Proportionality in Australian Public Law[1]
Justice Peter Davis[2]

Introduction

The title is a wide one. What I have explored is the recent history of proportionality as it has found its way into Constitutional and Administrative Law in Australia.

What is proportionality and why is it a potentially difficult subject in administrative law?

In a paper delivered by the Honourable Justice Susan Kiefel in 2012 titled "*Proportionality: A rule of reason"*, her Honour described proportionality in these terms:

> "One meaning of the word 'proportion' is the correct relation that one thing bears to another. When something is in proportion it may be said to have achieved a correct balance. The term is employed in many disciplines, including mathematics, musical theory and philosophy. In law, proportionality is employed as a concept and an ideal; as a test and as a conclusion. Its basis as a legal rule is reason."[3]

Various areas of the law can be identified where proportionality as a concept is obviously applied. This is because the common law has developed so that proportionality is naturally a part of the exercise of administrative or judicial power or a statute has introduced proportionality into the mix.

Sentencing is an obvious area where common law principles are applied proportionally. In *Markarian v The Queen*,[4] the High Court considered how a sentencing judge should approach the calculation of a sentence. Two alternative approaches were advanced. Firstly, was the "two tier approach". That involved setting a preliminary sentence and then adding and subtracting from that starting point to reflect aggravating and mitigating factors. The second approach was the "intuitive synthesis approach" which, in essence, obliges the sentencing judge to look at the entire case and set a sentence taking into account all the relevant circumstances.

In the course of endorsing the instinctive synthesis approach, McHugh J observed this:

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1 Delivered on the 8th day of June 2021 at the Australian Institute of Administrative Law seminar.
2 Judge of the Supreme Court of Queensland, President of the Queensland Industrial Relations Commission.
3 Hon Justice Susan Kiefel AC, Proportionality: A rule of reason (2012) 23 PLR 85.
4 (2005) 228 CLR 357.

> "The principle of proportionality is one of the fundamental principles of sentencing law. It is difficult - maybe impossible - to reconcile that principle with the two-tier approach to sentencing. The principle of proportionality requires the judge to make a judgment concerning the relationship of the penalty to the facts. This is a value judgment, based on experience and instinct, derived after taking into account all the facts and circumstances of the case. The existence of the proportionality principle makes one wonder whether, despite appearances, two-tier sentencers exist. At the end of the process, the subtractions from the objectively determined sentence is proportionate to the accused's offence. What happens if the judge concludes that the result is not proportionate to the offence? It would be almost a miracle if it was. If the judge tinkers with the quantum of each component in the sentence to achieve a result compatible with the concept of proportionality, the two-tier structure is meaningless, if not a charade."

Common law damages claims (although now heavily regulated by statute) naturally involve the assessment of proportionality between the extent of the injury and the level of damages awarded as compensation. There are many other examples.

A statutory example can be found in the criminal law concerning self-defence. The defence used must be proportionate to the assault being defended against. By s 271 of the *Criminal Code* the authorised force used in defence is described as that force "as is reasonably necessary to make effectual defence against the assault".[5]

Fitting proportionality into the construct of well-understood principles of administrative law is quite another matter. That is because of the limitations which the law has traditionally placed on the review of executive power. Basic principles underpinning the doctrine of the separation of powers dictate that the exercise of administrative power is not replaced or supplanted by the later exercise of judicial power on review. Judicial review of administrative action is, subject to statute, aimed at correction of error in the process of the exercise of administrative power, not a review of the merits of the decision, subject of course to *Wednesbury* unreasonableness.

That was made clear in *Attorney-General (NSW) v Quin*[6] where Brennan J, as his Honour then was, observed as follows:

> "The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the

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5 *Criminal Code*, s 271(1).

6 (1990) 170 CLR 1.

> exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.
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> There is one limitation, '*Wednesbury* unreasonableness' (the nomenclature comes from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[7] which may appear to open the gate to judicial review of the merits of a decision or action taken within power. Properly applied, *Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: *Nottinghamshire County Council v Secretary of State for the Environment*.[8] Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action. The limitation is extremely confined."[9]

Since *Quin*, there have been significant developments in the Australian understanding of *Wednesbury* unreasonableness. That occurred in *Minister for Immigration and Citizenship v Li*[10] to which I shall return.

