Six unexplored aspects of proportionality under human rights legislation in Australia

*Kent Blore**

Over the past decade, proportionality has been the subject of fierce debate in the High Court in the context of the implied freedom of political communication, and, more recently, the freedom of interstate trade, commerce and intercourse under s 92 of the *Constitution*.[1] Structured proportionality is now routinely used by a majority of the High Court as the test for determining whether a burden on a constitutional freedom is justified,[2] with Gageler and Gordon JJ still refusing to come to the party,[3] and Steward J still unsure of the need for justification at all (whether using a test of proportionality or some other test).[4] We have learned a great deal about proportionality from this debate. As Gageler J said, the judges of the High Court have engaged in the kind of 'abstracted debate about methodology' one might expect to see in 'the pages of a law review'.[5]

That rigour of debate has not been replicated in other areas of the law where justification and proportionality are relevant. In particular, the human rights case law in the Australian Capital Territory, Victoria and Queensland appears to be largely unaffected by the debate about proportionality in the High Court. That is curious, given that limits on human rights are required to be justified using the proportionality test set out in the general limitation clauses in s 28 of the *Human Rights Act 2004* (ACT), s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and s 13 of the *Human Rights Act 2019* (Qld).

In this article, I raise six questions to generate debate about the role of proportionality under human rights legislation in Australia. Drawing upon the debate in the High Court in the constitutional context, but embellishing a little, the six questions I pose are as follows:

1. Do the general limitation clauses import a structured proportionality analysis like the High Court applies in the implied freedom context, or do they call for a 'global judgment' of the kind applied by the South African Constitutional Court?

2. If we apply structured proportionality, should we apply the Canadian version, which focuses most of the attention on the necessity limb, or the German version, which

* Kent Blore is Senior Principal Lawyer, Crown Law, Queensland. The views expressed in this article are the author's own and not those of Crown Law. The author thanks Felicity Nagorcka for her comments on an earlier version of this paper. This is an edited version of a paper given at an AIAL seminar held on 23 June 2022 at the Supreme Court Library in Brisbane.

1 *Palmer v Western Australia* (2021) 95 ALJR 229, 244–5 [61]–[62] (Kiefel CJ and Keane J), 284 [264] (Edelman J). Cf at 249 [94] (Gageler J), 254–5 [198] (Gordon J).

2 *McCloy v New South Wales* (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 368–9 [123]–[127] (Kiefel CJ, Bell and Keane JJ), 416–7 [278] (Nettle J); *Unions NSW v New South Wales [No 2]* (2019) 264 CLR 595, 615 [42] (Kiefel CJ, Bell and Keane JJ), 638 [110] (Nettle J); *Clubb v Edwards* (2019) 267 CLR 171, 186 [6] (Kiefel CJ, Bell and Keane JJ), 264–5 [266] (Nettle J), 311 [408], 330–1 [462]–[463] (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373, 400–3 [32]–[33], [35], [38] (Kiefel CJ, Bell, Keane and Nettle JJ), 451 [188] (Edelman J).

3 Though Gageler J has recently made attempts to express his conclusions in the language of structured proportionality: *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 517 [119] (Gageler J).

4 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 554–6 [298]–[304] (Steward J); *Ruddick v Commonwealth* (2022) 96 ALJR 367, 403 [174] (Steward J).

5 *Palmer v Western Australia* (2021) 95 ALJR 229, 258 [140] (Gageler J).

focuses most of the attention on the fair balance limb? Is there an intermediate position, in the form of 'proportional alternatives', put forward by Israeli theorist Aharon Barak?

3. How do we identify the weight of the human right on one side of the scales? Are we concerned with the value of the human right in the abstract, or the 'incremental burden' (or 'marginal social importance')? Can the 'incremental burden' be reduced to nothing if another measure is also responsible for burdening the human right? On the other side of the scales, do we take into account existing measures that help to achieve the policy objective at the necessity stage (when considering alternative measures) or at the fair balance stage (when considering the 'marginal social importance' of the policy objective)?

4. A number of human rights have an internal limitation of 'arbitrariness'. For example, the right to privacy is a right not to have one's privacy 'arbitrarily' interfered with. In *Thompson v Minogue*, the Victorian Court of Appeal recently held that, in a human rights context, 'arbitrary' means, among other things, 'disproportionate'. If arbitrariness and the general limitation clause are both about proportionality, how do they interact?

5. The paradigm example of proportionality is where it is used to test the justification for a limit on a negative right (such as the right *not* to be deprived of life). But what about positive rights, such as the right of access to education or health services? On one view, difficult questions about the allocation of resources go to the duty of progressive realisation and whether the right has been limited, rather than whether a limit on the right is justified. When considering positive rights, should we eschew proportionality altogether, like the majority of the High Court did in *Murphy v Electoral Commissioner*, or should we apply proportionality using the concept of 'alternativity' developed by the German theorist Robert Alexy?

6. With courts increasingly grappling with issues of intergenerational equity, can a temporal dimension be incorporated into the proportionality analysis, in the way the German Constitutional Court recently did in the climate change case of *Neibauer v Germany* (discussed later)?

Structured proportionality or global judgment?

In considering whether a measure breaches a human right, the analysis proceeds in two stages: first, identifying a limit on a human right; and, second, considering whether that limit is justified.[6] For the second stage, the test of justification is set out in the general limitation clause in s 28 of the ACT Human Rights Act, s 7(2) of the Victorian Charter and s 13 of the Queensland Human Rights Act.

6 See Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 19–21, 26–7. See the international position set out exhaustively in *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 27–33 [67]–[97] (Bell J).

They provide the limitations shown in Table 1.

Table 1: The test of justification

ACT	Vic	Qld
28 Human rights may be limited (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following: (a) the nature of the right affected; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.	7 Human rights — what they are and when they may be limited (1) … (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including — (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. (3) …	13 Human rights may be limited (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant — (a) the nature of the human right; (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom; (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose; (d) whether there are any less restrictive and reasonably available ways to achieve the purpose; (e) the importance of the purpose of the limitation; (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; (g) the balance between the matters mentioned in paragraphs (e) and (f).

Elsewhere,[7] I have traced the text of these general limitation clauses to the overall test in s 1 of the Canadian Charter,[8] as well as the list of factors in s 36 of the South African Constitution.[9] The factors derived from South Africa help to answer the overall test of justification derived from Canada.

