

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
ON TO STRASBOURG OR BACK TO TEMPLE?: THE FUTURE OF
EUROPEAN LAW IN AUSTRALIA POST-BREXIT
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1. In 2005, while she was still a judge of the Federal Court, Justice Kiefel posed a challenge for the High Court, over which she would later preside: “the question for it, and its judges”, she urged, “may be whether its role ought to evolve, to an extent and where possible, with developing European law or whether it ought to remain a custodian of the common law tradition”.¹ This question, with seeming prescience, takes on renewed significance today. As she now ascends to the Chief Justiceship, many have speculated whether her Honour’s interest in comparative law and, in particular, the European principle of proportionality will affect the comparative trajectory of the Court.² Meanwhile any steering in this direction is to be met by Britain’s cry, in the form of Brexit, to reclaim the common law after its steady colonisation by Europe.
2. Concerns which fuelled the Brexit vote last June were in part grounded in an anxiety that Britain was losing control of the common law, a system which it founded and fostered for centuries; and that European laws and principles, particularly those relating to human rights, were being undemocratically imposed on the British people. While these sentiments were no doubt helped along by the tabloid press, they also reflect views held by some esteemed judges and members of the legal profession. In 2010, the Lord Chief Justice, Lord Judge, lamented the way in which “our Australian colleagues (and those from other common law countries) seem to be claiming bragging rights as the custodians of the common

* I express thanks to my Research Director, Ms Bronte Lambourne, for her assistance in the preparation of this address.

¹ Hon Justice Susan Kiefel, “English, European and Australian law: Convergence or divergence?” (2005) 79 ALJ 220, 232.

² See eg, Anne Twomey, “Start of the Susan Kiefel High Court” *The Australian* (online), 30 November 2016 <<http://www.theaustralian.com.au/news/inquirer/start-of-the-susan-kiefel-high-court/news-story/83587b6265b6bfd147ab49c596894b47>>.

law”.³ Speaking in Sydney last year, Lord Goldsmith, former Attorney General of England and Wales, embraced the Brexit result as an opportunity to set about “the decontamination of English law”.⁴

3. To understand these reactions, it is necessary to provide a brief context of the influence of European law in Britain. For our purposes, it is necessary to canvass two relevant influences. First, when the UK acceded to the European Union in 1973, it also legislated for the incorporation of European Union law into domestic law.⁵ This Act required domestic courts to apply and follow decisions of the European Court of Justice in Luxembourg. EU membership also demanded that the UK observe the requirements of EU treaties and of any Regulations and Directives issued by the EU. EU law, or community law as it also known, regulates such areas as competition, environment and extradition.
4. Second, and more pertinent to our topic today, is the influence of the European Convention on Human Rights. Prior to 2000, the Convention was not part of the UK’s domestic law and domestic courts were not required to take account of the Convention in their decisions. However, the Convention established the European Court of Human Rights in Strasbourg and included a right of individual petition, meaning litigants could bypass the UK courts and go straight to Strasbourg. In an attempt to reclaim jurisdiction over human rights, the UK introduced the *Human Rights Act 1998* (UK), which took effect on 2 October 2000. The Act made convention rights part of UK law and required UK courts to have regard to decisions of the Strasbourg Court. The effect on domestic jurisprudence was profound, with cases concerning the *Human Rights Act* averaging 37.5% of the House of Lords’ case load between 2002 and 2008.⁶
5. With the decision of the UK to withdraw from the EU, there is much speculation as to whether English law will “regain its purity” as judges are no longer required to cast one eye towards the European Courts.⁷ As Lord Neuberger has ruminated:

“it may well mean that the influence of EU law will be a 50-year blip on the near thousand years of the life of the common law. So, too, the government has suggested that it may bring forward

³ Judge (Rt Hon Lord), “The Judicial Studies Board Lecture 2010” (Speech delivered at the Inner Temple, 17 March 2010).

⁴ Lord Goldsmith, “Brexit And Its Implications For International Arbitration” (Speech delivered at the Australian Dispute Centre, Sydney, 24 October 2016).

⁵ *European Communities Act 1972* (UK).

⁶ Louis Blom-Cooper QC, Brice Dickson, and Gavin Drewry, *The Judicial House of Lords: 1876-2009* (1st ed, Oxford University Press, Oxford, 2009) 546.

⁷ Goldsmith, above n 4.

proposals to repeal and replace the 1998 Act. ... [That] could result in the European Convention influence being no more than a twenty year bliplet on the life of the common law.”⁸

6. So where does that leave Australia? Just as our High Court is beginning – ever so tentatively – to embrace European principles, our common law progenitor is running in the opposite direction; are we to learn from its mistakes? It is important to note that Australia has not been immune to the effect of international treaties and Conventions upon our domestic law. While we do not have the pressure of the European Union to guide our hand, we too must confront the increasing “internationalisation of legal norms”⁹ and decide how we wish to respond to them.
7. Today, I wish to focus on the way in which European legal principles have been received in Australian public law, with a particular focus on the principle of proportionality. In this area, there are three overarching foundational concerns that have characterised both the British and Australian response. These are, first, the constitutional separation of powers or, for the UK, the Diceyan principle of parliamentary sovereignty; second, the role of individual rights in the constitutional framework; and third, the methodological differences between common and civil law systems. It is important to keep these principles in mind as they recur frequently throughout the debate.
8. First, the constitutional arrangements of both countries are resistant to judges reviewing legislative or executive action as a matter of substance or merit as opposed to legality. In Australia, this is mandated by the constitutional separation of powers, modelled off the principle of judicial review established in the US Supreme Court case of *Marbury v Madison*.¹⁰ Under such a model, the characteristic duty of the judiciary, as the third branch of government, “is the declaration and enforcing of the law affecting the extent and exercise of power”.¹¹ In the UK, where there is no written constitution, parliamentary sovereignty manifests itself in an even purer form. As Lord Neuberger explains, the UK has

“...no history of the courts overruling Parliament ... This means that the idea of courts overruling decisions of the UK parliament, as is substantially the effect of what the Strasbourg court and the

⁸ Lord Neuberger, “Has the identity of the English Common Law been eroded by EU Laws and the European Convention On Human Rights?” (Speech delivered at National University of Singapore, Faculty of Law, 18 August 2016).

⁹ Hon Justice James Douglas, “England as a source of Australian law: For how long?” (2012) 86 ALJ 333, 349.

¹⁰ 5 U.S. 137 (1803).

¹¹ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35 (Brennan J).

