (2015) 257 CLR 178, 195 (French CJ, Kiefel, Bell and Keane JJ); [2015] HCA 34: “proportionality in Australian law describes a class of criteria ... developed by this Court ... to determine whether legislative or administrative acts are within the legislative grant of power under which they purport to be done” (emphasis added).

⁶⁰ *South Australia v Tanner* (1989) 166 CLR 161, 165 (Wilson, Dawson, Toohey and Gaudron JJ): “whether the regulation is capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose” (citing Deane J in *Commonwealth v Tasmania* (1983) 158 CLR 1, 260); *Williams v Melbourne Corp* (1933) 49 CLR 142, 155 (Dixon J); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 84 (Crennan and Kiefel JJ); [2013] HCA 3.

⁶¹ *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, [285]–[310]; [2020] FCA 732.

⁶² Bracton, *Laws and Customs of England* (1235): “quod rex non debet esse sub homine, sed sub Deo et Lege” (the King should not be under man, but under God and the law).

⁶³ *William v Berkley* (1561) 1 Plowden 223; 75 ER 339; *Magdalen College* (1615) 11 Co Rep 66, 72a; 77 ER 1235, 1243; *Case of Ecclesiastical Persons* (1601) Co Rep 14a and 14b; *Entick v Carrington* (1765) 19 Howell’s St Tr 1029; 95 ER 807; *R (Miller) v Prime Minister* [2020] AC 373, 401; [2019] UKSC 41; Lord Bingham, “The Rule of Law” (2007) 66 *Cambridge Law Journal* 67, 78.

⁶⁴ Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959).

⁶⁵ Dicey, n 64, 110.

⁶⁶ Dicey, n 64, 124.

In *Australian Communist Party v Commonwealth*,⁶⁷ Dixon J made two points of present relevance. He pointed out that history was replete with examples of the Executive attempting to supersede democratic institutions and constraints.⁶⁸ He further pointed out that the Australian *Constitution* was framed in accordance with assumptions, including the rule of law.⁶⁹ It was upon this basis that he struck out a law that gave a member of the executive power to declare an organisation to be unlawful, with no criteria to guide the exercise of the discretion. This was in the context of a constitutional law, rather than administrative law, challenge to the declaration. However, either way, concern about arbitrary exercise of power by the Executive is clearly evident.

In *Plaintiff S157/2002 v Commonwealth (Plaintiff S157/2002)* Gleeson CJ noted that the power of a court to provide a remedy in cases of an excess of power or jurisdiction was consistent with the separation of powers enshrined in the Australian *Constitution*.⁷⁰ He referred to judicial review as the means by which executive action is maintained within acceptable bounds, as a way of protecting individual liberty, and that this was part of the rule of law.⁷¹ The joint reasons expressly referred to the observation of Dixon J that the Australian *Constitution* was framed on the assumption of the rule of law.⁷² The reasons then added that the High Court's jurisdiction to ensure that the executive act within jurisdiction, in other words its judicial review of administrative action, was "protective".⁷³

In the United Kingdom, Lord Neuberger stated that "there is no more fundamental aspect of the rule of law than that of judicial review of executive decisions or actions".⁷⁴ He explained that "judges have no more important function than that of protecting individuals and organisations from abuse or misuse by the executive of its considerable and extensive powers".⁷⁵ Recently in *R (Miller) v Prime Minister*, all members of the Supreme Court stated that, when courts exercise a supervisory jurisdiction over the Executive to ensure it is acting within power, it gives effect to the separation of powers principle.⁷⁶ The fact that the Executive was accountable to Parliament was irrelevant in terms of the court's supervisory jurisdiction. Extra-judicially, Lord Bingham stated that arbitrariness was the antithesis of the rule of law,⁷⁷ and the rule of law required that members of the executive exercise their powers reasonably, for the purposes for which they were conferred, and within legal limits.⁷⁸ The rule of law protects human rights.⁷⁹

⁶⁷ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁶⁸ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187.

⁶⁹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193. Gummow and Hayne JJ observed in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381; [1998] HCA 22 that the occasion was "yet to arise" for all that may follow from the observation of Dixon J.

⁷⁰ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 484; [2003] HCA 2.

⁷¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492; [2003] HCA 2 (quoting, with evident approval, the judgment of Brennan J in *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70).

⁷² *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); [2003] HCA 2; see Leighton McDonald, "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" (2010) 21 PLR 14.

⁷³ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 514; [2003] HCA 2.

⁷⁴ *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, 1407 (Lord Neuberger); [2015] UKSC 69.

⁷⁵ *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 814; [2013] UKSC 38.

⁷⁶ *R (Miller) v Prime Minister* [2020] AC 373, 401–402 (Baroness Hale and Lord Reed, for the Court); [2019] UKSC 41.

⁷⁷ Lord Bingham, n 63, 72.

⁷⁸ Lord Bingham, n 63, 78; see also Rosalind Dixon, "Calibrated Proportionality" (2020) 48(1) *Federal Law Review* 92, 109: "ultimate constitutional values includ(e) ... non-arbitrary forms of government". Professor Dixon states that whether or not a law or measure advances or impinges upon ultimate constitutional values would be relevant to whether it is considered to be adequate in its balance in terms of proportionality analysis; see also Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018). Members of the High Court in *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448; [2019] HCA 11 appeared to discern the dignity of the sovereign people as a constitutional value relevant to proportionality analysis: Kiefel CJ Bell and Keane JJ (475); others have expressed scepticism: Groves and Weeks, n 33, 151.

⁷⁹ Barak, n 3, 230: "one of the main tenets of the substantive aspect of the rule of law is the recognition and protection of human rights."

Extra-judicially, Steven Rares has noted that:

The rule of law assumes that public power will be exercised reasonably. That is because the arbitrary, capricious, unjustified or inadequately justified use of the power of the State is a hallmark of tyranny and the antithesis of the rule of law.⁸⁰

Allan argues that the rule of law is consistent with a requirement that government *justify* incursions on human rights and freedoms.⁸¹ Similar views have been expressed by a former Chief Justice of the Supreme Court of Canada.⁸²

Will Bateman discussed the implications of the High Court's constitutional enshrinement of judicial review for jurisdictional error. He stated:

To hold that the *Constitution* entrenches a jurisdiction to review for jurisdictional error while, simultaneously, holding that Parliament may confer a power that is devoid of jurisdictional limitations, is to empty the constitutional conception of jurisdictional error of all content and privileges form over substance. Thus the *Constitution* prevents a federal or state parliament from creating a statutory power that is not conditioned by jurisdictional limitations sufficient to render the power "limited" or "controlled".⁸³

Bateman's concern was with the arbitrary exercise of government power. Where a power was not sufficiently constrained, it was arbitrary. This was contrary to the system of government contemplated by s 75(v) of the *Constitution*. In order that jurisdictional error can play its part in the overall constitutional design, the legislature must be effectively prohibited from conferring administrative powers so broad that effectively there are no sensible limits to it.⁸⁴ Of course, this concept is closely limited to rule of law principles which are said to be an "assumption" under which the Australian *Constitution* was framed.⁸⁵

The point is that an administrative decision that lacks proportionality, in not being suitable to achievement of the identified objective, necessary to achieve that objective, or adequate in its balance in terms of the importance of the legislative objective having regard to the extent to which it interferes with other rights, is one that is arbitrary. Proportionality is a means of determining that an administrative decision is arbitrary. An administrative decision that is arbitrary is contrary to the rule of law, which has constitutional status. Thus, it is well within the role of a court within a separation of powers constitutional structure to declare that an administrative decision that fails proportionality analysis is invalid.⁸⁶ The role of the court in upholding the rule of law, and striking out administrative decisions infected by arbitrariness, is constitutionally enshrined and guaranteed.