Each of the general limitation clauses in Australia has been held to embody a test of proportionality.[10] That is true of all general limitation clauses.[11] But there is more than one way to apply proportionality. In Canada[12] (and most other human rights jurisdictions, including the United Kingdom[13] and New Zealand[14]), the courts apply a 'structured' form of proportionality. Structured proportionality can be traced back to Prussian administrative law in the 1800s.[15] The German Constitutional Court began applying the test of *Verhältnismäßigkeit* to human rights in the wake of World War II, which in turn influenced the European Court of Human Rights. Structured proportionality has since spread so widely that it has assumed a global constitutional status.[16]

According to the test of 'structured proportionality', a limit on a human right will be justified if it meets four requirements:

- the measure must have a proper purpose or legitimate aim;[17]
- the measure must be rationally connected to that purpose, or a suitable way of achieving the purpose, meaning it actually helps to achieve that purpose;[18]

7 Kent Blore, 'Proportionality under the *Human Rights Act 2019* (Qld): When are the factors in s 13(2) necessary and sufficient, and when are they not?' (2022) 45 *Melbourne University Law Review* (advance).
8 *Canada Act 1982* (UK) c 11, sch B, pt I s 1 ('*Canadian Charter of Rights and Freedoms*').
9 *Constitution of the Republic of South Africa Act 1996* (South Africa).
10 *Re Application under Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 449 [148]–[149] Warren CJ); *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 40 [134] (Bell J); *Re Application for bail by Islam* (2010) 175 ACTR 30, 78–9 [242]–[243], [247(d)] (Penfold J); *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 505 [205] (Dixon J); *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, [104] (Martin J).
11 Barak (n 6) 142–3.
12 *R v Oakes* [1986] 1 SCR 103, 138–40 (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ); *Carter v Canada (A-G)* [2015] 1 SCR 331, 378–9 [94] (The Court); *R v KRJ* [2016] 1 SCR 906, 938 [58] (Karakatsanis J for McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ).
13 *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Lord Clyde for the Judicial Committee); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 187 [19] (Lord Bingham for the Judicial Committee); *Bank Mellat v Her Majesty's Treasury [No 2]* [2014] AC 700, 790–1 [73]–[74] (Lord Reed JSC); *R (Nicklinson) v Ministry of Justice* [2015] AC 657, 807–9 [167]–[168] (Lord Mance JSC).
14 *R v Hansen* [2007] 3 NZLR 1, 28 [64] (Blanchard J), 40–1 [103]–[104] (Tipping J), 69 [203]–[204] (McGrath J).
15 Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 384–5.
16 See, eg, Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 *Revus* 51, 51; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 74; Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 *International Journal of Constitutional Law* 263, 263–4; Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 63–4.
17 ACT s 28(2)(b), Vic s 7(2)(b), Qld s 13(2)(b).
18 ACT s 28(2)(d), Vic s 7(2)(d), Qld s 13(2)(c).

- the measure must be necessary or minimally impairing, meaning the purpose cannot be achieved in some other way that has a lesser impact on human rights;[19] and
- the measure must strike a fair balance between its purpose and the impact on human rights.[20]

According to the logic of structured proportionality, each step builds on the last, so that it makes sense to work through the steps sequentially. Further, if a measure falls down at one stage of the analysis, it cannot be saved by any of the steps that come afterwards.[21] For example, if a measure imposes a limit on human rights that is not necessary, it is impossible to conclude that the impact on human rights is outweighed by the policy objective. How can the need to limit a human right be more important than the human right if the limit is completely unnecessary?

South Africa stands apart from this approach. Early in its case law, the Constitutional Court of South Africa determined that it would apply proportionality as a form of intuitive synthesis of all relevant factors. In the early case of *S v Manamela*, the court said: 'In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list'.[22] For me, the image of a cauldron comes to mind. You throw all the factors in, stir the pot and see what emerges.

In the early stages of Victoria's Charter case law, Bell J endorsed the South African approach. In *Re Kracke and Mental Health Review Tribunal*, he said:

> … the test is whether the limitation is reasonable and demonstrably justified in a free and democratic society based on the values of the Charter. This requires a global judgment and not a mechanical, check-list approach. The specific factors are given to help in making that judgment.[23]

Since then, the debate about how to apply proportionality under the Charter petered out, even while debate began to heat up in the High Court in the context of the implied freedom. From 2015, a majority of the High Court has consistently applied the more structured form of proportionality.

Elsewhere, I have argued that s 13 of the Queensland Human Rights Act imports a structured proportionality test.[24] In my view, the factors in s 13(2) have been moulded to align more closely with the structured form of the test.

For present purposes, in order to stimulate debate, I will offer three reasons for and against applying structured proportionality under human rights legislation in Australia.

19 ACT s 28(2)(e), Vic s 7(2)(e), Qld s 13(2)(d).
20 ACT s 28(2)(b), (c), Vic s 7(2)(b), (c), Qld s 13(2)(e), (f), (g).
21 *Clubb v Edwards* (2019) 267 CLR 171, 331 [463] (Edelman J); *Palmer v Western Australia* (2021) 95 ALJR 229, 285 [266] (Edelman J)
22 *S v Manamela* [2000] 3 SA 1, 19–20 [32] (Madala, Sachs and Yacoob JJ).
23 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 40 [133] (Bell J).
24 Blore (n 7).

As to the case against structured proportionality:

- First, as a matter of text, the factors in s 28 of the ACT Human Rights Act and s 7(2) of the Victorian Charter are inclusive. The factors in s 13 of the Queensland Human Rights Act 'may' be relevant. The inclusive and permissive nature of the factors points against a form of proportionality in which *all* of the factors will *always* be relevant.

- Second, the South African origins of the factors in each of the general limitation clauses might point to an intention to adopt the South African case law on proportionality.[25]

- Third, as Gageler J recently said in *Palmer v Western Australia*, the rigid formula of structured proportionality may result in some factors receiving 'unwarranted analytical prominence'.[26] Conversely, factors that do not readily fit in any of the steps 'get ignored or suppressed or downplayed', or worse still, are 'pushed down to be swept up in the residual inquiry into "adequacy of balance"'.[27]

As to the case in favour of structured proportionality:

- First, as to the text, the word 'including' in the ACT and Victorian general limitation clauses has other work to do, as does the word 'may' in the Queensland general limitation clause. The factors in the ACT and Victoria need to be inclusive because the final balancing exercise is not explicitly included. In Queensland, 'may' allows for the possibility that not all of the factors will be relevant; for example, because the right is absolute or because an internal limitation in a particular human right modifies the test of justification.

- Second, the South African approach stands apart from the more structured approach applied in almost all other human rights jurisdictions. Moreover, applying the South African approach would also now depart from the approach of a majority of the High Court in the context of the implied freedom and s 92 of the *Constitution*.

- Third, a 'global judgment'[28] would 'invite little more from the Court than an impression' and would 'not address the need for transparency in reasoning'.[29] Whereas a global judgment is 'pronounced as a conclusion, absent reasoning',[30] structured proportionality 'help[s] control intuitive assessments, [and] make[s] value judgments explicit'.[31]

25 Where the Parliament of one jurisdiction adopts the law of another jurisdiction, it generally also intends to adopt the interpretation that has been given to that law: *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 233–4 [19] (Kiefel CJ), 244–5 [52] (Bell, Keane, Nettle and Edelman JJ).

26 *Palmer v Western Australia* (2021) 95 ALJR 229, 259 [146] (Gageler J).