Luxembourg court can do, is little short of offensive to our notions of constitutional propriety. All the more so, given that the courts concerned are not even British courts".¹²

9. Second, neither Australia nor the UK chose to incorporate a bill of rights into their constitutional set up, nor has Australia chosen to implement a legislative bill of rights. While European administrative law is oriented around the protection of individual rights, the conceptual lodestar for Australian public law remains the framework and objects of the particular statute in question. The UK has also traditionally been resistant to general statements of rights, and the *Human Rights Act* has accordingly been met with vocal opposition. It is important to note, however, that such resistance does not necessarily represent an opposition to rights themselves, but an opposition to the resultant shift of power to an unelected judiciary, who have the responsibility for interpreting them.¹³
10. In this way, Australia and the UK distinguish themselves from the United States in preferring a more flexible, "democratic" approach. As Sir Owen Dixon explained to an American audience, "to our Founding Fathers, the Bill of Rights and the Fourteenth Amendment were undemocratic because to adopt them was to argue a want of confidence in the will of the people".¹⁴ This was echoed by Justice Dawson in *Australian Capital Television v The Commonwealth*,¹⁵ in which he observed that "those responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process".¹⁶
11. Third, the importation of broad principles from European legal systems is seen by many as antithetical to the empirical approach of the common law. This is embodied in the famous statement of American jurist, Oliver Wendell Holmes Jr, "the life of the law is not logic: it is experience".¹⁷ While common law systems work via inductive reasoning, with principles building up by a gradual accretion of cases, civil law systems reach results by deductive reasoning from *a priori* principles. Civil law

¹² Lord Neuberger, "The British and Europe" (Speech delivered at Cambridge Freshfields Annual Law Lecture, Cambridge, 12 February 2014).

¹³ Rosalind Croucher, "Getting to grips with encroachments on freedoms in Commonwealth laws: The ALRC Freedoms Inquiry" (2016) 90 ALJ 478, 482 citing Jeffrey Goldsworthy, "Constitutional Implications Revisited" (2011) 30 UQLJ 9, 25.

¹⁴ Virginia Bell, "Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System" (Speech delivered at the Sir Ninian Stephen Lecture, 29 April 2016) citing Sir Owen Dixon, "Two Constitutions Compared" in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (W S Hein, 2nd ed, 1965), 101-2.

¹⁵ (1992) 177 CLR 106.

¹⁶ *Ibid* 186.

¹⁷ Oliver Wendell Holmes Jr, *The Common Law* (Little Brown & Co, 1881), 1.

principles are thought to derive from natural law and in that sense to be static and inflexible, while common law principles have been described as “working hypotheses”¹⁸ and “kaleidoscopic, in the sense that [they are] in a constant state of change in minute particulars”.¹⁹ The concern associated with foreign intrusions of principle has been aptly summarised by Justice Douglas of the Queensland Supreme Court in the query: “is the genius of the common law expressed in its propensity for bottom-up reasoning in danger of being replaced by a form of procrustean top-down reasoning?”²⁰

PROPORTIONALITY: AN “EXOTIC JURISPRUDENTIAL PEST”²¹?

12. With these foundational principles in mind, I want to move to consider how the European principle of proportionality, touted by some as the “most important doctrinal tool in constitutional rights law around the world”,²² has been accommodated within, or rejected from, the common law framework. In Australia, the seeds of proportionality have been sown across both constitutional and administrative law, whether they will take root or be weeded out is something I hope to consider in the remaining time.
13. Before examining the future of proportionality in Australian *constitutional* law, it is necessary for me to briefly outline the history of the principle and how it has manifested itself across legal systems. Proportionality is a judicial tool of analysis for testing the proper boundaries of legislative or administrative power. It is most commonly employed when such power interferes with individual rights. Chief Justice Kiefel traces an embryonic form of the principle to the Prussian State Administrative Courts where the test of proportionality was applied as a check on the discretionary powers of police authorities.²³ In post-war Germany, the principle developed as a form of means-ends analysis such that state action was reviewed on the basis that proportional means must be used

¹⁸ Douglas, above n 9, 344.

¹⁹ Jack Beatson, “Has the Common Law A Future?” (1997) 56 *The Cambridge Law Journal* 291, 314 citing Robert Goff, “The Search for Principle” (1983) 59 *Proceedings of the British Academy* 169, 186.

²⁰ Douglas, above n 9, 338.

²¹ *Murphy v Electoral Commissioner* [2016] HCA 36; (2016) 90 ALJR 1027, 1039 [37].

²² Kai Möller, “Proportionality: Challenging the Critics” (2012) 10 *International Journal of Constitutional Law* 709, 709.

²³ Kiefel, above n 1, 224.

for legitimate ends.²⁴ It was in this context that the three-limbed test, to which I will later refer, was first formulated.²⁵

14. The principle of proportionality is not expressly stated in the European Convention on Human Rights but it was adopted into Strasbourg jurisprudence from German constitutional law in the case of *Handyside v The United Kingdom*.²⁶ In that case, the Court had to determine whether the British *Obscene Publications Acts* infringed Art 10 of the Convention, which protects freedom of expression. It was held that

*“The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society' ... This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued”*²⁷

This involved a discussion of whether the *Obscene Publication Acts* had an aim that was legitimate and whether that aim necessitated the various measures taken against the applicant under the Acts.²⁸

15. While UK jurisprudence contained hints of proportionality analysis for some time, it was not until the implementation of the *Human Rights Act*, which required UK courts to have regard to Strasbourg jurisprudence when a Convention right was engaged, that proportionality was fully imported into the UK. In the case of *R v Secretary of State for the Home Department, ex parte Daly*,²⁹ a prisoner challenged a government policy which directed prison staff to search prisoners' cells in the absence of the prisoners, and examine their legal correspondence to ensure it was *bona fide*. The common law right of legal professional privilege was at issue, which attracted the traditional grounds of judicial review, but the *Human Rights Act* had come into effect immediately before the case was heard by the House of Lords. As a result, the judgment also involved some discussion of the Convention right of respect for a person's correspondence under Article 8 and the test of proportionality attached to that right.
16. Lord Steyn stated that, at that time, “the contours of the principle of proportionality [were] familiar”.³⁰ While not drawing explicitly on

²⁴ Eric Engle, *The History Of The General Principle Of Proportionality: An Overview* (2012) 10 *The Dartmouth Law Journal* 1, 6.

²⁵ Kiefel, above n 1, 224-5.

²⁶ (1979-80) 1 EHRR 737.

²⁷ *Ibid* 754 [49].

²⁸ *Ibid* 753 [46]-[47].

²⁹ [2001] 2 AC 532 (*Daly*).

³⁰ *Ibid* 547 [27].