What is seen from the constitutional cases to which I will turn shortly is a resort by at least some of the judges of the High Court to a process of proportionality reasoning which has relatively modern European origins, although general concepts of proportionality, as explained by Kiefel CJ in her paper date back to Plato and Cicero.

The European concept that has taken hold has three limbs:

1. the limitation or restrictions be adapted or suitable to the legislative purpose;

2. the statutory restrictions be reasonably necessary;

3. the restrictions not be excessive.[11]

That approach is more adaptable as a test of validity of a statute, or in other words as a test to examine the exercise of legislative power and whether its limits have been exceeded, than to the exercise of executive power. However, the adoption of that sort of assessment on a review of the exercise of decision-making power would be a leap away from traditional understandings.

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7 [1948] 1 KB 223.
8 [1986] AC 240, at p 249.
9 *Quin* at 36.
10 (2013) 249 CLR 322.
11 Kiefel; Proportionality: A rule of reason (2012) 23 PLR 85 at 88.

When considering the role of proportionality in the assessment of a judicial review of an administrative decision on the basis that it was unreasonable, the authors of Judicial Review of Administrative Action and Government Liability[12] observed this:

> "It used to be unthinkable to maintain that administrative action could be attacked for being too heavy-handed unless, of course, it was so harsh that (in *Wednesbury's* terms) no reasonable decision-maker would agree with it."

No doubt similar sentiments motivated Spiegelman CJ in *Bruce v Cole*[13] to note this:

> "The concept of proportionality is plainly more susceptible of permitting a court to trammel upon the merits of a decision than Wednesbury unreasonableness. This is not the occasion to take such a step in the development of administrative law, if it is to be taken at all."

The Australian Constitution cases

The notion of proportionality as an identifiable concept arose for consideration in the High Court in *McCloy v New South Wales*.[14]

McCloy concerned a constitutional challenge to the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW). That legislation sought to limit and regulate donations to political parties. The basis of the challenge was that the law allegedly impermissibly burdened the plaintiff's implied freedom of communications on governmental and political matters, as explained in *Lange v Australian Broadcasting Corporation*,[15] *Coleman v Power*[16] and *Unions New South Wales v New South Wales*.[17]

All seven justices in *McCloy* held that the implied freedoms were not infringed. It was in the reasoning to that conclusion where those who joined in a joint judgment (French CJ, Kiefel, Bell and Keane JJ) differed from those who delivered separate judgements (Gageler, Nettle and Gordon JJ).

All judges confirmed that the *Lange* test, as explained in *Coleman v Power*, led to the necessity to ask three questions in order to determine the question of the constitutional validity of a law which allegedly burdened the implied constitutional freedom. Those questions were:

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12 Aronson, Groves, Weeks, Law Book Co, Thomson Reuters, 6th Edition, 2017.
13 (1998) 45 NSWLR 163.
14 (2015) 257 CLR 178.
15 (1997) 189 CLR 520.
16 (2004) 220 CLR 1.
17 (2013) 252 CLR 530.

1. Does the law burden the freedom?

2. If so, are the purposes of the law legitimate in being compatible with the maintenance of the constitutionally prescribed system of representative government? and

3. Is the law reasonably appropriate and adapted to advance that legitimate objective?

It was the third question that was held by those who participated in the joint judgment in *McCloy* to resort to proportionality reasoning. Their Honours explained question 3 as follows:

> "3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object?[18] This question involves what is referred to in these reasons as 'proportionality testing' to determine whether the restriction which the provision imposes on the freedom is justified.
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> The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the inquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
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> *suitable* – as having a rational connection to the purpose of the provision;[19]
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> *necessary* – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
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> *adequate in its balance* – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
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> If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be 'no' and the measure will exceed the implied limitation on legislative power."

Importantly for present purposes, their Honours went on to say:

> "[3] As noted, the last of the three questions involves a proportionality analysis. The term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done. Some such criteria have been applied to purposive powers; to constitutional legislative powers authorising the making of laws to serve a specified purpose; to incidental powers, which must serve the purposes of the substantive powers to which they are incidental; and to

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18 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

19 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 558-559 [55]-[56].