27 Ibid 258 [143], 259 [146]. See also at 269–70 [198] (Gordon J). See also Marcus Teo, 'Proportionality as Epistemic Independence' [2022] (April) *Public Law Review* 245, 261 ('[I]f this "channelling effect" is all that proportionality achieves, then it is hard to see why proportionality is a good thing at all. The fact that parties and courts are channeled away from some enquiries and toward others is, in the abstract, a neutral fact — and in the context of the regulation of public administration, a negative fact.').

28 *S v Manamela* [2000] 3 SA 1, 19–20 [32] (Madala, Sachs and Yacoob JJ).

29 *Brown v Tasmania* (2017) 261 CLR 328, 369 [125] (Kiefel CJ, Bell and Keane JJ). See also Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 87, referring to the risk of 'an unconstrained value judgment' if an unstructured approach is taken.

30 *McCloy v New South Wales* (2015) 257 CLR 178, 216 [75] (French CJ, Kiefel, Bell and Keane JJ). See also *Brown v Tasmania* (2017) 261 CLR 328, 369 [125], 369 [125] n 93 (Kiefel CJ, Bell and Keane JJ); *Palmer v Western Australia* (2021) 95 ALJR 229, 242 [51], 243 [55] (Kiefel CJ and Keane J), 273 [217], 284–5 [262]–[266] (Edelman J).

31 Gertrude Lübbe-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court' (2014) 34(1–6) *Human Rights Law Journal* 12, 16, quoted with approval in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, 1622 [96] (Lord Mance JSC, Lord Neuberger PSC, Baroness Hale DPSC and Lord Wilson JSC agreeing); *McCloy v New South Wales* (2015) 257 CLR 178, 216 [77] (French CJ, Kiefel, Bell and Keane JJ).

For what it is worth, I am a structured proportionality convert. But there is a debate to be had here.

The Canadian or German approach to necessity testing?

The third step of structured proportionality is necessity testing. It involves looking at alternative ways of achieving the legitimate aim. Are there other ways of achieving the legitimate aim, but in a way that limits human rights to a lesser degree? As the general limitation clauses in the ACT, Victoria and Queensland put it, are there 'any less restrictive and reasonably available ways to achieve the purpose'?[32] If such an alternative exists, then it cannot be said that the limit on human rights is necessary. The same result could have been achieved without harming human rights (or by harming them to a lesser extent).

After retiring from the Federal Constitutional Court of Germany, Dieter Grimm wrote an influential article in 2007 titled 'Proportionality in Canadian and German Constitutional Jurisprudence'.[33] He pointed out that, in Canada, laws that are found to impose disproportionate limits on rights tend to fall down at the third stage of the analysis (necessity or minimal impairment), whereas, in Germany, cases tended to be decided at the final stage (fair balance).[34] One key explanation is that Canadians are more relaxed about what qualifies as a hypothetical alternative, whereas the Germans are far more strict.

In Canada, a measure that is 'nearly as effective' will qualify as an alternative for the purposes of the necessity test (which is there known as the minimum impairment test). As McLachlin CJ said in *R v Hutterian Brethren of Wilson Colony*:

> the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunise the law from scrutiny at the minimal impairment stage.[35]

That is how Australian courts applied necessity testing in early cases. *Betfair Pty Ltd v Western Australia* is often held up as the paragon of necessity testing in Australian constitutional law. In that case, Western Australia had banned betting exchanges in order to protect the integrity of the racing industry and prevent fraud. The High Court found that the incursion on free interstate trade and commerce under s 92 of the *Constitution* was not necessary to prevent fraud when it was considered that Tasmania managed to tackle the same problems by regulating, rather than banning, betting exchanges.[36] Of course, the simple comparison of the Western Australian and Tasmanian models overlooks that an outright ban will always

32 ACT s 28(2)(e), Vic s 7(2)(e), Qld s 13(2)(d).
33 Grimm (n 15).
34 Ibid 384, 389.
35 *R v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, 597 [55] (McLachlin CJ, Binnie, Deschamps and Rothstein JJ concurring). Cf R v KRJ [2016] 1 SCR 906, 945–6 [79] (Karakatsanis J, McLachlin CJ, Cromwell, Moldaver, Wagner, Gascon and Côté JJ concurring), where the Canadian Supreme Court may have shown signs of a retreat to an 'as effective' test, in order to accord 'appropriate deference to Parliament's choice of means, as well as its full legislative objective.'
36 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479–80 [110]–[112] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

be more effective in reducing the risk of fraud.[37] That is, the two legislative models did not satisfy the anti-fraud objective to *exactly* the same extent.

For the Germans, the alternative must achieve the same objective to the same extent. The logical value of the necessity test is that it tells us whether the limit on human rights is truly necessary to achieve the objective. In the comparison, the objective needs to stay constant. If you are comparing different alternatives that have different objectives, really you are comparing apples and oranges (which is fine to do, but should be reserved for the final balancing exercise in the next step).

After retiring as President of the Supreme Court of Israel, Aharon Barak wrote a book in 2012 titled *Proportionality: Constitutional Rights and their Limitations*.[38] It has proven to be highly influential around the world, including with our own High Court. In his book, Barak advocates for the German approach to necessity testing. Justices Crennan, Kiefel and Bell picked up that reasoning in *Tajjour v New South Wales*. Quoting Barak, they said:[39]

> To qualify as a true alternative for the purposes of the comparison between the impugned legislative provision and a hypothetical provision, the latter must be *as practicable* as the impugned provision.[40] That is, the hypothetical measure must be as effective in achieving the legislative purpose. It must be as capable of fulfilling that purpose as the means employed by the impugned provision, 'quantitatively, qualitatively, and probability-wise'.[41]

That is now the orthodox approach of a majority of the High Court to necessity testing.[42]

That may be a win for logic, but is it a win for the protection of human rights? In Canada, the courts have been comfortable with striking down laws at the necessity stage, but far less comfortable with striking down laws at the fair balance stage, where value judgments loom large.[43] By contrast, courts in Germany and Israel are also very comfortable engaging with competing values in the final balancing exercise.[44] A perverse combination in the Australian context would be German adherence to the logic of the necessity test, but a reluctance to engage in balancing because of our anxiety not to undermine the separation of powers. The result would be that measures that should be found to breach human rights will pass necessity testing on a technicality, and then go on to pass the final balancing test because the court has been scared away from the value judgment required.

37 Arguably, the Court was actually engaged in comparing proportional alternatives, explored below. 'Even though [regulation] was less effective than the total ban, given that the public interest aim did not seem to be particularly significant, the drop in effectiveness was outweighed by the increment in trade': Csongor István Nagy, 'Justifying Trade Restrictions under s 92 of the Australian Constitution: A Comparative Law-Based Proposal for a Coherent Doctrine' (2020) 94 *Australian Law Journal* 874, 878. For other examples of close comparisons for the purposes of the necessity test, see at 883–4.

38 Barak (n 6).

39 *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [114] (Crennan, Kiefel and Bell JJ).

40 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306; *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 134–5 [438]–[439].