That proportionality is a limit on executive power is consistent with the High Court decision in *Davis v Commonwealth*,⁸⁷ which found that the Commonwealth's inherent nationhood power/executive power was subject to it. It is also consistent with statements in decisions such as *Leask v Commonwealth* (*Leask*), and its actual use in the context of the implied freedom of political communication and s 92 of the *Constitution*, that proportionality is useful in the context of limitations on power. The rule of law, forbidding arbitrary exercise of power, is such a limitation on power. It is thus appropriate, according to

⁸⁰ Rares, n 34, 162.

⁸¹ TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP, 2013) 168.

⁸² Beverley McLachlin, "The Role of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 *Canadian Journal of Administrative Law and Practice* 171, 174.

⁸³ Will Bateman, "The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review" (2011) 39 *Federal Law Review* 463, 502.

⁸⁴ Bateman, n 83, 502–506.

⁸⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); see similarly *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ), 513–514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); [2003] HCA 2.

⁸⁶ Others have expressly linked (dis)proportionality with arbitrariness: "the real doctrine is that, where a local council ought to take some interest into account ... the court will interfere with a decision that is so disproportionate in its impact on that interest that it is arbitrary or capricious or manifestly unjust or oppressive": Endicott, n 13, 18.

⁸⁷ *Davis v Commonwealth* (1988) 166 CLR 79.

Leask, McCloy v New South Wales and progeny and *Palmer v Western Australia*, to apply proportionality analysis to it.⁸⁸

Barak tied together the concepts of proportionality, rule of law, and democracy in the following passage:

Democracy, the rule of law and human rights are inseparable. Without democracy and the rule of law there are no human rights, and without human rights there is no democracy and rule of law ... the limitation of human rights is compatible with democracy and the rule of law if there is a proper justification for limiting a constitutional right; namely a proper balance is struck between the rights on the one end and the reasons for their limitation on the other.⁸⁹

In sum, recognition and application of proportionality principles in the administrative law context would be congruent with, not antagonistic towards, Australia's constitutional design.

B. Flexible Application

One of the appealing features of proportionality is its ability to apply flexibly to a range of situations,⁹⁰ as opposed to *Wednesbury* unreasonableness. As a specific example, the strength of the government interest in a particular subject matter can be weighed in the balance of judicial review if proportionality analysis is adopted. In matters of national security, it may be appropriate to accord government decisions greater deference.⁹¹ In matters of complex policy, where government is likely to have access to greater levels of expertise and courts very limited access, greater deference is appropriate. "Low intensity review" might apply in cases involving an essentially political judgment or where the decision relates to implementation of key government economic policy. At the other end of the spectrum, where fundamental human rights are at stake, "high intensity review" may be appropriate.⁹²

Of course, to make this point is not to imply that courts are in some way reviewing merits of a government decision or policy. Lord Kerr was at pains to make this point:

It is important to start any debate on the subject with the clear understanding that a review based on proportionality is not one in which the reviewer substitutes his or her opinion for that of the decision maker. At its heart, proportionality review requires of the person or agency that seeks to defend a decision that they show that it was proportionate to meet the aim that it professes to achieve. It does not demand that the decision maker bring the reviewer to the point of conviction that theirs was the right decision in any absolute sense.⁹³

With respect, Lord Kerr is correct. I must comment on another judgment in the same case, wherein Lord Neuberger claimed that proportionality did involve merits review *because* it required the court to consider the balance struck by the decision-maker between competing interests.⁹⁴ Two points might be made by way of (respectful) response to Lord Neuberger. With respect, this is a non-sequitur. The fact that courts are considering whether the balance struck by the decision-maker between competing interests is legally defensible does not mean they are reviewing the merits of the decision, in the sense

⁸⁸ The connection between the rule of law and proportionality was made by the German Constitutional Court in *19 BVerfGE 342* [1965] 348: "in ... Germany the principle of proportionality is enshrined in the Constitution. It emanates from the principle of the rule of law."

⁸⁹ Barak, n 3, 472.

⁹⁰ *R (Prolife) v BBC* [2004] 1 AC 185, 257 (Lord Walker); [2003] UKHL 23.

⁹¹ This was alluded to by Steward J in *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, [296]; [2021] HCA 18; see also *A v Secretary of State for the Home Department* [2005] 2 AC 68, 160 (Lord Rodger) and 172 (Baroness Hale); [2004] UKHL 56.

⁹² *Kennedy v Information Commissioner* [2015] AC 455, 507–508 (Lord Mance, with whom Lord Neuberger and Lord Clarke agreed); [2014] UKSC 20. Lord Sumption expressed agreement with the judgment of Lord Mance (533); Craig, "Proportionality, Rationality and Review", n 32, 268.

⁹³ *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, 1444; [2015] UKSC 69 (Lord Mance in this case indicated (1411) he had expressed views similar to Lord Kerr in earlier decisions). Lord Kerr's pointed comments may have been a response to the claim by Lord Neuberger in the same case that proportionality did involve merits review because it required a court to consider the balance struck by the decision-maker (1409).

⁹⁴ *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, 1409; [2015] UKSC 69.

that merits review is typically understood.⁹⁵ The court is not making the decision anew. The court does not make the decision itself. It does not “second-guess” the legislature.⁹⁶ It does not set aside the original decision merely because they might have reached a different decision, based on all of the relevant information, or they think another decision to have been more “reasonable”. The court reviews the decision made by others on a limited, carefully controlled basis that is appropriately respectful of the democratic mandate of decisions made by the Executive, all being members of the legislature in a Westminster system of government. And second, even in *Wednesbury* analysis, it is axiomatic that courts will consider the weight accorded by the decision-maker to various factors.⁹⁷ Thus, it can hardly be maintained that *Wednesbury* unreasonableness is to be preferred to proportionality on the basis that the latter involves reviewing weighting given to particular factors, when judges have indicated that this is also relevant to *Wednesbury* unreasonableness.

Proportionality is also lauded on the basis that it identifies relevant issues to be considered, ostensibly providing for more transparent reasoning and decision-making, through a structured approach.⁹⁸ In contrast, judges might have regard to a whole range of factors in determining whether *Wednesbury* unreasonableness has been established. That review is relatively unbounded and uncontrolled. At least with proportionality, the criteria are well known and understood.

Application of proportionality testing encourages the legislature and the Executive to be nuanced in the exercise of their power, effectively encouraging them to carefully consider legislation or executive action that impinges upon the rights of an individual, including whether the measure is minimally invasive of human rights, having regard to its objectives. It encourages carefully targeted measures, rather than all-encompassing rules which needlessly infringe rights. So, for example, in relation to voting rights of prisoners. The *European Court of Human Rights* found that, although legislatures have a margin of appreciation in relation to the franchise, a blanket ban on prisoner voting was contrary to the *Convention*.⁹⁹ However, a more nuanced provision, distinguishing according to the length of time that a prisoner was serving jail time, based on the nature of the offence etc might have survived scrutiny. Yet, on the other hand, legislation that targets one individual or group of individuals, or one organisation, when the problem at which the legislation is targeted is not confined to that individual, group or organisation, might also indicate a lack of connection between the measure and the means utilised to achieve it, leading to a finding of disproportionality.¹⁰⁰ This demonstrates the highly fact-sensitive nature of proportionality analysis. Clearly, it would just not be possible to reach this level of sophistication in analysis through application of the *Wednesbury* standard.