European jurisprudence, the three-stage test he cited had an “affinity” to that developed by the Strasbourg court,³¹ namely,

*“whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”*³²

17. In *Bank Mellat v Her Majesty’s Treasury (No 2)*,³³ Lord Reed, in dissent, but in a paragraph approved by the majority, noted that the test of proportionality as developed in the UK was best reflected in the formulation of Chief Justice Dickson of the Canadian Supreme Court – that test, having itself migrated to Canada from the EU, included a fourth element, namely, “whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.”³⁴ This final element is also referred to as “strict proportionality”.
18. These four components to the test of proportionality have been analysed and consolidated in the influential work of Aharon Barak, former President of the Supreme Court of Israel.³⁵ Together they form what is now called “structured proportionality”, which is applied across the world particularly in the domain of constitutional rights law. The test as formulated by Barak states that a limitation of a constitutional right will be constitutionally valid if:

“(i) it is designated for a proper purpose [a legitimate aim]; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation (“proportionality stricto sensu” or “balancing”) between the importance of achieving the

³¹ See *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC 700, 790 [72] (Lord Reed).

³² *Daly* [2001] 2 AC 532, 547 [27], citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

³³ [2014] AC 700 (*Bank Mellat*).

³⁴ *Ibid* 790-1 [74].

³⁵ See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

*proper purpose and the social importance of preventing the limitation on the constitutional right.*³⁶

19. As a shorthand for these various components, I will refer to them as: legitimate aim, rational connection, necessity and strict proportionality.

Proportionality in Australian Constitutional Law

20. It is now appropriate for me to turn to the place of proportionality in Australian constitutional law. “Proportionality” first entered the lexicon of Australian constitutional law as a test for characterising a statute as one falling within a constitutional head of power. It will be noted that in this context, proportionality has nothing to do with individual rights. It has been applied as a test of sufficiency of connection between a law and a purposive head of power. So, in *Marcus Clarke & Co Ltd v The Commonwealth*,³⁷ Justice McTiernan stated, “the defence power authorises the Parliament to take such measures as are proportionate to the end for which the Constitution created the defence power”.³⁸ The test of proportionality in this context has been translated into the formulation “whether the law is capable of being 'reasonably considered to be appropriate and adapted' to [the] purpose or object” of the relevant head of power.³⁹
21. Although proportionality analysis only applies in the characterisation of purposive powers,⁴⁰ when a non-purposive power is exercised for a particular purpose, most significantly, where the external affairs power is exercised for the purpose of implementing a treaty, proportionality will also be relevant. Thus, in the *Tasmanian Dams case*,⁴¹ Justice Deane held that implicit in the “reasonably appropriate and adapted” formula was a requirement that there “be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it”.⁴² Such a test also applies to the characterisation of a law enacted to exercise an implied incidental power.⁴³
22. When used in the context of characterisation, proportionality bears limited resemblance to the European test discussed earlier. As Chief

³⁶ Ibid, 3.

³⁷ (1952) 87 CLR 177.

³⁸ Ibid 226.

³⁹ See eg, *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 296 (Mason CJ).

⁴⁰ *Leask v The Commonwealth* (1996) 187 CLR 579.

⁴¹ *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁴² Ibid 260.

⁴³ *Davis v The Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ).

Justice Brennan described in *Leask v The Commonwealth*,⁴⁴ although not without objection,⁴⁵ proportionality is used in two senses in Australian constitutional law. As a test of characterisation, “proportionality has nothing to say about the appropriateness, necessity or desirability of the law to achieve an effect or purpose or to attract the support of the power”.⁴⁶ However, when proportionality is used in “the context of a challenge to a law on the ground that it infringes a constitutional limitation, express or implied, which restricts a head of power ... the context is similar to that in which the European Court of Justice employs the concept of proportionality”.⁴⁷

23. Indeed, it is in the context of constitutional limitations that a more fully fledged structured proportionality test has made its appearances. While constitutional characterisation of laws might be thought to involve only the “rational connection” element of the four-part test, questions of necessity and strict proportionality have arisen where there is a tension between an express grant of power and some express or implied limitation on that power. This includes cases concerning the freedom of interstate trade under s 92 of the *Constitution*, the implied freedom of political communication and the implied right to vote.
24. In the structured proportionality test, the necessity and strict proportionality elements are the ones subject to the most controversy and criticism. The test of necessity considers whether there were alternative methods of achieving the same object that would be less intrusive on the protected right or freedom, but this raises two uncertainties: is the availability of alternative means determinative or merely relevant? And what is required for an alternative measure to be a “true alternative”? It has also been argued that it is not the role of the court to assess policy alternatives. Meanwhile, strict proportionality has attracted criticism for inviting an impressionistic value judgment from the court and providing little guidance on how the incommensurate values are to be weighed.
25. Nevertheless, such analytical tools have been deployed with increasing frequency throughout the case law. In cases involving s 92 of the *Constitution*, both the necessity and strict proportionality tests have appeared in various guises. In *Befair Pty Ltd v State of Western*

⁴⁴ (1996) 187 CLR 579.

⁴⁵ See eg, *ibid* 635 (Kirby J): “The same basic question is in issue in every case: namely where the boundary of federal constitutional power lies”.

⁴⁶ *Ibid* 593.

⁴⁷ *Ibid* 593-4.

Australia,⁴⁸ the majority of the Court found that a criterion of “reasonable necessity” necessarily inhered in the formulation of “reasonably appropriate and adapted” and that such a position “should be accepted as the doctrine of the Court” in considering whether particular legislation or regulations contravene s 92.⁴⁹ In that case, the majority considered whether the prohibition on betting through betting exchanges in Western Australia was necessary for the protection or preservation of the integrity of the racing industry in that State.⁵⁰ In so doing, the majority considered alternative methods which were “effective but non-discriminatory”, citing the legislative choice taken by Tasmania as evidence that the Western Australian law was “not proportionate ... [and] not appropriate and adapted to the propounded legislative object”.⁵¹

26. In *Castlemaine Tooheys Ltd v South Australia*,⁵² the Court considered the constitutionality of legislative measures in South Australia which imposed a mandatory deposit on beer bottles, with an 11 cent differential between refillable and non-refillable bottles, with the purported aim of environmental conservation but with the effect of making interstate brewers who used non-refillable bottles non-competitive. Describing the reasoning process in that case, Chief Justice Mason in *Nationwide News Pty Ltd v Wills*⁵³ stated,

*“in deciding whether a law was appropriate and adapted to the protection of the environment, in which event the law would have been valid, it was necessary to consider whether the adverse or extraordinary consequences of the law were disproportionate to the achievement of the relevant protection”.*⁵⁴

This has been described as a test which resembles strict proportionality in the sense that it is a test of excessive effects.⁵⁵

27. However, it is in the field of the implied freedom of political communication that structured proportionality has had particular impact in Australian constitutional law. The famous formulation developed in *Lange v Australian Broadcasting Corporation*,⁵⁶ which determines whether a law is compatible with the maintenance of the constitutionally

⁴⁸ (2008) 234 CLR 418.