41 Barak (n 6) 324.

42 *Comcare v Banerji* (2019) 267 CLR 373, 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

43 Grimm (n 15) 394–5.

44 See Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) 47.

Barak might offer an intermediate position with his concept of 'proportional alternatives'. At the final balancing stage, Barak reintroduces alternatives that were excluded at the necessity stage because they were not equally as effective in achieving the policy aim. There may be an alternative measure that only achieves the purpose to a slightly lesser extent, but which entirely avoids (or mostly avoids) impacts on human rights. An alternative measure that strikes a *fairer* balance between the policy objective and the impact on human rights tends to show that the way you have decided to do things might not strike a fair balance between those two things. Effectively, you need to carry out a proportionality analysis on the impugned measure, then carry out another proportionality analysis on an alternative measure, and finally weigh up those two proportionality analyses. An image of two sets of scales on either side of a set of scales comes to mind.

Barak offers the example of the decision to build a security wall across farmers' land in the case of *Beit Sourik Village Council v Israel*.[45] There was an alternative route for the wall *around* the farmers' property, but that would have cost more money. Because the alternative would not have been as effective in achieving the security and efficiency purposes, it could be ruled out at the necessity stage. However, the alternative route avoided impacts on the human rights of the farmers, whereas the chosen route had a devastating impact on the farmers. The alternative route showed that the decision to build the wall across the farmers' land was disproportionate.

Proportional alternatives require a level of sophistication we have not yet seen in Australian cases. It might be a very nice logical way of reasoning, but why overcomplicate things with proportional alternatives when necessity testing can be applied in a way that accords with commonsense comparisons of alternative measures (just as the High Court did in *Betfair*)? Maybe the Germans are right, logically speaking, but the Canadians are right, practically speaking.

Incremental burdens? (And incremental legitimate aims?)

In the context of the *implied* freedom, the burden on the freedom is 'gauged by nothing more complicated than comparing: the practical ability of a person or persons to engage in political communication with the law; and the practical ability of that same person or those same persons to engage in political communication without the law'.[46]

Identifying the burden using a simple 'but for' test helps to home in on the impact that can be attributed to the measure being impugned. The impact that comes from other measures in the background can be put to one side. Take, for example, a law that criminalises political protests on private land. In assessing the impact of that law on free political communication, you need to take into account that, quite apart from the impugned law, it was already unlawful to trespass on private property under other laws. The burden that requires justification is not the burden imposed by the anti-protest law, considered in the abstract; rather, 'it is any *incremental* burden that needs justification.'[47]

45 [2004] IsrSC 58 807, summarised in Barak (n 6) 341–2, 353–4.

46 *Brown v Tasmania* (2017) 261 CLR 328, 383 [181] (Gageler J). See also at 365 [109] (Kiefel CJ, Bell and Keane JJ).

47 *Brown v Tasmania* (2017) 261 CLR 328, 456 [397] (Gordon J) (emphasis added). See also at 386 [188] (Gageler J). See also *Ruddick v Commonwealth* (2022) 96 ALJR 367, 399 [155]–[156] (Gordon, Edelman and Gleeson JJ).

The idea of 'incremental' limitations has not yet featured in human rights cases in Australia. However, there are good reasons to import the idea. First, each of the general limitation clauses requires identification of the 'extent' of the limitation on human rights.[48] Second, in his influential book, Barak clarifies that the relevant value of the human right on one side of the scales is not the value of the human right considered in the abstract, but rather the 'marginal social importance' of the human right. For Barak, the same is true of the value of the policy objective on the other side of the scales.[49] He explains it in this way:

> In determining the balancing we compare the weight of the social importance of the benefit gained by fulfilling the proper purpose and the weight of the social importance of preventing the harm that this fulfillment may cause to the constitutional right. This comparison focuses on the state of affairs prior to the law's enactment and the changes caused by the law. Accordingly, the issue is not the comparison of the general social importance of the purpose (security, public safety, etc) on the one hand and the general social importance of preventing harm to the constitutional right (equality, freedom of expression, etc) on the other. Rather, the issue is much more limited. It refers to the comparison between the state of the purpose prior to the law's enactment, compared with the state afterwards, and the state of the constitutional right prior to the law's enactment compared with its state after enactment. Accordingly, we are comparing the marginal social importance of the benefit gained by the limiting law and the marginal social importance of preventing harm to the constitutional right caused by the limiting law. The question is whether the weight of the marginal social importance of the benefits is heavier than the weight of the marginal social importance of preventing the harm[50]

In my mind, I envisage a subtraction equation on either side of the scales: the overall burden minus the burden of other measures.

However, there may be reason for caution in applying the idea of incremental burdens to the human rights context. I will offer three notes of caution.

First, requiring precise identification of the incremental burden might overly complicate the analysis, especially if it requires a detailed comparison with the entire edifice of the general law, trawling through overlapping statutes, common law and equity.

Second, is the simple subtraction equation really as accurate as it seems? We might be lulled into thinking we can subtract and subtract until there is no limitation on human rights left, such that there is nothing left requiring justification. Take, for example, the law challenged in *Brown v Tasmania*, which prohibited protests on forestry land. There was already separate forestry-management legislation in place which regulated movement on forestry land for safety purposes, not to mention trespass at common law. That is, there were already other reasons why people could not protest in the forest. For Edelman J, this reduced the burden on the implied freedom of political communication to zero: 'If the conduct about which legislation is concerned is independently unlawful, so that there was no legal freedom to communicate about government or political matters, then there can be no "burden" on the freedom.'[51] Perversely, we might come to the same conclusion about the forestry-management legislation: according to the logic of incremental burdens, that

48 ACT s 28(2)(c), Vic s 7(2)(c), Qld s 13(2)(f).
49 ACT s 28(2)(b), Vic s 7(2)(b), Qld s 13(2)(e).
50 Barak (n 6) 350–1.
51 *Brown v Tasmania* (2017) 261 CLR 328, 502–3 [557] (Edelman J). See, similarly, *Ruddick v Commonwealth* (2022) 96 ALJR 367, 399 [155]–[156], 401–2 [161]–[172] (Gordon, Edelman and Gleeson JJ).

legislation would also not limit human rights, because the anti-protest law independently prohibits protests on forestry land in any event. The absurd result would be that if two pieces of legislation burden the implied freedom, then somehow neither of them will burden the implied freedom. Of course, that would come as a surprise to Bob Brown, who was unable freely to communicate through protest about the political issue of logging.