> powers exercised for a purpose authorised by the *Constitution* or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication. Analogous criteria have been developed in other jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools which, according to the nature of the case, may be applied in the Australian context." (emphasis added)

It can be seen that while *McCloy* was a constitutional case, those participating in the joint judgment considered the proportionality principles applicable to consideration of the exercise of "purposive powers" which included "administrative acts".

There is no doubt that the application of the *Lange* and *Coleman v Power* test involves consideration of proportionality in the sense of balancing the appropriateness of the law to the advancement of the legitimate objective. The issue was whether the European based concepts, described by Gageler J in McCloy as "standardised proportionality analysis" was an appropriate tool to use in the assessment of the validity of the law.

Gageler J in *McCloy* said this:

> "[98] Together with a majority of the Court, I hold that none of the provisions challenged in this case imposes an impermissible burden on the implied constitutional freedom. Unlike a majority of the Court, however, I do not reach that result through the template of standardised proportionality analysis. I reach that result instead by concluding that the restrictions on political communication imposed by the provisions are no greater than are reasonably necessary to be imposed in pursuit of a compelling statutory object. The compelling statutory object is the object of preventing corruption and undue influence in the government of the State.
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> [99] To explain my analysis, it is appropriate to commence by reiterating the structural reasons identified in *Lange v Australian Broadcasting Corporation*[20] for the implication of the constitutional freedom of political communication, and by relating those structural reasons to the analytical framework established by that case for determining whether or not a law impermissibly burdens the implied constitutional freedom."

The attitude of Nettle J is seen in this passage:

> "[222] For reasons which will later be explained, it should now be accepted that the standard of appropriateness and adaptedness does vary according to the nature and extent of the burden. A law which imposes a discriminatory burden will require a strong justification. And the availability of alternative means is a relevant but not determinative consideration. For present purposes, however, it is unnecessary to delve into strict proportionality."

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[20] (1997) 189 CLR 520.

And Gordon J:

> "[338] Thus, when asking what is 'the extent of the burden effected by [Div 2A] on the freedom'[21] or to what extent does Div 2A affect or burden the freedom,[22] it is neither right nor relevant to ask whether the benefits which will follow from application of the impugned law are 'larger than' or 'outweigh' the diminution in political communication (a test of proportionality strictly so called and sometimes seen as part of proportionality analysis).[23]

None of Gageler J, Nettle J or Gordon J resorted to proportionality reasoning in reaching the same conclusion as reached in the joint judgment.[24]

The third element of the *Lange* test necessarily involves a weighing of the restrictions imposed by the law sought to be impugned and the right being compromised. To that extent, the exercise naturally and necessarily involves considerations of proportionality. The difference between the three individual judgments and the joint judgment is that it is only in the latter where there was resort to what was described as "strict proportionality" or, to use Gageler J's term, "standardised proportionality testing" which harks back to the recognition of proportionality as an approach to reasoning. The other judges simply approached the issue at hand by applying the principles which had been settled in *Lange* and *Coleman v Power*.

The first time the High Court considered *McCloy* was in *Murphy v Electoral Commissioner*.[25] That was another constitutional case. It was argued that provisions in the *Commonwealth Electoral Act* 1918 (Cth), which regulated how electoral rolls would be settled and prepared, were constitutionally invalid as being incompatible with the system of representative government prescribed by the Constitution. That raised issues about whether the restrictions were "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government".[26] French CJ, Bell J and Kiefel J all expressly relied on proportionality reasoning. French CJ and Bell J[27] observed:

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21 See *Dietrich v The Queen* (1992) 177 CLR 292 at 319-321; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 199 [141]. See also, eg, the incremental development of the law in negligence: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481; *Hill v Van Erp* (1997) 188 CLR 159 at 178-179; *Cattanach v Melchior* (2003) 215 CLR 1 at 24 [39].

22 *Unions NSW* (2013) 252 CLR 530 at 554 [36], 555 [40]

23 cf *Bedford v Canada (Attorney-General)* [2013] 3 SCR 1101, especially at 1150-1152 [120]-[123].

24 Gageler J at [98], Nettle J at [222] and Gordon J at [338].

25 (2016) 261 CLR 28.