⁴⁹ *Ibid* 477 [102]-[103].

⁵⁰ *Ibid* 480 [112].

⁵¹ *Ibid* 479 [110].

⁵² (1990) 169 CLR 436.

⁵³ (1992) 177 CLR 1.

⁵⁴ *Ibid* 29.

⁵⁵ The Hon Justice Susan Kiefel AC, “Proportionality: A Rule of Reason” (2012) 23 *Public Law Review* 85, 90.

⁵⁶ (1997) 189 CLR 520 (*Lange*).

prescribed system of representative and responsible government, has received heightened attention over the last four years as it has been subjected to cumulative elaboration. The traditional two-limbed test, as modified in *Coleman v Power*,⁵⁷ asks the Court to consider:

*“First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government”.*⁵⁸

28. In *Monis v The Queen*,⁵⁹ Justices Crennan, Kiefel and Bell found that “the second limb of the *Lange* test, read with other statements in *Lange*, may be seen to involve a series of different inquiries”.⁶⁰ In *Tajjour v New South Wales*,⁶¹ the same justices identified in the second-limb enquiry a requirement that there be a legitimate purpose and that the means employed are capable of advancing that purpose in the sense that they are rationally connected or “suitable”.⁶² They also identified a requirement that there be “reasonable necessity” which will be found “where no other (hypothetical) alternative exists which would be less harmful to the freedom while equally advancing the legislative purpose”.⁶³ Thus, in the second limb of the *Lange* test, their Honours detected the first three elements of structured proportionality. The final inquiry that their Honours identified involved an investigation of the extent of the burden on the freedom, however, they did not go so far as to hold that this burden must be balanced against the legislative object in the strict proportionality sense.⁶⁴ They did, however, leave the question open for a later case.⁶⁵
29. That case arrived in the form of *McCloy v New South Wales*.⁶⁶ In *McCloy*, the appellants challenged various provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), which prohibited political donations by property developers and imposed donation caps,

⁵⁷ (2004) 220 CLR 1.

⁵⁸ *Lange* (1997) 189 CLR 520, 567; *Coleman v Power* (2004) 220 CLR 1, 50-1 [93]-[96] (McHugh J); 78 [196] (Gummow, Kirby and Hayne JJ).

⁵⁹ (2013) 249 CLR 92 (*Monis*).

⁶⁰ *Ibid* 193 [279].

⁶¹ (2014) 254 CLR 508.

⁶² *Ibid* 570-571 [110]-[112].

⁶³ *Ibid* 571 [113].

⁶⁴ *Ibid* 573-5 [126]-[130].

⁶⁵ *Ibid* 575 [133].

⁶⁶ [2015] HCA 34; (2015) 89 ALJR 857 (*McCloy*).

above which, indirect campaign contributions were prohibited. The applicants argued that these provisions imposed a disproportionate burden on the implied freedom of political communication. In the outcome, Justices Kiefel and Bell were joined by Chief Justice French and Justice Keane to form a majority in support of explicitly adopting a structured proportionality test where the implied freedom of political communication was concerned. The majority opinion divided the second limb of the *Lange* test into two inquiries: compatibility testing and proportionality testing.

30. Compatibility testing asks whether the purpose of the law and the means adopted to achieve that purpose are legitimate. While this bears some resemblance to the first component of Barak's structured proportionality test, the majority made clear that, unlike in other jurisdictions where the aim of the inquiry is to determine whether the legislative purpose is one permitted by the relevant constitution, in the Australian constitutional law context, the question is whether both the purpose and the means of the legislation is compatible with the constitutionally prescribed system of government.⁶⁷
31. Proportionality testing then involves the remaining three elements of structured proportionality: rational connection, necessity and strict proportionality. For the test of necessity, the majority drew for support on the *s 92* cases as well as *Unions NSW v New South Wales*⁶⁸ and *Lange* itself.⁶⁹ Their Honours noted that the necessity test was qualified such that the alternative means must be obvious and compelling.⁷⁰ In justifying the strict proportionality component of the test, the majority acknowledged that *Lange* did not expressly identify the importance of the legislative purpose as a relevant factor, but held that it was impossible to ignore such importance in considering the reasonableness of a legislative measure.⁷¹ Their Honours found that an assessment of the public importance of the purpose sought to be achieved necessarily and logically inhered in the *Lange* test.⁷²
32. The majority opinion represents the first explicit application of strict proportionality in Australia, but it also represents a shift from the various elements of structured proportionality being used, when appropriate, as helpful tools of analysis to those elements forming a mandatory and sequential inquiry. The majority justified such a step on the basis that it

⁶⁷ Ibid 873 [67].

⁶⁸ (2013) 252 CLR 530

⁶⁹ *McCloy* [2015] HCA 34; (2015) 89 ALJR 857, 872 [57].

⁷⁰ Ibid 872 [58] citing *Monis* (2013) 249 CLR 92, [347].

⁷¹ Ibid 876 [83]-[84]

⁷² Ibid 876 [86]

produced “a more structured, and therefore more transparent, approach”.⁷³

33. In the reaction to the majority’s judgment, concerns stemming from each of the foundational principles identified at the beginning of this speech can be found. First, both the necessity test and the strict proportionality test invite concern over judges descending into the merits of the legislation in a way that abrogates the constitutional separation of power between the judiciary and the legislature. It is for this reason that the majority emphasised a high standard for the necessity test in that alternatives must be obvious and compelling, leaving some room for parliamentary choice once it is “within the domain of selections which fulfil the legislative purpose with the least harm to the freedom”.⁷⁴
34. Justice Gordon, in particular, raised objection to the value judgment that was required to balance “the value of the means (the burden of the provision) against the value of the end (the legitimate purpose)”.⁷⁵ Because there were no criteria or rules by which a balance could be struck, she preferred to simply question whether the impugned law impermissibly impaired the maintenance of the constitutionally prescribed system of government.⁷⁶
35. Second, all judges of the Court were at pains to highlight the distinction between positive, individual rights conferred on citizens under, for instance, the American Constitution or the European Convention on Human Rights and the negative limitation on legislative power that the implied freedom of political communication represented.⁷⁷ The majority held that, nevertheless, proportionality testing had “evident utility”.⁷⁸ Meanwhile, Justice Gageler was concerned that such balancing, developed in jurisdictions conferring express rights, did not “cleave ... to the reasons for the implication for the constitutional freedom”.⁷⁹ In other rights-oriented jurisdictions, “the authority to balance competing principles is explicitly ‘anchored in the constitution’.”⁸⁰ But the anchor in

⁷³ Ibid 866 [23]

⁷⁴ Ibid 876 [82]

⁷⁵ Ibid 916-7 [336].