Third, on the other side of the scales, should the incremental legitimate aim be factored in at the necessity stage or the fair balance stage of structured proportionality? *Brown v Tasmania* provides an example of both approaches. Kiefel CJ, Bell and Keane JJ found that the anti-protest law fell down at the necessity hurdle. For them, it was enough to point out that the forestry-management legislation achieved the same purposes as the anti-protest law, but in a less draconian way.[52] In a sense, at the necessity stage, the extent of the legitimate aim can be reduced to zero by subtracting the extent to which the legitimate aim is already served by other measures.[53]

By contrast, Nettle J found that the impugned law passed necessity testing. This was because the alternatives (including the forestry-management legislation on the books) did not target the detrimental effect of protests on business activities and did not achieve deterrence to the same extent.[54] However, his Honour reintroduced alternatives at the balancing stage.[55] Because the forestry-management legislation was already on the books and went most of the way to achieving the purposes of the anti-protest law, Nettle J noted that 'the importance of the [anti-protest law] is considerably lessened. When that lessened level of importance is weighed in the balance against the extent of the burden so identified, it is apparent that [the provisions of the anti-protest law] are grossly disproportionate to the achievement of the stated purpose of the legislation.'[56] That is, his Honour weighed the marginal social importance of the implied freedom against the marginal social importance of the policy objective. But maybe the difference between Nettle J and the plurality is more apparent than real. Ultimately, they both arrived at the same conclusion in *Brown*: the anti-protest law was disproportionate.

How do arbitrariness and proportionality interact?

A number of human rights in the ACT, Victoria and Queensland turn on the concept of 'arbitrariness', including the right to life,[57] the right to privacy,[58] the right to liberty,[59] and (in Queensland only) the right to property.[60] For example, the right to privacy is a right 'not to have [one's] privacy … *arbitrarily* interfered with' (emphasis added).

52 *Brown v Tasmania* (2017) 261 CLR 328, 372–3 [140]–[146] (Kiefel CJ, Bell and Keane JJ).
53 See, similarly, *Ruddick v Commonwealth* (2022) 96 ALJR 367, 375 [23] (Kiefel CJ and Keane J), 386–7 [89] (Gageler J).
54 *Brown v Tasmania* (2017) 261 CLR 328, 420 [286], 422 [289] (Nettle J).
55 Ibid 423 [291] (Nettle J).
56 Ibid 425 [295] (Nettle J).
57 ACT s 9(1), Vic s 9, Qld s 16.
58 ACT s 12(a), Vic s 13(a), Qld s 25(a).
59 ACT s 18(1), Vic s 21(2), Qld s 29(2).
60 Qld s 24(2). Cf Vic s 20 (which contains an internal limitation of 'lawfulness' instead).

Arbitrariness raises ideas that go to whether the impact on the right is justified (for example, whether privacy has been interfered with for a good reason) rather than to the hard outer limits of the scope of the right (for example, whether privacy includes impacts on physical and mental integrity[61] such as a vaccination requirement[62]). This complicates the two-stage model of a human rights analysis of asking first whether the human right is limited, and second whether that limit is justified. Conceptually, arbitrariness straddles both stages of the analysis.

The reason why some of the human rights in the ACT, Victoria and Queensland have internal limitations (such as arbitrariness) is that they are drawn primarily from the *International Covenant on Civil and Political Rights*, which does not have a general limitation clause.[63] Accordingly, each right in the covenant needs to set out the content of the right as well as the way that a limit on the right can be justified. Combining the internal limitations of the rights derived from the covenant with a general limitation clause has been described by some academics as 'inapt', because it effectively results in a duplication of limitation provisions.[64] In any event, that is the reality of our 'hybrid model'.[65]

Over the past decade, there has been a debate in Victoria (and to a lesser extent in the ACT) about whether 'arbitrary' carries its ordinary meaning or its human rights meaning.[66] According to its ordinary meaning, arbitrary means 'capricious and not based on any identifiable criterion or criteria';[67] it 'denotes a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim'.[68] By contrast, drawing on the case law of the UN Human Rights Committee, the human rights meaning is 'capricious, unpredictable or unjust and also … unreasonable in the sense of not being proportionate to a legitimate aim sought.'[69] Recently, in the case of *Thompson v Minogue*, the Victorian Court of Appeal resolved the debate in favour of the human rights meaning.[70] Accordingly, it is now clear that 'arbitrary' means, among other things, 'disproportionate'.

61 *Pretty v United Kingdom* (2002) 35 EHRR 1, 35 [61] ('It covers the physical and psychological integrity of a person').

62 *Vavřička v The Czech Republic* (European Court of Human Rights, Grand Chamber, application nos 47621/13 and 5 others, 8 April 2021) [258]–[264].

63 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 35 [106] (Bell J); *McDonald v Legal Services Commissioner* [*No 2*] [2017] VSC 89, [30]–[31] (Bell J).

64 Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 166 [5.21] (in respect of s 15(3) of the charter).

65 Michael Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government Printer, 2015) 157.

66 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 66–7 [199] (Tate JA); *Re Beth* (2013) 42 VR 124, 144 [97] n 54 (Osborn JA); *ZZ v Secretary to the Department of Justice* [2013] VSC 267, [85] (Bell J); *DPP v Kaba* (2014) 44 VR 526, 570–1 [154]–[156] (Bell J); *Jurecek v Director, Transport Safety Victoria* (2016) 260 IR 327, 345 [68] (Bell J); *Miller v Commissioner for Social Housing* [2017] ACAT 10, [99] (Member Symons); *Little v Commissioner for Social Housing* [2017] ACAT 11, [136] (Member Symons); *Andrews v Thomson* (2018) 340 FLR 439, 450–1 [57] (Elkaim and Loukas-Karlsson JJ, Robinson AJ); *PBU v Mental Health Tribunal* (2018) 56 VR 141, 178–9 [124] (Bell J); *LG v Melbourne Health* [2019] VSC 183, [76] (Richards J); *McLean v Racing Victoria Ltd* (2019) 59 VR 422, 440 [66] (Richards J); *HJ v Independent Broad-Based Anti-Corruption Commission* (2021) 64 VR 270, 305 [152] (Beach, Kyrou and Kaye JJA).

67 *WBM v Chief Commissioner of Police* (2010) 27 VR 469, 484 [57] (Kaye J).

68 Ibid 483 [51] (Kaye J).

69 *PJB v Melbourne Health* (2011) 39 VR 373, 395 [85] (Bell J) ('*Patrick's Case*').

70 *Thompson v Minogue* [2021] VSCA 358, [55], [221] (Kyrou, McLeish and Niall JJA).

A parallel debate has been about how arbitrariness is to be folded into the two-stage model. On one view, if an interference with the right (to privacy, for example) is not 'arbitrary', then the right is not limited, and there is no need to move on to the justification stage.[71] The other view is that arbitrariness is relevant to the justification analysis (especially because 'arbitrary' means 'disproportionate'). Taking this approach, the word 'arbitrary' in the right to privacy is 'an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision'. That is, consideration of whether the interference is 'arbitrary' becomes 'subsumed in the overall justification analysis'.[72] A more pragmatic, intermediate approach has been to recognise that the difference is much of a muchness: 'Even if [arbitrariness and justification] are separate questions, the relevant evidence is the same, and it is convenient to consider them together'.[73]

The Victorian Court of Appeal also sought to solve this problem in *Thompson v Minogue*. The Court acknowledged there are 'difficult questions' about how the internal limitation of arbitrariness in particular rights interacts with the general limitation clause.[74] Ultimately, the Court opted to treat arbitrariness as being relevant to whether the right is limited at the first stage of the analysis, not whether the limit is justified in the second stage of the analysis.[75] There are good textual reasons for this conclusion. The general limitation clauses apply to human rights, which are defined to mean the human rights set out in each Act.[76] It takes a lot of squinting to read 'human rights' as meaning only some of the text of the rights set out in each Act (so that internal limitations are not part of the scope of the right).