26 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [83], cited in *Murphy* at [31].

27 At [37].

"[37] A structured approach to the application of the general proportionality criterion to a law said to burden the implied freedom of political communication was recently set out in the joint judgment in *McCloy*. It was invoked by the plaintiffs in support of their case. That approach, foreshadowed in the judgment of Kiefel J in *Rowe*,[28] involved an unpacking of the question whether a law found to burden the implied freedom, and to do so for a legitimate purpose, was 'reasonably appropriate and adapted to advance that legitimate object'.[29] The analysis used to answer the proportionality question was undertaken by reference to three considerations drawn from the approach of European and, in particular, German courts:[30]

1. Suitability – whether the law had a rational connection to the purpose of the provision – a criterion which reflects that adopted by Gleeson CJ in *Roach*.

2. Necessity – whether there was an obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom.

3. Adequacy in its balance – whether the extent of the restriction imposed by the impugned law was outweighed by the importance of the purpose it served.

The adoption of that approach in *McCloy* did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law. It is a mode of analysis applicable to some cases involving the general proportionality criterion, but not necessarily all. For example, as Kiefel J observed in *Rowe*:[31]

> 'A test of reasonable necessity, by reference to alternative measures, may not always be available or appropriate having regard to the nature and effect of the legislative measures in question.'

In *Davis v The Commonwealth*,[32] *Nationwide News Pty Ltd v Wills*[33] and *Australian Capital Television Pty Ltd v The Commonwealth*,[34] as her Honour observed, want of proportionality was assessed by reference to a range of factors."

Neither Keane J nor Nettle J resorted to the principles.[35]

Gageler J observed:

"[98] The problem for the plaintiffs was at the next level of the analysis. The problem was exacerbated by the plaintiffs' treatment of the question of whether

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28 (2010) 243 CLR 1 at 140-142 [460]-[466].
29 (2015) 257 CLR 178 at 193-195 [2].
30 (2010) 243 CLR 1 at 140 [460] per Kiefel J.
31 (2010) 243 CLR 1 at 136 [445].
32 (1988) 166 CLR 79.
33 (1992) 177 CLR 1 at 31.
34 (1992) 177 CLR 106.
35 French CJ and Bell J at [31], [34], [36], [37], [38]; Kiefel J at [62], [63], [64], [65].

> there was a substantial justification for the exclusion as one which needed to be answered through the application of standardised 'proportionality testing'."

And later:

> "[101] My reservations about the appropriateness of importing such a structured and prescriptive, and ultimately open-ended, form of proportionality testing into our constitutional setting have been expressed elsewhere.[36] The plaintiffs' attempt to shoehorn their argument within it highlights the inappropriateness of attempting to apply such a form of proportionality testing here. What is at best an ill-fitted analytical tool has become the master, and has taken on a life of its own."

Gordon J said:

> "[294] The questions in *Lange* were directed to whether a law will be invalid for infringing the implied freedom of political communication. More recently, in *McCloy v New South Wales*,[37] a majority of the Court altered the traditional formulation of that test and adopted a framework of 'structured' proportionality.
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> [295] Here, the plaintiffs proceeded on the basis that, because of the 'affinity' between the test outlined in *Roach* and the second question in *Lange*, the validity of the impugned provisions fell to be determined in accordance with the 'structured' proportionality approach of the joint judgment in *McCloy*. The Commonwealth, while accepting that some form of proportionality testing was appropriate, rejected the suggestion that it should take the form adopted by the joint judgment in *McCloy*. The Attorney-General for South Australia, who intervened to make submissions only on the issue of the relevant test, supported the Commonwealth's approach.
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> [296] The concept of proportionality is applied in a variety of areas in Australian jurisprudence.[38] It should not be assumed that, because a particular test for proportionality has been adopted in one particular constitutional context, it can be uncritically transferred into another context, constitutional or otherwise,[39] even within the same jurisdiction.
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> [297] The 'structured' proportionality approach adopted by the joint judgment in *McCloy* is inappropriate in the constitutional context in this case. That can be demonstrated by considering the 'necessity' stage of the *McCloy* test."