⁷⁶ Ibid 917 [336].

⁷⁷ See eg, ibid 867 [29]-[30], 875 [73] (French CJ, Kiefel, Bell and Keane JJ); 882 [120] (Gageler J); 899 [219], 904 [248] (Nettle J); 914 [317]-[318] (Gordon J).

⁷⁸ Ibid 875 [73].

⁷⁹ Ibid 887 [150].

⁸⁰ Bonina Challenor, “The Balancing Act: A Case For Structured Proportionality Under The Second Limb Of The Lange Test” (2015) 40 *The University of Western Australia Law Review* 267, 300 citing Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, (Cambridge University Press, 2012), 491.

the Australian Constitution is the preservation of a system of government, not the protection from interference of a positive right.

36. Justice Gageler also raised the third concern identified above, that the majority's approach sought to impose "one size fits all ... standardised criteria" that did not accord with the idiosyncratic approach of the common law that assesses each case in its context.⁸¹ Justice Gordon echoed this concern, stating that "the extent and nature of the burden on the implied freedom ... will be case specific and, therefore, any analysis must be case specific".⁸²
37. Justice Gageler, as an alternative to balancing in the strict proportionality sense, promotes an approach based on categories. As Sir Anthony Mason describes, "categorisation is a traditional common law approach to the solution of legal problems".⁸³ A categorisation approach applies different levels of scrutiny to different categories of burden, so a content-based restriction will warrant closer scrutiny than a restriction on manner or form; a direct burden on political communication will warrant closer scrutiny than an incidental burden.⁸⁴ Justice Nettle observed that this approach is simply "a different kind of balancing such that, as the nature and extent of the burden imposed by the law increases, the corresponding burden of justification also increases".⁸⁵ Importantly, however, Justice Gageler has translated the test from one that applies broad principles, natural to civil law systems, to one that assesses the appropriate extent of power based on the individual circumstances of the case, a test more easily accommodated in the common law.
38. Having considered the freedom of interstate trade under s 92 and the implied freedom of political communication, it is now necessary to turn to the final relevant constitutional limitation, the implied right to vote. Of course, the phrase "right to vote" is a misleading shorthand; the constitutional implication does not confer a positive right on individuals but prevents Parliament from legislating in a way that is inconsistent with the requirements of sections 7 and 24 of the *Constitution*, that members of the Senate and House of Representatives be "directly chosen by the people".

⁸¹ *McCloy* [2015] HCA 34; (2015) 89 ALJR 857, 886 [142].

⁸² *Ibid* 917 [337].

⁸³ Hon Sir Anthony Mason AC KBE GBM, "The use of proportionality in Australian constitutional law" (2016) 27 *Public Law Review* 109, 121.

⁸⁴ *McCloy* [2015] HCA 34; (2015) 89 ALJR 857, 888 [152] (Gageler J).

⁸⁵ *Ibid* 905-6 [254].

39. In *Roach v Electoral Commissioner*,⁸⁶ a majority of the Court held that legislative disqualification from what would otherwise be adult suffrage must be for a “substantial reason”.⁸⁷ The plurality, comprising Justices Gummow, Kirby and Crennan, stated that a substantial reason will be found where the legislation is reasonably appropriate and adapted to serve an end which is compatible with the constitutionally prescribed system of government.⁸⁸ Their Honours noted that the affinity of this test to the second limb of the *Lange* test was apparent.⁸⁹ This begs the question whether the same proportionality analysis as is applied to the second limb of the *Lange* test applies where the right to vote is concerned – a question that arose for consideration in the case of *Murphy v Electoral Commissioner* last year.⁹⁰
40. In *Murphy*, the plaintiffs sought to challenge longstanding provisions in the *Commonwealth Electoral Act 1918* (Cth) that provided for a suspension period following the closure of the electoral rolls, during which time names and particulars could not be altered on the rolls. In determining whether such measures were inconsistent with the constitutionally prescribed system of government, the fragile majority of the Court in *McCloy* splintered.
41. Justice Kiefel stood by the appropriateness of structured proportionality analysis in the context of the right to vote but held that the legislative measures in question were not disproportionate.⁹¹ Justice Keane appears to have also left open the application of structured proportionality in such a scenario, but found that the threshold question had not been met in order to engage such an analysis, namely, there was no relevant burden on the constitutional mandate.⁹² Meanwhile, Chief Justice French and Justice Bell retreated from their position in *McCloy*, holding that structured proportionality was “a mode of analysis applicable to some cases involving the general proportionality criterion, but not necessarily all”.⁹³
42. It appears that the application of structured proportionality in the context of the facts in *Murphy* was seen to impermissibly abrogate the foundational principles of Australia’s legal system. First, to a greater extent than in *McCloy*, the necessity test was seen to intrude on

⁸⁶ (2007) 233 CLR 162 (*Roach*).

⁸⁷ *Ibid* 174 [7] (Gleeson CJ); 199 [85] (Gummow, Kirby and Crennan JJ).

⁸⁸ *Ibid* 199 [85].

⁸⁹ *Ibid* 199 [86].

⁹⁰ [2016] HCA 36; (2016) 90 ALJR 1027 (*Murphy*).

⁹¹ *Ibid* 1045 [70], [74].

⁹² *Ibid* 1062 [202], 1063 [204]-[205].

⁹³ *Ibid* 1039 [37].