But the Court of Appeal's clear answer in *Thompson* raises more questions. I will raise three.[77]

First, does the approach in *Thompson* effectively reverse the onus of proof? The person alleging a limit on human rights bears the onus of showing a limit, and the public authority then bears the onus of showing that the limit is justified.[78] If arbitrariness goes to whether there is a limit in the first place, effectively the complainant will be required to show why the impact on them is not proportionate. Yet matters that go to justification may be solely within the knowledge of the public authority. To try to avoid some of the unfairness that comes with this approach, the Court of Appeal left open the possibility that, in some cases, the complainant may be able to infer arbitrariness from the objective circumstances and the absence of any information from the public authority.[79]

71 See, albeit in respect of a different internal limitation, *Magee v Delaney* (2012) 39 VR 50, 81 [157] (Kyrou J) ('*Magee*').
72 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 35 [109]–[110] (Bell J).
73 *Minogue v Thompson* [2021] VSC 56, [86] (Richards J) ('*Minogue*'). See also at [140]–[141].
74 *Thompson v Minogue* [2021] VSCA 358, [44]–[45] (Kyrou, McLeish and Niall JJA). See also at [58], [78], [221].
75 Ibid [78] (Kyrou, McLeish and Niall JJA).
76 ACT s 5, Vic s 3, Qld s 7.
77 Building on previous analysis of the *Thompson v Minogue* decision in the specific context of the right to property in Queensland: see Kent Blore and Nikita Nibbs, 'A Theory of the Right to Property under the *Human Rights Act 2019* (Qld)' (2022) 30 *Australian Property Law Journal* 1, 19–20.
78 *Thompson v Minogue* [2021] VSCA 358, [47]–[48] (Kyrou, McLeish and Niall JJA).
79 Ibid [47] (Kyrou, McLeish and Niall JJA).

Second, does the distinction between limitation and justification break down where there is no onus of proof? Under the 'procedural limb', public authorities are required to give proper consideration to human rights whenever they make a decision.[80] Public authorities would fail to give proper consideration to privacy, for example, if they waited for someone to complain and discharge their onus of showing that the interference was arbitrary. Likewise, members in Parliament who introduce a Bill are required to set out their consideration of human rights in a statement of compatibility.[81] Members are going to have to grapple with arbitrariness themselves. If the distinction between limitation and justification breaks down in these scenarios, does arbitrariness effectively get 'subsumed in the overall justification analysis' anyway?[82]

Third, if 'arbitrary' means 'disproportionate', what work is left for the general limitation clause? Surely an interference with privacy which is found to be disproportionate, and therefore arbitrary, cannot somehow be found to be nonetheless proportionate under the general limitation clause. Conversely, an interference with privacy which is found to be proportionate, and therefore not arbitrary, will never need to be justified under the general limitation clause. The Victorian Court of Appeal was alive to this issue. Kyrou, McLeish and Niall JJA recognised that there is an unavoidable overlap: '… some or all of the facts and matters that inform the justification requirement will have already been considered on the question whether the interference is arbitrary'.[83]

Their Honours appear to have attempted to leave work for the general limitation clause by treating proportionality for the purposes of arbitrariness as slightly different from proportionality for the general limitation clause. Their Honours said:

> the phrase 'unreasonable in the sense of not being proportionate to the legitimate aim sought' does not mean that, in determining whether an interference with privacy is arbitrary, direct and express consideration must be given to the matters set out in s 7(2) of the Charter. In other words, the phrase does not incorporate the proportionality analysis in s 7(2). Rather, the phrase requires a broad and general assessment of whether, in all the circumstances, the interference extends beyond what is reasonably necessary to achieve the statutory or other lawful purpose being pursued by the public authority.[84]

This is a repeat of history. The Constitutional Court of South Africa also adopted a meaning of 'arbitrary' which is less than 'disproportionate' in order to try to retain some work for the general limitation clause to do.[85] The experiment has not been successful. In the South African case law on the rights to property and liberty, the general limitation clause never has

80 ACT s 40B(1)(b), Vic s 38(1), Qld s 58(1)(b).
81 ACT s 37, Vic s 28, Qld s 38.
82 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 35 [109]–[110] (Bell J).
83 *Thompson v Minogue* [2021] VSCA 358, [58] (Kyrou, McLeish and Niall JJA).
84 *Thompson v Minogue* [2021] VSCA 358, [56] (Kyrou, McLeish and Niall JJA). See also at [221].
85 *First National Bank of SA Limited v Commissioner for the South African Revenue Services* [2002] 4 SA 768, [65] (Ackermann J for the court).

any meaningful work to do.[86] As one text notes in respect of the right to property, treating arbitrariness as going to whether the right is limited 'has the effect of making the basis for justifying the infringement of s 25 the very reason why s 25 was infringed in the first place … It seems then that s 36 can have no meaningful application to s 25.'[87] In the most recent case on the right to property, the Constitutional Court noted that 'it is difficult to conceive of a situation where arbitrary law or conduct can be reasonable and justifiable'.[88]

A more fundamental problem with the *Thompson* approach is that structured proportionality may be built into the general limitation clause. The subtests of structured proportionality 'direct attention to different aspects of what is implied in *any rational assessment* of the reasonableness of a restriction'.[89] It is difficult to see how those subtests can be ignored when assessing whether the restriction is arbitrary in the human rights sense. An interference which had no legitimate aim would be capricious. An interference which was not rationally connected to the policy objective would be irrational. An interference which is unnecessary to achieve the policy objective would be unreasonable. Finally, an interference which comes at too high a cost to human rights is disproportionate.[90] The work of arbitrariness cannot be quarantined from the work of the general limitation clause.

The interaction between the general limitation clause and the internal limitation of arbitrariness is a vexed issue. *Thompson* resolves some of the topics for debate, but it also raises new questions.

Does proportionality apply to positive rights?

The German Constitutional Court has long recognised that a human right can be breached not only by going too far in limiting the right (*Übermaßverbot*) but also by doing too little to protect the right (*Untermaßverbot*).[91] Structured proportionality is generally applied in the first scenario, to answer the question of whether a limit on a *negative* right is justified. Many of the human rights protected in the ACT, Victoria and Queensland are negative rights. A negative right represents a *prohibition* on the state or a public authority from doing something. Take the example of a police officer who kills a person in self-defence. That would engage the right *not* to be (arbitrarily) deprived of life. You would then work through the steps of structured proportionality to see that the deprivation of life was justified by self-defence.