Brown v Tasmania[40] was another case concerning the alleged impermissible restriction upon the implied freedom of political expression. This case involved consideration of the provisions of the *Workplaces (Protection from Protestors) Act* 2014 (Tas). Largely, that case concerned

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36 *McCloy v New South Wales* (2015) 257 CLR 178 at 235-239 [141]-[152].

37 (2015) 257 CLR 178.

38 See *McCloy* (2015) 257 CLR 178 at 195 [3].

39 See *McCloy* (2015) 257 CLR 178 at 215 [72]; see also *Mulholland* (2004) 220 CLR 181 at 200 [39]; *Roach* (2007) 233 CLR 162 at 178-179 [17]; *McCloy* (2015) 257 CLR 178 at 234 [139], 288-289 [339].

40 (2017) 261 CLR 328.

the application of the *Lange* and *Coleman v Power* principles by reference to what had been said in *McCloy*.

Of some interest to the present topic was what Gageler J observed in relation to proportionality reasoning:

> "[158] Three-staged proportionality testing was not sought to be characterised in *McCloy* as anything more than a tool of analysis,[41] not to be confused with the constitutional principle it served.[42] The plurality did not suggest that its adoption is compelled by the reasoning which supports the implication of the freedom of political communication as authoritatively expounded in *Lange*.[43] The plurality also disavowed any suggestion that "it is the only criterion by which legislation that restricts a freedom can be tested".[44]
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> [159] The point is therefore not one of reopening and overruling *McCloy*: nobody has suggested that *McCloy* was wrongly decided; *McCloy* does not elevate three-staged proportionality testing to the level of constitutional principle; and *McCloy* does not endow it with precedential status. The point is one of emphasising that the tool is, at best, a tool. For my own part, I have never considered it to be a particularly useful tool.
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> [160] Though it originated within a civil law tradition, three-staged testing for proportionality ("Verhältnismäigkeit") has been found by some courts applying the methodology of the common law to be useful when undertaking constitutionally or statutorily mandated rights adjudication. The structure it imposes is not tailored to the constitutional freedom of political communication, which is not concerned with rights, and which exists solely as the result of a structural implication concerned not with attempting to improve on outcomes of the political process but with maintaining the integrity of the system which produces those outcomes. The first stage —"suitability" ("Geeignetheit") — can be quite perfunctory if confined to an inquiry into "rationality". The second — "necessity" ("Erforderlichkeit") — is too prescriptive, and can be quite mechanical if confined to an inquiry into "less restrictive means". The third stage — "adequacy of balance" ("Zumutbarkeit") — even if the description of it as involving a court making a "value judgment"[45] conveys no more than that the judgment the court is required to make can turn on difficult questions of fact and degree,[46] is too open-ended, providing no guidance as to how the incommensurables to be balanced are to be weighted or as to how the adequacy of their balance is to be gauged."[47]

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41 At [68], [73], [77], [78]. See also at [144], quoting *Bank Mellat v HM Treasury (No 2)* [2014] AC 700; [2013] 4 All ER 495; [2013] UKSC 38 at [74].

42 *McCloy* at [68].

43 At [70]–[72].

44 *McCloy* at [74].

45 *McCloy* at [2], [74]–[75].

46 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270; 31 ACSR 99; [1999] HCA 27 (*Re Wakim*) at [149].

47 See Schauer, "Proportionality and the Question of Weight", in *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Huscroft, Miller and Webber (Eds), 2014, pp 173, 177–8, 180.

Falzon v Minister for Immigration and Border Protection (2018) 262 CLR 333 concerned a different constitutional challenge. The complaint there was that, by reference to the principles of proportionality as explained in *McCloy*, a constitutionally guaranteed freedom from executive detention had arisen. That was rejected.[48]

McCloy was considered again in *Burns v Corbett*,[49] but is not relevant to the current question.