Parliament's authority. Chief Justice French and Justice Bell found that a necessity test would invite the Court "to undertake a hypothetical exercise of improved legislative design" and in so doing, "to depart from the borderlands of the judicial power and enter the realm of the legislature".⁹⁴ Similar concerns were echoed by Justice Gageler.⁹⁵

43. Justice Gordon questioned whether a determinative necessity test was ever appropriate in Australian constitutional law,⁹⁶ but was able to draw a distinction between the implied freedom of political communication and the constitutional limitation in question. She found that the judiciary was less justified in considering legislative alternatives where Parliament was under an obligation to maintain laws such as the impugned ones in order to design a comprehensive electoral system that met the constitutional mandate.⁹⁷ Her Honour highlighted that, in doing so, Parliament was required to balance a wide range of matters and values and it was inappropriate for the judiciary to single out and assess individually any one component by comparing it to alternatives.⁹⁸
44. Justice Kiefel was also mindful of preserving the separation of powers, however, she believed this could be achieved by the requirement that an alternative measure must be otherwise identical in its effects, including, within a range, the amount of government funding it required.⁹⁹
45. While the proper role of the judiciary in reviewing legislative action for proportionality was a concern in *McCloy*, its practical application in *Murphy* brought such concerns into sharper relief. It appears that Chief Justice Gleeson's warnings in *Roach* – that the application of European style proportionality "create[s] a relationship between legislative and judicial power significantly different from that reflected in the *Australian Constitution*"¹⁰⁰ – came to bear in this case.
46. Secondly, the lack of positive, individual rights in the Australian *Constitution* was also relevant in *Murphy*. Part of the reason why the structured proportionality analysis attempted by the plaintiffs did not accord with the Australian constitutional framework was because they were seeking to use the constitutional limitation as a sword, in order to

⁹⁴ *Ibid* 1039 [39].

⁹⁵ *Ibid* 1051 [109].

⁹⁶ *Ibid* 1079 [299].

⁹⁷ *Ibid* 1079-80 [301].

⁹⁸ *Ibid* 1080 [301]-[303], 1083 [328].

⁹⁹ *Ibid* 1044 [65].

¹⁰⁰ *Roach* (2007) 233 CLR 162, 179 [17].

maximise their opportunity to vote, rather than as a shield, to protect against legislative interference.¹⁰¹

47. Thirdly, Justice Gageler once again expressed concerns over the importation of “such a structured and prescriptive, and ultimately open-ended, form of proportionality testing”.¹⁰² He referred to the principled, civil law approach as a form of “abstracted top-down analysis”¹⁰³ into which the plaintiff’s argument had to be shoehorned.¹⁰⁴ It is exactly this concern – that common law principles will be stretched and distorted in order to fit into *a priori* legal concepts – that common law purists cite as the reason to fear importations from civil law systems. It is notable that Chief Justice French and Justice Bell also seem drawn towards this conclusion. By holding that structured proportionality did not have universal application,¹⁰⁵ their Honours sought to preserve the flexibility of the common law to deal with cases as they arise.
48. This leaves much to question about the state of European-style proportionality in Australia. Will structured proportionality continue to be applied universally to cases concerning the implied freedom of political communication?¹⁰⁶ In what circumstances, if any, will structured proportionality be applied in the context of the right to vote? And where does this leave proportionality analysis in cases arising under s 92 of the *Constitution*. The majority in *McCloy* appeared to draw on such cases in support of the necessity and strict proportionality tests – should these questions be incorporated into the structured approach in the context of the freedom of interstate trade?

Proportionality in Australian Administrative Law

49. But before I leave you to ponder those questions, it is necessary to consider the other domain in which proportionality rears its head, which is, of course, administrative law. Since the UK does not have a written constitution, it is in the field of administrative review, rather than legislative review, that proportionality has flourished.
50. In both Australia and the UK there is a fiercely policed boundary between legality and merits review, but a minor breach exists in the form of rationality review, where, in the infamous words of Lord Greene, a

¹⁰¹ See eg, *Murphy* [2016] HCA 36; (2016) 90 ALJR 1027, 1039 [39] (French CJ and Bell J).

¹⁰² *Ibid* 1050 [101].

¹⁰³ *Ibid* 1051 [109].

¹⁰⁴ *Ibid* 1050 [101].

¹⁰⁵ *Ibid* 1039 [38].

¹⁰⁶ See *Chief of the Defence Force v Gaynor* [2017] FCAFC 41, [92].

decision is “so unreasonable that no reasonable authority could ever have come to it”.¹⁰⁷

51. In the UK, the importation of Strasbourg jurisprudence in the context of human rights has seen the steady eclipse of reasonableness review by proportionality as the European principle has slowly managed to infiltrate common law review. The first suggestion of proportionality as a ground of administrative review came in the judgment of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*.¹⁰⁸ From there, it looked like proportionality in English public law would meet a premature death. In *R v Secretary of State for the Home Department; Ex Parte Brind*,¹⁰⁹ Lord Ackner held that, without legislative interference, there was “no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country”.¹¹⁰
52. Of course, there was legislative interference and the *Human Rights Act* paved the way for the entry of proportionality into the British common law, but before that Act was introduced, the Court of Appeal heard the case of *R v Ministry of Defence; Ex parte Smith* in which Smith sought to challenge her dismissal from the Royal Air Force, which had been ordered on the basis of her sexuality.¹¹¹ Since the Convention at that time did not have the force of law in the UK, the case was decided strictly on common law grounds and traditional rationality review. Nevertheless, the Court allowed for a degree of flexibility in common law review where a fundamental human right was concerned, accepting the proposition that “[t]he more substantial the interference with human rights the more the Court will require by way of justification before it is satisfied that the decision was reasonable”.¹¹²
53. In the outcome, the Court found that the standard of unreasonableness at common law had still not been met and Smith pursued the right of individual petition to the European Court of Human Rights. The Strasbourg court directly applied a proportionality test and upheld the claim.¹¹³ Since that case and the introduction of the *Human Rights Act*, each iteration of the congruence between rationality review at common law and proportionality review under the Convention and the *Human Rights Act* has grown stronger, at least where fundamental rights are

¹⁰⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, 683.

¹⁰⁸ [1985] AC 374, 410.

¹⁰⁹ [1991] 1 AC 696.

¹¹⁰ *Ibid* 763.

¹¹¹ [1996] QB 517.

¹¹² *Ibid* 554 (Sir Thomas Bingham MR).

¹¹³ *Lustig-Prean and Beckett v United Kingdom* (2000) 29 ECHR 548.

concerned. It has been observed that “it must be fair to say that the decision of the European Court of Human Rights [in the case of Smith]... softened up the English Courts for proportionality”.¹¹⁴

54. In *Daly*, the prisoners’ rights case mentioned earlier, Lord Steyn noted:

*“there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach.”*¹¹⁵

Thirteen years later in *Kennedy v Charity Commission*,¹¹⁶ Lord Mance concluded that there was no reason why factors such as rational connection, necessity and strict proportionality “should not be relevant in judicial review even outside the scope of Convention and EU law”¹¹⁷ and “that there would be no real difference in the context of that case between the nature and outcome of scrutiny required under common law and under art 10 of the European Convention on Human Rights”.¹¹⁸

55. In *Pham v Secretary of State for the Home Department*,¹¹⁹ Lords Carnwath, Mance and Sumption each cited Lord Mance’s remarks in *Kennedy*,¹²⁰ while Lord Sumption also observed that the failure to adopt proportionality as a general principle of English public law “produced some rather arbitrary distinctions between essentially similar issues”¹²¹. Ultimately, he noted, “the solution adopted, albeit sometimes without acknowledgment, was to expand the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality.”¹²²

56. The question in the UK has now become whether proportionality should supplant rationality review as the general ground of administrative review, even in cases not concerning fundamental rights. This was the argument put forward by the appellants in *Keyu v Secretary of State for Foreign and Commonwealth Affairs*,¹²³ who were seeking review of a

¹¹⁴ The Hon Justice Garry Downes AM, “Reasonableness, Proportionality And Merits Review” (Speech delivered at the New South Wales Young Lawyers Seminar, Issues of Administrative Law, 24 September 2008).