C. Objections to Proportionality

Apart from the objection that proportionality is effectively merits review, which has been dealt with above, objections to proportionality have been articulated in Australia in particular by Gageler and Gordon JJ. Gageler J stated that proportionality does not permit appropriate latitude to legislatures, and varying latitude in individual cases.¹⁰¹ Gageler J also expressed dissatisfaction with the third aspect of proportionality testing in particular, a consideration of whether a measure is “adequate in its balance”.

⁹⁵ Michael Taggart, “Proportionality, Deference, *Wednesbury*” [2008] *New Zealand Law Review* 423, 449 who wrote that proportionality “is not a power grab by the judiciary; and neither does it threaten separation of powers, nor penetrate to the merits”; Craig, “The Nature of Reasonableness Review”, n 32, 141; Jowell and Lester, n 37, 49.

⁹⁶ Jeffrey Jowell, “Beyond the Rule of Law: Towards Constitutional Judicial Review” [2000] *Public Law* 671, 681; compare Dan Meagher, “The Common Law Principle of Legality in the Age of Rights” (2011) 35 *Melbourne University Law Review* 449, 470.

⁹⁷ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J, as he then was) (with whom Dawson J agreed); Craig, “The Nature of Reasonableness Review”, n 32, 142–149.

⁹⁸ *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 790 (Lord Reed); [2013] UKSC 38; Craig, “The Nature of Reasonableness Review”, n 32; *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 544 (Edelman J); [2019] HCA 11; *Palmer v Western Australia* [2021] HCA 5, [55] (Kiefel CJ and Keane J); [2021] HCA 5.

⁹⁹ *Hirst v United Kingdom (No 2)* [2004] ECHR 122, [51].

¹⁰⁰ *Bank Mellat v HM Treasury (No 2)* [2014] AC 700; [2013] UKSC 38.

¹⁰¹ *McCloy v New South Wales* (2015) 257 CLR 178, 235; [2015] HCA 34.

Gageler J stated that the kind of review contemplated was too open-ended in nature.¹⁰² As others have pointed out, Gageler J effectively criticises proportionality as being both too inflexible, and too flexible.¹⁰³ Gageler J stated that when considering the validity of a law that impacted on the freedom of political communication (a context in which a majority of the Court has adopted proportionality analysis), the Court must consider validity in terms of the reasons for the constitutional implication and the risk that the impugned measure will affect political communication.¹⁰⁴ He indicated, for instance, that the law in this area distinguished between a law that operated a content-based restriction and one which did not, and one focused closely on political communication versus one with another objective, but with an incidental impact on communication.¹⁰⁵ Gordon J referred with apparent approval to the warning given by Gleeson CJ in *Roach*¹⁰⁶ about uncritical acceptance and use of a doctrine drawn from an overseas context without due regard to the fact that judicial review takes place in Australia in a different, narrower manner than that applied elsewhere.¹⁰⁷ She also expressed concern about the lack of guidance as to how the value judgments involved in proportionality analysis would be made.¹⁰⁸

With respect, these concerns can be addressed. One of the advantages of proportionality is that it facilitates different latitude being accorded to the legislature in individual cases, through the concept of deference. The UKSC has indicated this, stating that the application of proportionality principles is highly fact-dependent. It has indicated, for example, that in some areas such as national security or economic policy or other areas of complex policy choice, the legislature (and Executive) would be given greater latitude. Chief judicial proponent of proportionality in Australia, Kiefel CJ, stated that “proportionality analysis does not involve determining policy or fiscal choices, which are the province of parliament”.¹⁰⁹ In contrast, where a law or administrative decision significantly impacts human rights, less latitude would be given. Scholars have lauded the flexibility of the doctrine as one of its key attributes.¹¹⁰ This is hard to square with a suggestion that proportionality is too rigid and does not provide needed latitude to take account of individual case contexts.

Further, it is an interesting question to compare the scale of review of a legislature measure compared with an executive measure. There is authority to suggest that, if anything, greater deference is owed in respect of a legislative measure, as compare with an executive decision or regulation made under an enactment.¹¹¹

Gageler J also claimed that considering whether law was “adequate in its balance” was too open-ended.¹¹² However, the High Court is regularly called on to conduct a balancing exercise, and to make “value judgments”. In the constitutional case of *Davis v Commonwealth*,¹¹³ discussed above, where

¹⁰² *McCloy v New South Wales* (2015) 257 CLR 178, 235, 236–237; [2015] HCA 34.

¹⁰³ Evelyn Douek, “All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia” (2019) 47(4) *Federal Law Review* 551, 566: “one of the ironies of the debate over structured proportionality is that the test is attacked from both sides as both too uncertain, but also too rigid” (then referring to Gageler J in *McCloy v New South Wales* (2015) 257 CLR 178, 235; [2015] HCA 34).

¹⁰⁴ *McCloy v New South Wales* (2015) 257 CLR 178, 235, 238; [2015] HCA 34.

¹⁰⁵ *McCloy v New South Wales* (2015) 257 CLR 178, 235, 238; [2015] HCA 34.

¹⁰⁶ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–179; [2007] HCA 43.

¹⁰⁷ *McCloy v New South Wales* (2015) 257 CLR 178, 288–289; [2015] HCA 34.

¹⁰⁸ *Brown v Tasmania* (2017) 261 CLR 328, 465; [2017] HCA 43.

¹⁰⁹ *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 61–62; [2016] HCA 36; Endicott, n 13, 22: “it has often been pointed out that proportionality review can be conducted with deference towards the initial decision maker.”

¹¹⁰ Anne Carter, “Moving Beyond the Common Law Objection to Structured Proportionality” (2021) 49(1) *Federal Law Review* 73, 85; Dixon, n 78, 99.

¹¹¹ *R (ProLife) v BBC* [2004] 1 AC 185, 256 (Lord Walker); [2003] UKHL 23: “greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure”; *Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43 where Nettle J said a power attended by broad-ranging discretion was more likely to fail proportionality analysis (424).

¹¹² *Brown v Tasmania* (2017) 261 CLR 328, 377; [2017] HCA 43.

¹¹³ *Davis v Commonwealth* (1988) 166 CLR 79.

proportionality was applied, the Court considered the importance of the objective of the legislation balanced against its impact on established commercial freedoms. This was considered relevant to its constitutionality. Courts continuously balance a range of considerations, whether in terms of sentencing or in determining whether or not a duty of care has been breached. No one suggests that this usurps the role of other arms of government; it is a core function of the judiciary to balance competing considerations in determining legal outcomes.¹¹⁴ Similarly, in determining whether sufficient connection exists or whether a law is reasonably appropriate and adapted, evaluative judgment is required.¹¹⁵ No criteria are applied in the application of this test either. It seems odd, respectfully, to criticise proportionality on the basis it requires a value judgment and lacks criteria, when exactly the same criticism may be made of the test utilised by the critics.¹¹⁶

Specifically in terms of the implied freedom of political communication, proportionality analysis can easily accommodate the kinds of factors referred to by Gageler J in terms of existing principle. The fact that a law is content-based rather than neutral may indicate it is not necessary to achieve its objective; in other words, it may indicate it is overbroad. Further, a content-based restriction will be considered in the “adequate in its balance” – it might be more difficult to justify such a law as balanced. And the fact the law targets political communication, rather than incidentally affects it, might also suggest the law is not necessary to achieve its objective, or that it is inadequate in its balance, because of the significant way in which it impacts political communication. The fact a law is relevantly discriminatory could be relevant to suitability, necessity or adequacy of balance. In other words, the kinds of factors that were part of the law of the implied freedom of political communication can be readily adapted to be part of proportionality analysis.¹¹⁷

Edelman J has also pointed out that it is possible that proportionality testing in Australia takes on a different hue than that elsewhere.¹¹⁸ This was contemplated by its leading contemporary advocate.¹¹⁹ Kiefel CJ, Bell and Keane JJ stated that it does not mean that the courts determine the correct balance between competing interests; that is primarily something for other branches of government.¹²⁰ The court will only be satisfied that a measure fails the test of “necessity” if it finds that alternative measures less invasive of fundamental liberties are “obvious and compelling”.¹²¹ Nettle J described it as an outer limit beyond which Parliament could not go, where the legislation was grossly disproportionate to achievement of a legitimate objective, and narrower than a proportionality inquiry in other jurisdictions.¹²² In order that a law not be considered

¹¹⁴ “Courts are not infrequently called upon to weigh competing values that could never plausibly be reduced to any single metric of evaluation ... and despite the imprecision of those processes, they are the best available means of fulfilling essential functions ... the weighing of the importance of the purpose of a law against its impingement upon the implied freedom is no different”: *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 508 (Nettle J); [2019] HCA 11.