Club v Edwards; Preston v Avery,[50] was yet another case involving the implied freedom of political communication. Again, Kiefel CJ, Bell and Keane JJ considered the case by reference to proportionality testing. Gageler J, while agreeing with the result reached in the joint judgment, continued to express resistance to three tiered proportionality reasoning, at least in a constitutional setting. His Honour said:

> "[158] The three stages of the *Lange-Coleman-McCloy-Brown* analysis are anchored in our constitutional structure. They are part of our constitutional doctrine. Their application is mandated by precedent. Structured proportionality has not been suggested to be more than an intellectual tool.[51]
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> [159] That there continue to be differences of opinion about the propriety and utility of importing the three stages of the structured proportionality analysis is hardly surprising. The Australian constitutional tradition derives from that of the common law. Lawyers brought up in the tradition of the common law are comfortable with the application of precedent. Lawyers brought up in that tradition are less than comfortable with being constrained to adopt a standardised pattern of thought and expression in determining whether a given measure in a given context can be justified as reasonable or appropriate or adapted to an end. We value predictability of outcomes more than we value adherence to analytic forms. We have learned through long and sometimes bitter experience that '[l]inguistic refinement of concept' can 'result in fineness of distinction which makes it ever more difficult to predict a course of judicial decision' whereas 'an overtly imprecise concept can yield a degree of certainty in application, provided the reasons for choice are also made as overt as we can'.[52]

Nettle J accepted the utility of proportionality testing with some qualifications.[53] Gordon J said as follows:

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48 At [25] and [30].

49 (2018) 265 CLR 304.

50 (2019) 267 CLR 171.

51 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 52 [37], 60-61 [62].

52 Jacobs, "The Successor Books to 'The Province and Function of Law' – Lawyers' Reasonings: Some Extra-judicial Reflections" (1967) 5 *Sydney Law Review* 425 at 428, quoted in Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015), p 674.

53 At [266].

> "[390] Structured proportionality testing[54] is a means of expressing a chain of reasoning undertaken to arrive at a conclusion about the validity of a provision said to be beyond power because it burdens the implied freedom of political communication. It is a means of setting out steps to a conclusion – a tool of analysis.[55] It is not a constitutional doctrine[56] or a method of construing the Constitution. The contention that, in the Australian context, structured proportionality – even if not deployed in a rigid or sequenced way – may provide a better account of judicial reasoning and thereby promote more consistency and clarity in judgment[57] is to be approached with caution."

Edelman J observed as follows:

> "[208] Clarity about, and reconciliation of, the reasoning and outcome in *Brown v Tasmania* and in the Preston appeal is furthered by the application of a three-stage structured proportionality test. Structured proportionality testing provides an analytical, staged structure by which judicial reasoning can be made transparent. The extent of its value will depend upon the content of each stage. However, despite the presence of proportionality testing in many countries, there is no fixed approach within each stage. In Australia, a restrained approach to each stage is required because the freedom of political communication is a limited implication from the *Constitution* that applies only where it is necessary to ensure the existence and effective operation of the scheme of representative and responsible government protected by the terms of the *Constitution*. The approach at each stage must also reflect the terms and structure of the *Constitution* and the operation of the system of government that it instantiates. Those terms and that structure also contain a divide between legislative power and judicial power, which, whilst not clearly delineated, is now deeply embedded.[58]

Spence v Queensland[59] concerned the validity and operation of various Commonwealth and Queensland laws where the State laws were said to be invalid pursuant to s 109 of the Constitution. Kiefel CJ, Bell, Gageler and Keane JJ considered proportionality[60] whereas Edelman J thought it was unnecessary to reignite the debate.[61] Other constitutional cases have considered *McCloy* but needn't be considered here.[62]

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54 See *McCloy* (2015) 257 CLR 178 at 194-196 [2]-[4], 213-220 [69]-[92]; *Brown* (2017) 261 CLR 328 at 363-364 [104], 368-370 [123]-[131].

55 *McCloy* (2015) 257 CLR 178 at 213 [68], 215-216 [74]; *Brown* (2017) 261 CLR 328 at 369 [125], 370 [131], 376 [158]-[159], 417 [279]-[280], 476-477 [473].

56 *McCloy* (2015) 257 CLR 178 at 213 [68]; *Brown* (2017) 261 CLR 328 at 476-477 [473].

57 See Jackson, "Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality" (2017) 130 *Harvard Law Review* 2348 at 2375.

58 See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 272.

59 (2019) 367 ALR 587.

60 At [63].

61 At [350].

62 *Comcare v Banerji* (2019) 267 CLR 373, *Victoria International Container Terminal Ltd v Lunt* (2021) 388 ALR 376, *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1, *Gerner v Victoria* (2020) 385 ALR 394 and *Palmer v Western Australia* (2021) 388 ALR 180.