¹¹⁵ [2001] 2 AC 532, 547 [27].

¹¹⁶ [2014] 2 All ER 847.

¹¹⁷ *Ibid* 874 [54].

¹¹⁸ *Pham v Secretary of State for the Home Department* [2015] 3 All ER 1015, 1043 [94].

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* 1036 [50] (Lord Carnwath); 1043-4 [94] (Lord Mance); 1050 [109] (Lord Sumption).

¹²¹ *Ibid* 1047 [104].

¹²² *Ibid* 1048 [105].

¹²³ [2016] 4 All ER 794.

decision not to hold a public inquiry into the killing of unarmed civilians by British soldiers in Malaysia in 1948.

57. Lord Neuberger found that it would not be appropriate for the five-Justice panel there convened to either accept or reject the argument and that a nine-Justice panel would be required.¹²⁴ He did, however, note the profound and far-reaching consequences such a decision would have, in particular, because it would require the court to intrude on the merits of the decision at issue.¹²⁵ Lord Kerr emphasised that the distinction between rationality review and proportionality was no longer so stark, but echoed observations of Lord Reed in *Pham* that it was useful to distinguish between rights and non-rights cases.¹²⁶ His Lordship questioned the feasibility of proportionality analysis in non-rights cases,¹²⁷ where the court would have to strike the right balance between two incommensurate values.¹²⁸ In those circumstances, he found it difficult to say whether the decision not to hold an inquiry was disproportionate.¹²⁹ Lady Hale also shared a concern that it would be hard to apply proportionality analysis to ordinary administrative decisions that did not interfere with a fundamental right.¹³⁰
58. Returning the focus to our shores, proportionality has had far less success in infiltrating administrative review, but it has not been completely absent from the discussion. In *Australian Broadcasting Tribunal v Bond*,¹³¹ Justice Deane suggested that review under *Wednesbury* principles arguably required a minimum degree of proportionality.¹³² In *Bruce v Cole*,¹³³ Chief Justice Spigelman noted that while a complete lack of proportion may manifest unreasonableness, it had not been adopted as a separate ground of review.¹³⁴
59. The joint judgment of Justices Hayne, Kiefel and Bell in *Minister for Immigration v Li* marks a more receptive attitude to notions of proportionality in rationality review.¹³⁵ Their Honours found that “an obviously disproportionate response is one path by which a conclusion

¹²⁴ Ibid 828 [132].

¹²⁵ Ibid 828 [133].

¹²⁶ Ibid 863 [280].

¹²⁷ Ibid 863 [281].

¹²⁸ Ibid 864 [283].

¹²⁹ Ibid.

¹³⁰ Ibid 870 [304].

¹³¹ (1990) 170 CLR 321.

¹³² Ibid 367.

¹³³ (1998) 45 NSWLR 163.

¹³⁴ Ibid 185.

¹³⁵ (2013) 249 CLR 332.

of unreasonableness may be reached”.¹³⁶ In refusing to issue Ms Li with a student visa, the disproportionate weight given by the Migration Review Tribunal to the fact that Ms Li had had an opportunity to present her case was said to be relevant in finding *Wednesbury* unreasonableness.¹³⁷ While Chief Justice French refused to apply any kind of proportionality analysis, he recognised that there was an overlap between the traditional irrationality ground and proportionality stating:

*“a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves.”*¹³⁸

60. *Li* was an unusual case in which to entertain questions of proportionality. For one, no submissions were made on the question of proportionality. For another, as Janina Boughey notes, “it clearly involved less compelling rights claims than many of the other migration cases that frequently reach the High Court”.¹³⁹ Concerns in the UK over the awkwardness of applying proportionality analysis to non-rights cases are exacerbated in Australia where we lack a statutory framework of individual human rights; individual rights being the anchor around which proportionality analysis is structured. Sir Anthony Mason has argued that it is not necessary to confine proportionality to the field of rights, he proposes that a court can balance “the detriment to the individual occasioned by the policy” on the one hand with “the risk of compromise of the policy” on the other.¹⁴⁰
61. But does any detriment occasioned to an individual by a government policy justify the heightened form of intervention and scrutiny that proportionality analysis represents? The rights anchor is also a normative yardstick which marks the point where a court is justified in interfering with a policy decision; where individual interests take priority over public interests.¹⁴¹ Any normative justification for abrogating the constitutional separation of powers is lacking where “what is at stake is

¹³⁶ Ibid 366 [74].

¹³⁷ Ibid.

¹³⁸ Ibid 351 [30].

¹³⁹ Janina Boughey, “The Reasonableness Of Proportionality In The Australian Administrative Law Context” (2015) 23 *Federal Law Review* 59, 86.

¹⁴⁰ Sir Anthony Mason, “Lecture 2 : The scope of judicial review” (2001) 31 *AIAL Forum* 21,

38.

¹⁴¹ Boughey, above n 139, 71.

not ... a 'right' enjoyed by the public but rather a 'privilege' provided by a statutory scheme".¹⁴²

62. Judicial review of administrative decisions is not about upholding individual rights but about addressing public wrongs. The system is not structured to privilege individualism over effective government.¹⁴³ But it is complemented by a sophisticated system of merits review, something which Justice Downes cites as a reason why expansion of judicial review through proportionality analysis is not a present concern.¹⁴⁴
63. Orienting proportionality analysis around statutory privileges rather than fundamental rights also renders such an analysis more opaque. It asks the court to strike the right balance between the competing considerations which the original decision-maker was required to balance. An assessment of the correct weight to be given to a consideration is a clear descent into the merits of the decision.
64. It is notable in the UK that a type of proportionality analysis has spread from the specifically enumerated rights in the *Human Rights Act* and European Convention to common law rights at large. Part of the reason for this, as identified by Lord Sumption in *Pham*,¹⁴⁵ is that arbitrariness is produced when proportionality is applied in some contexts but not in others. While Australia does not have a *Human Rights Act*, it has adopted a structured proportionality test in the context of the constitutionally implied freedom of political communication. Where proportionality analysis is applied in one area of public law it is prone to leaking into other areas in order to maintain consistency in legal reasoning. In the Australian context, the question of consistently applying structured proportionality analysis arises right at the intersection of constitutional and administrative law, namely: when legislation confers a wide discretion on an administrator, which is not itself necessarily inconsistent with the constitutional limitation, but can be exercised in a way which is inconsistent, what is the relevant standard of administrative review?
65. Two cases help to illustrate the dilemma. In *Wotton v Queensland*,¹⁴⁶ the plaintiff sought to challenge two provisions of the *Corrective Services Act 2006* (Qld). Focusing on just one of those provisions, the Act made it

¹⁴² The Hon William Gummow AC, "Rationality and reasonableness as grounds of review" (2015) 40 Australia Bar Review 1, 16.