¹¹⁵ *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 492 (Gageler J); [2019] HCA 11; John Basten, “Review Essay: Understanding Proportionality Analysis” (2021) 43(1) *Sydney Law Review* 119, 130; Barak, n 3, 374–377; *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1049 (Dickson CJ, for Wilson LaForest and L’Heureux-Dube JJ): “unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis (as proportionality).”

¹¹⁶ This is noted by Edelman J in *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, [200]; [2021] HCA 18: “in contrast with a vague, ad hoc application which purports directly to apply the triple uncertainty in the phrase ‘reasonably appropriate and adapted’, a structured proportionality analysis provides a transparent manner in which to determine (constitution validity).”

¹¹⁷ See for a similar exercise *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 548 (Edelman J); [2019] HCA 11.

¹¹⁸ *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 553; [2019] HCA 11 where Edelman J indicates that a “restrained” approach to proportionality is required in Australia. He emphasises that courts cannot substitute their assessment for that of the legislature on matters of policy, and that the law will only be held to be inadequate in its balance if it involves a “gross or manifest lack of balance” between its purpose and the impact on rights (552); see similarly Kiefel CJ, Bell and Keane JJ (470–472) and Nettle J (513) and *Comcare v Banerji* (2019) 267 CLR 373, 402 (Kiefel CJ, Bell Keane and Nettle JJ); [2019] HCA 23.

¹¹⁹ Barak, n 3, 349.

¹²⁰ *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 470; [2019] HCA 11; see similarly *Brown v Tasmania* (2017) 261 CLR 328, 371–372 (Kiefel, Bell and Keane JJ), 422–423 (Nettle J); [2017] HCA 43.

¹²¹ *McCloy v New South Wales* (2015) 257 CLR 178, 196 (French CJ, Kiefel, Bell and Keane JJ); [2015] HCA 34; *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 510 (Nettle J); [2019] HCA 11.

¹²² *Brown v Tasmania* (2017) 261 CLR 328, 422 (Nettle J); [2017] HCA 43.

adequate in its balance, its impact on freedom must manifestly outweigh the benefit derived.¹²³ The court must not “engage in the assessment of the relative merits of competing legislative models”.¹²⁴ This might go to some extent to meeting the objection of Gleeson CJ, picked up by Gordon J.¹²⁵

D. A Culture of Justification for the Use of Public Power against Individuals

As indicated earlier, one of the reasons for applying a proportionality analysis to public law, including constitutional and administrative law, is *justification*. In a liberal state, the default position tends to the liberty of an individual. Kumm notes:

Liberal political rights are widely perceived as having special weight when competing with policy goals. The idea is expressed ... by Ronald Dworkin's conception of rights as trumps and the corollary distinction between principles and policies, or by what Rawls calls the “priority of the right over the good”, or by Habermas' description of rights as firewalls. Ultimately these ideas can be traced back to a theory, most fully developed by Immanuel Kant, grounded in the twin deals of human dignity and autonomy viewed as side constraints on the pursuit of the collective good.¹²⁶

This liberty is not absolute, but limitations on it require justification.¹²⁷ These limitations can be in legislative or executive action. Government has potentially great powers. These must be carefully constrained. One means of doing so is to insist that exercises of such power are shown to be proportionate.¹²⁸ In both the constitutional and administrative law context, the High Court has expressed limitations on power in terms of *justification*.¹²⁹ Former Australian Chief Justice Murray Gleeson spoke of it extra-judicially.¹³⁰

Australia is a democracy, with sovereignty residing in the Australian people.¹³¹ The sovereign people confer power upon their representatives to act on their behalf. But the federal compact demonstrates these powers are limited. Representatives are accountable to the people at regular, free and fair elections.

¹²³ *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, [85] (Kiefel CJ, Keane and Gleeson JJ); [2021] HCA 18. Steward J held it meant that the means of achieving a legitimate purpose was “so extreme in its effect on that freedom that it cannot, in any sensible way, be justified” ([292]).

¹²⁴ *Clubb v Edwards* (2019) 267 CLR 171; 93 ALJR 448, 508 (Nettle J); [2019] HCA 11.

¹²⁵ Carter, n 110, 94: “one is left with a lingering sense that proportionality is disliked because it is *foreign*”.

¹²⁶ Matthias Kumm, “Political Liberalism and the Structures of Rights: On the Place and Limits of the Proportionality Requirement” in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart, 2007) 141–142.

¹²⁷ Janina Boughey, “The Culture of Justification in Administrative Law: Rationales and Consequences” (2021) 54 *University of British Columbia Law Review* 403; Kai Moller, “Justifying the Culture of Justification” (2019) 17(4) *International Journal of Constitutional Law* 1078; *Dore v Federation of Law Societies of Canada* [2012] 1 SCR 395, 404 (Abella J, for the Court); Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *South Africa Journal of Human Rights* 31; Mosie Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (2013) 7; Mosie Cohen-Eliya and Iddo Porat, “Proportionality and the Culture of Justification” (2011) 59 *American Journal of Comparative Law* 463.

¹²⁸ Matthias Kumm, “Democracy Is Not Enough: Rights, Proportionality and the Point of Judicial Review” in Matthias Klatt (ed), *The Legal Philosophy of Robert Alexy* (OUP, 2009): “the question is what justifies the authority of a legislative decision, when it can be established with sufficient certainty that it imposes burdens on individuals for which there is no plausible justification. The judicial practice of Socratic contestation, structured conceptually by ... the proportionality test ... is uniquely suitable to give expression to and enforce this aspect of constitutional legitimacy.” He states that constitutional legitimacy does not “stand only on one leg”, by which he rejected the suggestion that legislatures elected by a majority of voters at free and fair elections legitimately have the right to implement what they consider to be the wishes of the majority, regardless of the impact on the rights of individuals. Reference to the word “legitimacy” also appears in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 754 (Simon Brown LJ); [2002] EWCA Civ 158: “there are limits to the legitimacy of executive or legislative decision making.”

¹²⁹ *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, [292] (Steward J); [2021] HCA 18; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 (Hayne, Kiefel, and Bell JJ); [2013] HCA 18.

¹³⁰ Chief Justice Murray Gleeson, “Outcome, Process and the Rule of Law” (Speech at delivered at the 30th Anniversary of the Administrative Appeals Tribunal, 2006) 18–19 noted that a culture of justification “pervades modern liberal democracies ... unless both merits review and judicial review of administrative action are understood against the background of a culture of justification, they are not seen in their full context”.

¹³¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ); John Locke, *Two Treatises of Government* (Peter Laslett ed, Everyman, 1960) 367; John Stuart Mill, *Utilitarianism, On Liberty, Considerations on Representative Government* (Everyman, 1993) 246.