But what about *positive* rights and doing too little to protect the right? Positive rights represent a *command* that the state or a public authority take positive action of some kind. The ACT,

86 With respect to the right to liberty, see, for example: *De Vos NO v Minister of Justice and Constitutional Development* [2015] ZACC 21; 2015 (2) SACR 217; 2015 (9) BCLR 1026, [59] (Leeuw AJ for the court); *Lawyers for Human Rights v Minister of Home Affairs* [2017] 5 SA 480, [59]–[63] (Jafta J for the court). With respect to the right to property, see, for example: *First National Bank of SA Limited v Commissioner for the South African Revenue Services* [2002] 4 SA 768, [110] (Ackermann J for the court); *Mkontwana v Nelson Mandela Metropolitan Municipality* [2005] 1 SA 530, [125] (O'Regan J); *National Credit Regulator v Opperman* [2013] 2 SA 1, [79]–[80] (Van der Westhuizen J for the majority); *Chevron SA (Pty) Ltd v Wilson* [2015] ZACC 15; 2015 (10) BCLR 1158, [31]–[34] (Madlanga J for the court).

87 Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta, 6th ed, 2013) 557.

88 *Chevron SA (Pty) Ltd v Wilson* [2015] ZACC 15; 2015 (10) BCLR 1158, [31] (Madlanga J for the court).

89 Lübbe-Wolff (n 31) 16 (emphasis added).

90 See the examples for each of these stages of structured proportionality in Blore and Nibbs (n 77) 31–34.

91 Grimm (n 15) 392.

Victoria and Queensland also protect positive rights. The ACT and Queensland even protect socio-economic rights, such as the right to work,[92] the right to education[93] and the right to health.[94] A more straightforward example is the positive aspect of the right to life in each jurisdiction: 'Every person has the right to life'.[95]

Positive human rights are characterised by 'alternativity', meaning that the state can fulfil its positive obligation in more than one way.[96] Robert Alexy takes the example of the right to life to explain alternativity:

> The prohibition of killing implies, at least *prima facie*, the prohibition of every act of killing, whereas the command to rescue does not imply a command to carry out every possible act of rescuing. It may be possible to save a drowning man by swimming to him, or by throwing him a life raft, or by sending out a boat, but it is not the case that all three acts are simultaneously required. Rather, what is required is that *either* the first act, *or* the second, *or* the third be performed.[97]

If any of those acts are performed, then the positive right to be rescued is not limited. That may be why a majority of the High Court declined to apply proportionality in *Murphy v Electoral Commissioner*.[98] The question in that case was whether the Commonwealth should have ensured 'direct choice' of the people by delaying the closing of the rolls until election day, instead of closing the rolls seven days after the issuing of the writs. Because, arguably, direct choice of the people is ensured by either option, provided one of the options is selected, there is no burden on ss 7 and 24 of the *Constitution*.

The picture is far more complicated where the different options available would protect the positive right to different extents. Let's say Queensland suffers a plague.[99] The right to life requires the state to take positive measures to address 'the prevalence of life-threatening diseases'.[100] The state could fulfil its positive obligation by:

- permanently adopting an elimination strategy, which leads to a negligible loss of life but with catastrophic impacts on the economy;
- adopting measures designed to 'flatten the curve', which leads to some loss of life, but with minimal impact on the economy; or
- allowing rapid spread of the plague so that Queenslanders can develop herd immunity as quickly as possible, leading to a catastrophic loss of life but negligible impacts on the economy.

92 ACT s 27B.
93 ACT s 27A, Qld s 36.
94 Qld s 37.
95 ACT s 9(1), Vic s 9, Qld s 16.
96 Robert Alexy, 'On Constitutional Rights to Protection' (2009) 3 *Legisprudence* 1, 5.
97 Ibid (emphasis in original).
98 *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 52–3 [37]–[39] (French CJ and Bell J), 71–2 [98]–[102] (Gageler J), 94 [202] (Keane J), 122–4 [294]–[305] (Gordon J). Cf at 60–4 [60]–[74] (Kiefel J). This was one hypothesis put forward in Amelia Simpson, 'Section 92 as a Transplant Recipient?: Commentary on Chapter 8' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) 283, 289.
99 For other examples, see the example of abortion in Alexy (n 96) 10–15; and the example of protection against trespass in Blore and Nibbs (n 77) 28–29.
100 UN Human Rights Committee, *General comment No. 36 – Article 6: right to life*, 124th session, UN Doc CCPR/C/GC/36 (3 September 2019) 6 [26].

Obviously, not all options are equal. According to Alexy, for positive rights, structured proportionality needs to be applied in a way that takes account of this alternativity. This can be done at the final balancing stage, by asking whether an alternative way of protecting the right would be more proportionate than the protection that has been selected.[101] In many ways, this mirrors Barak's idea of proportional alternatives.[102] If there is an alternative way to fulfil the positive right which strikes a much *fairer* balance (for example, between life and the economy), the way you have decided to fulfil the positive right may not strike a fair balance. The strategy of letting the plague rip through the community may come at too high a cost in lives lost.

Positive rights throw up further unanswered questions. Again, I will offer three.

First, in applying proportionality to impacts on positive rights, is full structured proportionality called for, or is it really only the final balancing stage that has any meaningful role to play? It might be thought that the sufficiency of the protection is not answered by enquiries about the means–ends relationship (covered by the first three steps of structured proportionality). Indeed, the German Constitutional Court skips over necessity testing altogether for positive rights, and goes straight to fair balance.[103]

Second, does proportionality go to identifying whether a positive right is limited, or in identifying whether a limit on a positive right is justified? Does the distinction between limitation and justification collapse for positive rights? The idea of alternativity is that, provided the state picks one of the alternative ways to fulfil the positive right, the right is not limited. But does this suffer the same drawbacks as 'arbitrariness' in bringing proportionality forward into the limitation stage of the analysis, effectively getting the horse before the cart?

Third, in the ACT and Queensland, where does the duty of progressive realisation for socio-economic rights factor into the analysis? Under the *International Covenant on Economic, Social and Cultural Rights*, the state does not have an obligation to spend limitless amounts of money fulfilling socio-economic rights such as the right to education and the right to health. Instead, under art 2, the state has a duty to 'take steps' according to 'its available resources' towards 'achieving progressively the full realization' of socio-economic rights.[104] In South Africa, the Constitutional Court has factored in the duty of progressive realisation by developing the *Grootboom* test,[105] similar to a strong form of the *Wednesbury* unreasonableness standard.[106] As with arbitrariness, the relationship between the *Grootboom*

101 Barak (n 6) 433–4.
102 Ibid 353.
103 Grimm (n 15) 392–3.
104 On the relationship between justification and the duty of progressive realisation, see Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 *Human Rights Law Review* 557, 570; Fons Coomans, 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' (2005) 65 *Heidelberg Journal of International Law* 167, 191–4
105 *South Africa v Grootboom* [2001] 1 SA 46, 67 [38] (Yacoob J, Chaskalson P, Langa DP, Goldstone, Kriegler, Madala, Mokgoro, Ngcobo, O'Regan, Sachs JJ and Cameron AJ agreeing).
106 Katharine G Young, 'Proportionality, Reasonableness, and Economic and Social Rights' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) 248, 252–5. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

test and the general limitation clause has been a vexed issue.[107] If the state has acted reasonably in failing to provide housing, for example, the right to housing is not engaged. Conversely, if the state has acted unreasonably, it is virtually a foregone conclusion that the right is not only limited but unjustifiably so. The reason is that all of the work of justification has already been done by the *Grootboom* test, leaving nothing for the general limitation clause to mop up.[108]

Intergenerational equity: how does time factor into proportionality?