¹⁴³ See Michael Taggart, "Proportionality, Deference, Wednesbury" [2008] *New Zealand Law Review* 423, 478.

¹⁴⁴ Downes, above n 114.

¹⁴⁵ *Pham* [2015] 3 All ER 1015, 1047 [104].

¹⁴⁶ (2012) 246 CLR 1.

an offence for a person to interview a prisoner, including a person on parole, unless the person had the written approval of the chief executive. The obligation to seek approval thus constituted a burden on political communication. Subjected to *Lange* analysis, the legislative provision was found to be constitutionally valid. No permission had been sought and the plaintiff did not seek to challenge a decision of the chief executive not to give approval. But if the chief executive had not exercised the discretion in a manner proportionate to the implied freedom of political communication, how would a court review such a decision? As the Court in *Wotton* emphasised, “discretionary powers must be exercised in accordance with any applicable law, including the *Constitution* itself”.¹⁴⁷ Since the discretion is constitutionally valid, the case must fall to be reviewed under one of the traditional grounds of administrative review, but it is unclear whether the existing standards of review can accommodate *McCloy* analysis or whether a separate ground of proportionality is required.

66. In the recent case of *Gaynor v Chief of the Defence Force (No 3)*,¹⁴⁸ regulation 85 of the *Defence (Personnel) Regulations 2002* (Cth) provided that an army officer’s service could be terminated if the relevant commanding officer was satisfied that retention of the officer was not in the interest of the Defence Force or the service. It was accepted that regulation 85 did not directly contravene a constitutional limitation.¹⁴⁹ However, the discretion conferred by regulation 85 was exercised by the Chief of Defence so as to terminate Mr Gaynor’s service in circumstances where he published statements on social media concerning his private views about political matters. It was argued that this exercise of discretion burdened the implied freedom of political communication.
67. Justice Buchanan, at first instance, reviewed the administrative decision by construing the regulation as not authorising infringement of the constitutional mandate.¹⁵⁰ Where the exercise of discretion was not reasonably appropriate and adapted according to a *Lange* and *McCloy* analysis, it was thus an exercise of discretion that was in excess of the statutory grant of power and *ultra vires*.¹⁵¹

¹⁴⁷ Ibid 9 [9].

¹⁴⁸ (2015) 237 FCR 188.

¹⁴⁹ Ibid 240 [207].

¹⁵⁰ Ibid 240 [208].

¹⁵¹ Ibid 255 [279].

68. On appeal to the Full Federal Court, in a judgment that came down two weeks ago, the Full Court overturned this decision.¹⁵² It held that the *Lange* test could only be applied at the level of legislative review, otherwise, where such analysis was applied directly to specific exercises of power, it impermissibly converted the limitation on legislative power into an individual right.¹⁵³ If the implied freedom was to be protected at the administrative review level, it could only be through the traditional grounds, for instance, by characterising the implied freedom as a relevant consideration.¹⁵⁴ The Court did, however, raise another unexplored scenario where an exercise of executive power is sourced for example only in s 61 of the *Constitution*, and does not owe its authority to statute, questioning whether the implied freedom would operate as a limit on an individual exercise of such a power in such circumstances.¹⁵⁵
69. Justice Buchanan’s approach of using the *Constitution* as a constraint on the exercise of statutory jurisdiction was a method endorsed by Justice Brennan in *Miller v TCN Channel Nine Pty Ltd*¹⁵⁶ and in *Wotton*,¹⁵⁷ but it is controversial,¹⁵⁸ as the Full Federal Court decision indicates. With the elaborated proportionality test endorsed in *McCloy*, the application of this rule of construction in the administrative law context is undoubtedly messy. On the other hand, using the traditional grounds of judicial review is inadequate and fails to ensure conformity with *McCloy*. As James Stellios observes, while questions of “suitability and necessity may be familiar enough tasks within administrative review ... strict proportionality is not”.¹⁵⁹ If strict proportionality is to remain an element of the *Lange* test, then it may “accelerate the normalisation of the proportionality exercise [in administrative review] and make the adoption of proportionality as a ground of review more palatable.”¹⁶⁰
70. It appears that the *McCloy* decision has opened a Pandora’s box. Whether the High Court, under the leadership of Chief Justice Kiefel, chooses to embrace proportionality and its necessary implications across constitutional and administrative law, or whether it will be a short-

¹⁵² *Chief of the Defence Force v Gaynor* [2017] FCAFC 41.

¹⁵³ *Ibid* [47], [55]-[63].

¹⁵⁴ *Ibid* [80].

¹⁵⁵ *Ibid* [71].

¹⁵⁶ (1986) 161 CLR 556, 613-14.

¹⁵⁷ *Wotton* (2012) 246 CLR 1, 13-14 [21].

¹⁵⁸ See eg, *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 88 [216] (Kiefel and Crennan JJ) where it was suggested that the constitutional limitation could not confine the statute without express words conditioning the exercise of the discretion.

¹⁵⁹ James Stellios, “Marbury v Madison: Constitutional Limitations and statutory discretions” (2016) 42 Australian Bar Review 324, 348.

¹⁶⁰ *Ibid*.

lived phenomenon, remains to be seen. Despite the insistence of Chief Justice French and Justice Bell to the contrary, the High Court must question whether proportionality is truly not “some exotic jurisprudential pest destructive of the delicate ecology of Australian public law”,¹⁶¹ or if so, how it is to be tamed and domesticated into a common law system which defers the protection of rights to the democratically elected legislature and maintains a constitutional separation of powers in which the judiciary is to regulate only the *legality* of legislative and executive acts.

¹⁶¹ *Murphy* [2016] HCA 36; (2016) 90 ALJR 1027, 1039 [37].