Jackson has noted that ensuring that the Executive has justified reasons for actions and decisions that affect the sovereign people, and that these actions are proportionate to achieve legitimate objectives and are appropriately sensitive to their impact on the rights of sovereign individuals, is another accountability mechanism.¹³² The same point may be made in relation to exercise of legislative power. In other words, the mere fact that governments are accountable to the people periodically at election time (which some term “procedural democracy”) is not a sufficient protection against government overreach.¹³³ Barak refers to the need also for “substantive democracy”, including the separation of powers, rule of law, independence of the judiciary, and protection of human rights.¹³⁴ As part of this concept, constant protection of rights is required, and this occurs when governments must demonstrate the need for particular incursions on liberty, and show its sensitivity to human rights considerations in all decisions it makes.¹³⁵ The social contract and the consent of the sovereign people for governments to act on their behalf is premised on this power being used carefully and narrowly.¹³⁶ Locke expressed legislative and executive power as being limited to the public good, and not to be exercised arbitrarily.¹³⁷ Proportionality is a tool to appropriately curb excessive use of power in this space, by focusing on whether government incursion on liberty is justified. It is consistent with the separation of powers and traditional judicial review.¹³⁸

The structured nature of proportionality analysis is lauded. It permits decision makers to carefully consider proposed legislation or executive action and their implications for human rights. It encourages soundly drafted laws, and careful exercise of executive power, logically related to clearly identified purposes, and no larger or wider than necessary to achieve legitimate objectives.¹³⁹

The use of proportionality implies a balancing between different, competing interests. This is why it has been most prevalent in the context of express and implied constitutional human rights and freedoms in Australia. Europe and Canada obviously have express human rights instruments; thus, it is readily possible to apply proportionality in that context. However, notably there are cases which have applied proportionality analysis where no express right in the *European Convention* is implicated.¹⁴⁰ Further, proportionality has been and is applied overseas in non-rights contexts including German administrative law, free trade within the European Union, as well as more general aspects of the Treaty of Rome.¹⁴¹

¹³² Vicki Jackson, “Constitutional Law in an Age of Proportionality” (2015) 124 *Yale Law Journal* 3094, 3108–3109: “proportionality bears a special relationship to government in a constitutional democracy. For an essential idea of constitutional democracy is that in confrontations between citizens and government, government is restrained and avoids oppressive and arbitrary action. The means to achieve this goal are varied, but requiring proportionality is one way in which the idea of limited government can be realized. Second, constitutional democracies’ legitimacy is based on accountability to the people ... elections provide one source of accountability, but ensuring that government has justified reasons for action (whether legislative or executive) helps promote accountability on an ongoing basis”; see also Janina Boughey and Greg Weeks, “Government Accountability as a Constitutional Value” in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) Ch 6.

¹³³ Grant Hooper, “The Rise of Judicial Power in Australia: Is There Now a Culture of Justification?” (2015) 41 *Monash University Law Review* 102, 105.

¹³⁴ Barak, n 3, 218.

¹³⁵ Moller says that it is only such exercises of government power that are “legitimate”: Moller, n 127, 1078.

¹³⁶ Mattias Kumm, “The Idea of a Socratic Contestation and the Right to Justification: The Point of Rights-based Proportionality Review” (2010) 4 *Law and Ethics of Human Rights* 141, 168 stating that the only exercises of government power that are legitimate “must plausibly qualify as a collective judgment of reason about what the commitment to rights of citizens translates into under the concrete circumstances addressed by the legislation”; elsewhere he refers to “a right to contest decisions by public authorities (giving) expression to a commitment of liberty as non-domination not to be subject to laws that you might not reasonably have consented to”: Kumm, n 128.

¹³⁷ Locke, n 131, 353, 357, 372.

¹³⁸ Former Chief Justice of Canada Beverley McLachlin, “Proportionality, Justification, Evidence and Deference: Perspectives from Canada” (2015), 15–16.

¹³⁹ Barak, n 3, 460–463.

¹⁴⁰ *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC 700; [2013] UKSC 38 (case involved a “right to trade”, not one recognised expressly by the *European Convention on Human Rights*); see also *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355; [2015] UKSC 69 (applicants sought review of refusal to hold a public inquiry into historical events – again no *European Convention* right implicated).

¹⁴¹ Adrienne Stone, “Proportionality and Its Alternatives” (2020) 48(1) *Federal Law Review* 123, 131. Professor Stone develops an argument that would not tie proportionality in with express rights provisions. This is the State-limiting, rather than express

There is no national bill of rights in Australia, though sub-national jurisdictions in Australia have enacted human rights instruments (which themselves adopt proportionality).¹⁴²

The lack of a national bill of rights in Australia ought not to preclude proportionality analysis beyond the existing parameters discussed above. Proportionality was developed in a context unconnected with provisions of an express human rights instrument.¹⁴³ It ought to apply beyond s 92, implied freedom of political communication and right to vote cases, and in reading down heads of power such as inherent nationhood or defence power, because the rationale for its use, that of justification of government incursion on an individual's liberties, is applicable well beyond these limited contexts. The issue becomes, as Jeremy Kirk importantly observed, *the identification of interests which the law should deem to be worthy from government regulation*.¹⁴⁴

How should these interests be identified in a defensible and rational manner? An obvious place to start would be the common law. The High Court sees common law as fundamental and foundational in preserving an individual's freedom.¹⁴⁵ A common law bill of rights has been articulated for Australia.¹⁴⁶ Again, there is precedent for applying common law rights to constrain government action. The principle of legality is important here. It is a well-accepted canon of statutory interpretation in Australia that, where a legislative provision is ambiguous and potentially impacts on fundamental human rights, it is to be presumed that Parliament did not intend to abrogate fundamental rights.¹⁴⁷ This is considered congruent with a position that, where fundamental human rights are at issue, it may be more difficult for a legislature or executive action to pass proportionality analysis.¹⁴⁸ The importance of the right at issue will be weighted in terms of whether the measure is "adequate in its balance".

This occurred in Australia in the context of executive power in *Davis v Commonwealth*¹⁴⁹ and in the United Kingdom in *Bank Mellat v Her Majesty's Treasury (No 2)*.¹⁵⁰ It featured in *Brett Cattle Co.*¹⁵¹ It occurred in Australia in the context of legislative action in the *Australian Communist Party v*

rights-enhancing, version of proportionality: 134–136; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 21: "(proportionality) enabled the (German) courts to protect individual freedoms by applying limits on state action despite the absence of an expressly justiciable set of constitutional rights."

¹⁴² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2019* (Qld) s 13; *Human Rights Act 2004* (ACT) s 28.

¹⁴³ Chordia, n 141, 40: "there is nothing about the way in which proportionality initially emerged in German constitutional law which suggests that the concept has an intrinsic connection with individual rights jurisprudence"), and it developed earlier as part of German administrative law in a similar context.

¹⁴⁴ Jeremy Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 *Melbourne University Law Review* 1, 26.

¹⁴⁵ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 564: "under a legal system based on the common law, everybody is free to do anything, subject only to the provisions of the law" (all members of the Court, quoting *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283 (Lord Goff)).

¹⁴⁶ James Spigelman, "The Common Law Bill of Rights" (Speech delivered at the McPherson Lecture, 10 March 2008) 23–24, citing principles of non-retrospectivity, liberty, freedom of movement, freedom of speech, fair trial, right to access courts, right to appeal, legal professional privilege, privilege against self-incrimination, procedural fairness, right to property, just terms, right to religion, right to reputation and non-discrimination on irrelevant grounds; see also Meagher, n 96.