In March 2021, the Federal Constitutional Court of Germany delivered a groundbreaking ruling in *Neibauer v Germany*.[109] In that case, the complainants successfully challenged the failure of the German Government to take more urgent action on climate change.[110] That involved curly issues about positive rights and the German idea of breaching rights by doing too little (*Untermaßverbot*).[111] But the case also led the Constitutional Court to unpack a temporal dimension to proportionality.

Germany had committed to carbon neutrality by 2050, with an interim goal of reducing greenhouse gas emissions by 55 per cent on 1990 levels by 2030. The complainants said that this allowed overly generous greenhouse gas emissions until 2030, requiring future generations to bear the burden of rapidly reducing emissions thereafter, if Germany is to keep within its remaining carbon budget.

The Constitutional Court agreed. The Court held that the state is required by the rights to life and physical integrity (among other rights) to take action on climate change. There is an upper limit of the greenhouse gas emissions that the state can allow to be emitted consistent with its obligations to protect life. That upper limit is represented by Germany's remaining carbon budget. The longer Germany delays emissions reductions today, the steeper the reductions will need to be in the future, if Germany is to stay within the absolute limit set by the carbon budget.[112]

Equally, preventing greenhouse gas emissions will limit other rights and freedoms. For example, the freedom of movement will be impacted if certain cars are banned in the effort to reduce greenhouse gas emissions.[113] As the Constitutional Court pointed out, '[p]ractically all forms of freedom are potentially affected because virtually all aspects of human life involve the emission of greenhouse gases … and are thus potentially threatened by drastic

107 NW Orago, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes' (2013) 16 *Potchefstroom Electronic Law Journal* 170, 199–206.

108 *Khosa v Minister of Social Development* [2004] 6 SA 505, 540 [83]–[84] (Mokgoro J, Chaskalson CJ, Langa DCJ, Goldstone, Moseneke, O'Regan and Yacoob JJ agreeing), 549 [105]–[107] (Ngcobo J, Madala J agreeing); *Phaahla v Minister of Justice and Correctional Services* [2019] 7 BCLR 795, 812 n 56 (Dlodlo AJ, Mogoeng CJ, Khampepe, Mhlantla, Teron JJ, Basson, Goliath and Petse AJJ agreeing).

109 Bundesverfassungsgericht [Federal Constitutional Court], 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 24 March 2021.

110 Ibid [266].

111 Ibid [152]–[157], [172].

112 Ibid [120], [242]–[246].

113 See ibid [249].

restrictions after 2030.'[114] The Court went so far as to point out that activities as mundane as the wearing of clothes are at stake, given that the production, use and disposal of clothing and footwear currently accounts for 8 per cent of global greenhouse gas emissions.[115]

Thus, the state is required to strike a fair balance between the climate change impacts on the right to life, on the one hand, and the negative impacts on other human rights that arise from taking action on climate change, on the other hand.[116] Not only is the state required to strike a fair balance between those competing rights now, but it must strike a fair balance between those rights in the future. Moreover, the state must ensure an intertemporal proportionality as between proportionality now and proportionality in the future. Again, the image comes to mind of two sets of scales on either side of a set of scales. As the Court held:

> It follows from the principle of proportionality that one generation must not be allowed to consume large portions of the CO_2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom — something the complainants describe as an 'emergency stop'.[117]

Whether the impacts of climate change engage human rights protected in the ACT, Victoria and Queensland is an open question.[118] It is also unclear whether future generations hold human rights under Australian human rights legislation.[119] But a temporal dimension to proportionality may have broader application than climate change litigation. Take, for example, a snap COVID-19 lockdown, which severely curtails human rights for a short period of time in order to avoid less severe human rights impacts but over a much longer period of time. Introducing a temporal dimension to proportionality unpacks our intuitive assessment that a snap lockdown may be the most proportionate option, even though it involves the deepest impacts on human rights in the present moment. As the German Constitutional Court said, 'the impacts on future freedom must be proportionate from the standpoint of today'.[120]

But can the text of the general limitation clauses in the ACT, Victoria and Queensland accommodate this latest German innovation?

114 Ibid [117].
115 Ibid [37].
116 Ibid [197].
117 Ibid [192].
118 See Kent Blore, 'Climate Change and Human Rights under the Australian Charters', *Australian Public Law* (blog post, 3 April 2020) <https://auspublaw.org/2020/04/climate-change-and-human-rights-under-the-australian-charters/>; Rachel Pepper and Harry Hobbs, 'The Environment is all Rights: Human Rights, Constitutional Rights and Environmental Rights' (2020) 44 *Melbourne University Law Review* 634, 673–6; Justine Bell-James and Briana Collins, 'Queensland's *Human Rights Act*: A New Frontier for Australian Climate Change Litigation?' (2020) 43 *University of New South Wales Law Journal* 3.
119 See, for example, ACT s 9(2) ('This section [right to life] applies to a person from the time of birth').
120 Bundesverfassungsgericht [Federal Constitutional Court], 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 24 March 2021, [192].

Conclusion

The various approaches outlined in this article can be combined. For example, incremental burdens and legitimate aims can be combined with proportional alternatives as well as intertemporal proportionality. In that scenario, you would have a set of scales comparing the proportionality of a measure now and in the future. Within each of those proportionality analyses, you would have another set of scales comparing the proportionality of the impugned measure with the proportionality of an alternative measure. And within each of those proportionality analyses, on one side of the scales you would subtract the burden already imposed on the human right by other measures, and on the other side of the scales you would subtract the extent of the legitimate aim already achieved by other existing measures. The proportionality analysis starts to look so complicated that a South African–style 'global' judgment starts to look appealing.

In this article, I hope I have raised many questions and answered none:

- Do the general limitation clauses in the ACT, Victoria and Queensland embody a 'structured' form of proportionality, so that each of the steps of structured proportionality is mandatory and exhaustive?
- For necessity testing, does the hypothetical alternative need to be equally as effective in achieving the policy objective, or is near enough good enough?
- On each side of the scales, is it the 'incremental' limit on human rights and the 'incremental' value of achieving the legitimate aim that we need to focus on?
- How are we to reconcile the internal limitation of 'arbitrariness' with the general limitation clause, given that both are about proportionality?
- Does proportionality apply to positive rights, and, if so, does the proportionality test need to be modified to take account of 'alternativity'?
- Can the general limitation clauses accommodate a temporal dimension to proportionality?

These questions remain largely unexplored. There is a real debate to be had about proportionality under Australian human rights legislation, which is yet to begin.