¹⁴⁷ *Coco v The Queen* (1994) 179 CLR 427, 436–437 (Mason CJ, Brennan, Gaudron, and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); [2010] HCA 23.

¹⁴⁸ Taggart, n 95, 434; see also Meagher, n 96, 468–470.

¹⁴⁹ *Davis v Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ) (reference to the law's impact on freedom of expression at a time when the High Court had *not yet* discerned that this freedom was constitutionally protected).

¹⁵⁰ *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700; [2013] UKSC 38 (case involved a "right to trade"); see also *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355; [2015] UKSC 69 (applicants sought review of refusal to hold a public inquiry into historical events – no ECHR right implicated); classically (and controversially) *Dr Bonham's Case* (1610) 8 Co Rep 113b, 118a; 77 ER 646, 652 (Coke CJ).

¹⁵¹ *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, [292] (Rares J); [2020] FCA 732: "one important common law right, to which the principle of legality attaches, is the right to carry on business in one's own way within the law."

*Commonwealth*¹⁵² decision and others.¹⁵³ There are glimpses of it in various other cases. It is consistent with the rule of law in a liberal democracy.¹⁵⁴

Relatedly, since many of the rights recognised in international human rights instruments have a foundation in the common law, Australia is a signatory to the *International Covenant on Civil and Political Rights*, and has legislated to recognise (to some extent) rights contained therein.¹⁵⁵ So while Australia lacks a national bill of rights, its commitment to protection of human rights is reasonably evident. Rights contained within covenants to which Australia is a signatory, together with the common law, could be used as a basis for conducting proportionality analysis.¹⁵⁶ The whole purpose of a written constitution is to set out the parameters and limits in terms of the powers of legislatures. They are constrained by requiring constitutional power to pass certain laws, and by the separation of powers principle. A federal structure also divides and diffuses legislative and executive power. In *Plaintiff S157/2002*, five members of the High Court noted that the Court's power of judicial review "exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction".¹⁵⁷

Both are rights-enhancing in limiting the extent to which a particular government can act to the detriment of the human rights of an individual. Thus, constraints on legislative and executive power in order to protect human rights is considered consistent with Australian constitutional structure and culture. It is consistent with a liberal democracy.¹⁵⁸

In sum, it is suggested first that in determining whether or not an exercise of executive power was valid or not, the court would apply proportionality analysis – whether the decision was *suitable* for the purposes for which it was made, whether it was *necessary*, considering whether the decision was minimally invasive of human rights (recognised at common law and international human rights instruments to which Australia is a signatory) or whether there was an obvious and compelling alternative decision that would have had reduced impact on the relevant rights. The court would consider whether, having regard to the purpose/s of the decision, and its impact on rights, it was *adequate in its balance*. Disproportionality may in some cases indicate that the decision-maker was seeking to act for purpose/s beyond their powers,¹⁵⁹ though of course it is broader than this. This ground would effectively supplant notions of *Wednesbury* unreasonableness, but other grounds of administrative review would remain available. Of course, in time, these may be affected if proportionality were to become more dominant.¹⁶⁰ It is possible that some may be subsumed under a broader proportionality analysis. Possible mapping of this is beyond the scope of the current work.

It is suggested second that in determining whether or not a Commonwealth law was within power, it would be required to pass a proportionality test.¹⁶¹ There is no reason to restrict the approach to

¹⁵² *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 198, 200 (Dixon J), 209 (McTiernan J), 226–227 (Williams J), 242 (Webb J).

¹⁵³ For example *X7 v Australian Crime Commission* (2013) 248 CLR 92, 136–137 (Hayne and Bell JJ), 153 (Kiefel J); [2013] HCA 29; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 592–593 (Brennan J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31 (Mason CJ); *Leask v Commonwealth* (1996) 187 CLR 579, 636 (Kirby J).

¹⁵⁴ *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn): "parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy based upon the principles and traditions of the common law ... and unless there is the clearest provision to the contrary, parliament must be presumed not to legislate contrary to the rule of law"; see similarly Lord Browne-Wilkinson (573). Mattias Kumm suggests that interests protected as rights are not limited to what he calls "classic" rights such as freedom of expression or association, but includes "all liberty interests": Kumm, n 126, 140.

¹⁵⁵ *Australian Human Rights Act 1986* (Cth) Sch 2; *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8 and 9.

¹⁵⁶ Kirk, n 144, 46.

¹⁵⁷ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); [2003] HCA 2.

¹⁵⁸ Kumm, n 136, 150: "the proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy."

¹⁵⁹ The fact that an administrative decision-maker is acting for proper purposes is, of course, already considered in determining the validity of administrative action: *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

¹⁶⁰ For example, some of the considerations relevant in determining whether there has been an improper exercise of power pursuant to *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(e).

¹⁶¹ Chordia, n 141, Ch 6.

so-called purposive heads of power, or laws under the incidental power. The court would consider whether the law was *suitable* to achieve an legitimate objective within the purpose/s of the relevant head of power, whether it was *necessary* to achieve that objective, given its impact on common law rights and those recognised in international human rights instruments to which Australia is a party, or whether an alternative existed that was less invasive of those rights that was obvious and compelling, and whether it was *adequate in its balance* in terms of its purpose/s and impact/s on freedoms. Disproportionality may in some cases indicate that the Parliament was seeking to achieve purposes outside its powers.¹⁶² In this way, a structurally similar approach would be taken to determining the validity of the exercise of executive and legislative power. Judicial power would operate as it was intended to, as a check and brake on excesses of power of the other two arms of government. However, it would not usurp the other two arms – the court's role would be limited in terms of a supervisory jurisdiction. It does not second guess the original decision-maker or set aside differences merely because members of the court disagree with the decision or the law on a philosophical basis.

It is suggested third that, in determining whether or not delegated legislation is valid, it would be required to pass a proportionality test – the court would consider whether the delegated legislation was suitable to achieve a legitimate objective within the purpose/s of the primary legislation, whether it was necessary to achieve such a purpose, given its impact on common law rights and those recognised in international human rights instruments to which Australia is a party, or whether an alternative existed that was less invasive of those rights that was obvious and compelling, and whether it was adequate in its balance in terms of its purpose/s and impact/s on freedoms. This approach is similar to take previously taken by the High Court in considering the validity of delegated legislation. The fact that delegated legislation is wider than that necessary to achieve the purposes of the primary legislation has been a factor in favour of invalidity.¹⁶³ The High Court has previously had regard to the impact of delegated legislation on fundamental common law rights in determining its validity.¹⁶⁴ Again, the court does not second guess the delegated legislation merely because members of the court believe that the legislation might have been drafted better, pursued different policy objectives, or made different choices between competing interests.

This would unify and consolidate the tests currently utilised to determine the validity of government action. It would simplify the law. It would reassert the culture of justification, that government incursion on rights of individuals must be carefully calibrated and closely tailored to their purpose. It would reduce the likelihood that legislation and delegated legislation would be drafted, or ministerial power exercised, in a way that was overbroad, with unjustified impact on the human rights of individuals. It would cause the government to carefully consider the impact of its proposed laws on the rights of individuals, a result consistent with parliamentary intent, reflected in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). It would be congruent with the Australian constitutional fabric in terms of a liberal democracy which upholds the rule of law and fundamentally respects and protects individual freedom.

IV. APPLICATION OF PROPORTIONALITY ANALYSIS TO PROPOSED VICTORIAN PANDEMIC LEGISLATION

The Victorian Government introduced proposed amendments to its pandemic legislation in October 2021. These proposed amendments created significant concern in legal circles.¹⁶⁵ Subsequently, a revised version of the proposed laws passed through Parliament. I will now use the original amendments to

¹⁶² *Davis v Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 352 (Dawson J).

¹⁶³ *South Australia v Tanner* (1989) 166 CLR 161, 165 (Wilson, Dawson, Toohey and Gaudron JJ); *Melbourne Corp v Barry* (1922) 31 CLR 174, 189 (Isaacs J); *Williams v Melbourne Corp* (1933) 49 CLR 142, 155 (Dixon J); similarly *Starke CJ* (147), 157 (Evatt J), 159 (McTiernan J).

¹⁶⁴ *Melbourne Corp v Barry* (1922) 31 CLR 174, 196–197 (Isaacs J), 206 (Higgins J).

¹⁶⁵ “An Open Letter Against Victoria's New Pandemic Laws”, *The Age*, 29 October 2021 (signed by 13 QCs), criticising the proposals on the basis they impose effectively unreviewable rule-by-decree in a manner “antithetical to basic democratic principles”; “Legal Bodies, QCs Oppose New Victorian Pandemic Bill”, *Lawyers Weekly*, 11 November 2021.

demonstrate application of the principles just discussed. It is important to discuss the potential invalidity of such laws. Inevitably there will be further pandemics, and further government attempts to introduce laws of the kind originally proposed by the Victorian Government. Such a discussion is not, therefore, “academic”.

A. Outline of Main Features of Original Proposal

The proposed new laws were contained in the *Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021* (Vic)(the Bill). This Bill would have amended the *Public Health and Wellbeing Act 2008* (Vic)(principal Act). It is convenient to summarise the most important provisions for the purposes of this article under a series of headings.

1. Declaration of a Pandemic

Proposed new s 165AB enabled the Victorian Premier to make a declaration order, if he or she were satisfied that there was a “serious risk to public health” arising from a pandemic disease or disease of pandemic potential. Clause 4 of the Bill defined “serious risk to public health” to be where a pandemic disease or disease of pandemic potential *may* pose a material risk of substantial injury or prejudice to human health. The clause stated this requirement might be satisfied although the rate of community transmission of the disease in Victoria was low, and/or there had been no cases of the disease in Victoria for a period of time. The Premier was required to consult with the Health Minister and Chief Health Officer (CHO) prior to making such a declaration.¹⁶⁶ The declaration would need to be in writing, specify the area to which it related, and specify the time period during which it would apply (maximum four weeks).¹⁶⁷ Further declarations could be made, including where there were no cases of the disease in Victoria at the time of the extension.¹⁶⁸ These could be for a maximum of three months.¹⁶⁹ There was no limit to the number of occasions on which an extension could be made.¹⁷⁰ The Premier was required to report to Parliament as to the reasons for the making or extension of the declaration, a copy of the advice from the Health Minister and CHO and, if related to an extension, how public health risk powers and pandemic management powers had been exercised during the period of the initial declaration.¹⁷¹

2. Pandemic Order

Once the Premier had made a pandemic declaration, the Health Minister could make a pandemic order that they believed was reasonably necessary to protect public health. The scope of such an order was potentially extremely broad. The proposed legislation provided some non-exclusive examples of the content of such an order. It may, for example, in relation to a pandemic management area:

- (1) require a person to be detained in such area for the period specified in the order, and for that detention to be extended;
 - (2) restrict movement in such area;
 - (3) require movement into or out of such area;
 - (4) prevent or limit entry to such area;
 - (5) prohibit or regulate gatherings in such area;
 - (6) require the use of personal protective equipment in such area;
 - (7) prohibit or regulate the carrying on of activities or businesses within such area;
 - (8) require provision of information, production of documents or keeping of records;
 - (9) require medical examination or testing of persons within such area or as a condition of entry to it;
- and

¹⁶⁶ Proposed s 165AB(2).

¹⁶⁷ Proposed s 165AC(1)(c).

¹⁶⁸ Proposed s 165AE(2).

¹⁶⁹ Proposed s 165AE(5).

¹⁷⁰ Proposed s 165AE(5).

¹⁷¹ Proposed s 165AG(1), (4).

(10) require quarantining, destruction or other management of certain animals capable of transmitting the disease in such area.¹⁷²

The period of detention was limited to the duration that the Minister believed reasonably necessary to eliminate or reduce risk to public health.¹⁷³

The pandemic order could apply to all persons, specified classes of persons, or specified persons, but not a single named individual. An order could differentiate in its application to persons or classes of persons based on (1) presence in a pandemic management area or an area within that area; (2) their participation in or presence at an event; (3) an activity they have undertaken or are undertaking; and (4) their characteristics, attributes or circumstances.¹⁷⁴

The proposed law made clear that attributes within the preceding provision could include those referred to in the *Equal Opportunity Act 2010* (Vic). Section 6 of that legislation refers to the following attributes: age, breastfeeding, employment activity, gender identity, disability, industrial activity, lawful sexual activity, marital status, parental status, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, sexual characteristics, sexual orientation, expunged homosexual conviction, spent conviction, or personal association with a person with one or more of these attributes.

The Minister was required to publish reasons for the making of the pandemic order, and an explanation of rights in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Charter*) that may be impacted by the order, and how that is demonstrably justified in accordance with s 7(2) of the *Charter*.¹⁷⁵

The legislation proposed significant penalties for failing to comply with a pandemic order, including a fine of 120 penalty units for an individual, and 500 penalty units and/or two years' imprisonment, where the person knows or ought to know that their failure to comply with the order is likely to cause serious risk to the health of another.

3. Scrutiny by Committee and Parliament

A parliamentary committee, the Scrutiny of Acts and Regulations Committee, could report to Parliament if it believed a pandemic order, or an extension of a pandemic order, was beyond the scope of the legislation, or incompatible with *Charter* rights.¹⁷⁶ In this situation, it could recommend the order be amended, or disallowed.¹⁷⁷ It could order that the order or extension be suspended until Parliament considers its recommendation/s.¹⁷⁸ If it so recommended, the Committee must send a copy of its report to the Health Minister, other responsible minister, and Governor in Council.¹⁷⁹ The Governor in Council may, on the recommendation of the responsible minister, overturn the recommendation of the Committee that the order or extension be suspended.¹⁸⁰ Both Houses of Parliament consider the Committee's recommendation. If both voted in favour of disallowing the pandemic order within 12 sitting days of notice of the resolution, it would be disallowed.¹⁸¹

4. CHO's Pandemic Management Powers

The proposed legislation conferred power on the CHO to grant authorisations to authorised officers, where reasonably necessary to do so. These could empower the authorised officer to (1) take any action

¹⁷² Proposed s 165AI(2).

¹⁷³ Proposed s 165AI(3).

¹⁷⁴ Proposed s 165AK(1), (2) and (3).

¹⁷⁵ Proposed s 165AP (2)(c).

¹⁷⁶ Proposed s 165AS(1)(a) and (c). It can also report that, without clear and express authority conferred by the proposed legislation, the order or extension has retrospective effect, imposes a tax, fine, fee, imprisonment or other penalty, reverses the onus of proof, or provides for sub-delegation of powers already delegated in the legislation.

¹⁷⁷ Proposed s 165AS(2).

¹⁷⁸ Proposed s 165AT(1).

¹⁷⁹ Proposed s 165AT(2).

¹⁸⁰ Proposed s 165AT(3).

¹⁸¹ Proposed s 165AU(2).

or give any direction they believe reasonably necessary to implement a pandemic order; and (2) to detain a person in a pandemic management area in accordance with a pandemic order.¹⁸² They also empower the authorised officer to (1) take any action or give any direction the authorised officer believes reasonably necessary to protect public health; and (2) to detain a person in a pandemic management area for the period the authorised officer believes reasonably necessary to eliminate or reduce a serious risk to public health.¹⁸³ These orders could include, but were not limited to, restrictions on movement, required movement, restrictions on gatherings, requiring the use of personal protective equipment, requires provision of information, medical examination, quarantining, or destruction of animals at risk of spreading the virus.¹⁸⁴

Where a person is to be detained, they must in most cases be given written notice. It must explain the reasons why it is proposed to detain them, and a warning that failure to comply with the notice or the pandemic order to which it relates without reasonable excuse is an offence.¹⁸⁵ The notice must explain the purpose of the detention, its terms, any exemptions that may be available to the person, and their right to complain about or challenge the decision.¹⁸⁶ The dangers of conferring a power of detention on individuals other than police have been explored in earlier work.¹⁸⁷

B. Application of Proportionality to These Proposed Laws

Obviously, it would be very difficult to successfully attack the Premier's initial pandemic declaration, the Minister's pandemic order and/or the CHO's authorisations on the basis of *Wednesbury* unreasonableness. These parties could always point to some basis upon which they exercised the relevant power, with at least a skerrick of plausibility and rationality. The recent Victorian decision of *Loiello v Giles* reflects strong judicial deference to decision makers in this space, and the difficulty for any individual who seeks to challenge executive decisions in this realm on *Wednesbury* grounds.¹⁸⁸

On the other hand, it is possible that structural proportionality might be applied to review the declaration, order or authorisation, as the Court did in *Brett Cattle Co.* The court would consider whether such action was suitable, necessary and adequate in the balance. On suitability, the court considers the question of rational connection between the challenged measure and the purpose of the statute. At one level, a pandemic declaration could be a suitable means of managing public health concerns. On the other hand, given the present situation that we have already had very substantial lockdowns, and very high vaccination rates, and mercifully comparatively low death rates, it may be questioned at this time whether a pandemic declaration is suitable to meet a public health concern. This is considered arguable, but a court might be prepared to accept government arguments regarding suitability. It may be more strongly doubted whether the measure was *necessary*, given the above matters, and given that the declaration has potentially a severe consequential impact on human rights. Compelling alternatives other than a pandemic declaration, in scenarios like those mentioned above and at the current stage of COVID-19 infection, are available. And it may not be *adequate in its balance*, given the impact on human rights, and the government's objective in passing the legislation in the kind of scenario that presents today, where cautious optimism prevails that the worst may be over, and a return to normality expected.

¹⁸² Proposed s 165B. The proposed legislation makes provision for a review of a detention, including the reasons for it, period, place, conditions or any other matter. The review is undertaken by a detention review officer. The legislation provides the officer is to use their best endeavours to decide the application within 24 hours. The officer can decide on the review application themselves, or refer it to the CHO. The officer can have regard to any information they wish, including information regarding risks to public health, in deciding the application.

¹⁸³ Proposed s 165BA(1).

¹⁸⁴ Proposed s 165BA(2).

¹⁸⁵ Proposed s 165BF(1).

¹⁸⁶ Proposed s 165BF(2).

¹⁸⁷ References would be included if this article were accepted.

¹⁸⁸ *Loiello v Giles* (2020) 63 VR 1, [191]–[203] (Ginnane J); [2020] VSC 722; Rosalind Croucher, "Lockdowns, Curfews and Human Rights: Unscrambling Hyperbole" (2021) 28 AJAL 137; see also *Kassam v Hazzard* [2021] NSWCA 299 on New South Wales provisions, though neither unreasonableness nor proportionality was considered by the court.

In such a scenario, the Minister's pandemic order might also be vulnerable to challenge. As well as the points already made about the stage at which COVID-19 infection has reached, with it apparently contained in much of the country and restrictions being progressively loosened, it can be said that in the making of such an order, the fact that the Minister is specifically authorised to take account of protected attributes recognised in the *Equal Opportunity Act 1984* (Vic) in making such an order is highly problematic. It will surely be extremely difficult to demonstrate how such discrimination on the basis of an attribute is "necessary". Recall that these attributes include a person's gender, race, religion, sexuality, disability, physical features, marital status, breastfeeding and political activity. Respectfully, it would be a very unusual situation in which it could be said that discrimination on such a basis was "necessary" in order to achieve legitimate public health objectives relating to a pandemic. It is hard to see it would be suitable towards achievement of such an objective, or that such a measure would be adequate in its balance, given its direct and potentially severe impact on attributes of a person that the legislature itself has recognised are not, in general terms, acceptable grounds upon which to discriminate against a person. Discrimination on such basis would be a serious incursion on fundamental human rights. Obviously, the court would hear the government's arguments, but there is considered to be a likelihood such measures would fail proportionality analysis. To be clear, this is not a consideration of the merits of the government decision.

Similar concerns attend the power of the CHO to authorise a person to detain others or take any other measures in pursuance of a pandemic order. The lack of criteria for the use of these powers is concerning. I have in earlier work expressed disquiet about persons other than members of the police being given powers to detain others. It is possible that a power to direct others and to detain them might, in some cases, be considered suitable in relation to pandemic management, for example to prevent spread of disease. Again, it is possible that it might be considered necessary to prevent spread of the pandemic, although the impact on civil liberties is extremely significant, involving the forfeiture of a person's liberty for an unknown duration at the whim of a delegate. And the stage of the pandemic we now appear to be in, two years in, with multiple lockdowns now (hopefully) behind us, and extremely high vaccination rates, is relevant. There are alternative ways in which the pandemic could be managed now that have much less significant impact on an individual's freedom. The power to detain an individual could be much more tightly circumscribed so that it was exercised only when less invasive measures had been considered and discarded, or upon the satisfaction of strict criteria. The measure may not be considered adequate in its balance – a person's liberty is an absolutely fundamental human right. The measure permits it to be taken away at the whim of a delegate who may have no particular expertise, and who is exercising a very broad, unconstrained discretion, where the benefit to public health from the exercise of the power may be extremely marginal, but the impact on a person's liberty very severe.

These powers are discretionary in nature. Some who are against proportionality might argue that it ought not to be applied to such powers, because of the inevitability that review will slip into merits review. However, most of the occasions on which proportionality has previously been used in administrative law have involved the exercise of discretion. For reasons explained above, there is nothing inevitable about its use in the area of discretion slipping into merits review.

V. CONCLUSION

Use of proportionality in administrative law in Australia has been somewhat hesitant, in contrast with its increased utilisation in the United Kingdom, to at least partially supplant *Wednesbury* unreasonableness. It has been noted that proportionality is congruent with, and not antagonistic towards, Australia's system of constitutional governance. It is highly compatible with and closely aligned with the rule of law. It is compatible with a liberal democracy that values and protects fundamental freedoms. One of the ways it does so is by insisting on careful justification and rationalisation of government incursions on liberty. Proportionality can assist with this. Through use of structured proportionality, the courts can consider the extent to which government action, whether legislative or Executive, is suitable, necessary and adequate in its balance. In making these assessments, the court can legitimately consider fundamental human rights that Australia recognises as being either fundamental common law rights or rights in international human rights instruments to which Australia is a signatory. Again, this is congruent with our current

system of government. This is not “judicial activism”, a breach of the separation of powers, or an unacceptable review of executive decisions on the basis of merit. It upholds the social contract, with governments of limited powers, with a view to maximising freedom. The article favours greater use of proportionality principles in the administrative law space. It has demonstrated that use of proportionality analysis would be more likely to lead the court to provide a remedy in cases of serious overreach of government power, as demonstrated by the 2021 proposed Victorian amendments that attracted near universal opprobrium and condemnation.