The Administrative Law decisions

Not since *McCloy* has there been consideration of proportionality in an administrative law setting by the High Court. The authors of the joint judgment in McCloy mentioned "administrative acts" in the same breath as proportionality. Proportionality (at least as a general concept) had been raised earlier as an issue in administrative cases such as *Plaintiff S156-2013 v Minister for Immigration and Border Protection*.[63]

Minister for Immigration and Citizenship v Li,[64] decided before McCloy, is a landmark decision on the application of the *Wednesbury* principle. As previously explained, from the point of view of administrative law, the impact of proportionality is likely going to be felt most when considering an allegation of an unreasonable exercise of administrative power.

Unreasonableness as a ground for judicial review is now statutorily provided.[65] However, as explained in *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission*,[66] it was always a common law basis of judicial intervention.[67]

Li was an appeal arising from a decision of the Migration Review Tribunal not to grant an adjournment to enable the applicant to muster some materials. The applicant was ultimately successful in the High Court on *Wednesbury* grounds.

French CJ expressed the *Wednesbury* ground in terms, at least in part, upon proportionality reasoning. His Honour said:

> "[30] The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker. Gleeson CJ and McHugh J made the point in *Eshetu* that the characterisation of somebody's reasoning as illogical or unreasonable, as an emphatic way of expressing disagreement with it, "may have no particular legal consequence".[68] As Professor Galligan wrote:[69]

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63 (2014) 254 CLR 28.
64 (2013) 249 CLR 332.
65 In Queensland, *Judicial Review Act* 1991, ss 20(2)(e) and 23(g).
66 (2007 233 CLR 229.
67 At [80] considering *House v The King* (1936) 55 CLR 499 at 505 and see *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.
68 (1999) 197 CLR 611 at 626 [40].
69 Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986), p 140.

> 'The general point is that the canons of rational action constitute constraints on discretionary decisions, but they are in the nature of threshold constraints above which there remains room for official judgment and choice both as to substantive and procedural matters. In other words, within the bounds of such constraints, different modes of decision-making may be employed.'

A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable.[70] It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts.[71] Be that as it may, a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut,[72] 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. That approach is an application of the principles discussed above and within the limitations they would impose on curial review of administrative discretions."

French CJ's reference to a decision being "characterised as irrational" was a reference back to Lord Greene MR's decision in *Wednesbury,*[73] namely that the decision ought to be set aside if it is so unreasonable that no reasonable person could have arrived at it.

Decisions of the High Court up to *Li*, generally show a restrictive view of what was unreasonable for the purposes of administrative review.[74]

Of some significance in *Li* was the statement of Hayne, Kiefel and Bell JJ in a joint judgment in these terms:

> "[68] Lord Greene MR's oft-quoted formulation of unreasonableness in *Wednesbury*[75] has been criticised for circularity and vagueness', as have subsequent attempts to clarify it.[76] However, as has been noted, *Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited

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70 Airo-Farulla, "Reasonableness, rationality and proportionality", in Groves and Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 212, at pp 214-215.

71 For an analogous application of reasonable proportionality as a criterion for the validity of delegated legislation see *Attorney-General (SA) v Adelaide Corporation* (2013) 249 CLR 1.

72 Airo-Farulla, "Reasonableness, rationality and proportionality", in Groves and Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 212, at p 215.

73 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233.

74 See Gageler J at [113].

75 [1948] 1 KB 223 at 230.

76 See *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat and Live-Stock Corporation* (1990) 96 ALR 153 at 166 per Gummow J, referring to Allars, *Introduction to Australian Administrative Law* (1990), p 187 [5.52].

> unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified. This is recognised by the principles governing the review of a judicial discretion, which, it may be observed, were settled in Australia by *House v The King*,[77] before *Wednesbury* was decided. And the same principles evidently informed what was said by Dixon J about review of an administrative decision in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*,[78] which was decided less than two years after *Wednesbury*, at a time when it was the practice of the High Court to follow decisions of the Court of Appeal in England which appeared to have settled the law in a particular area."[79]

At [74]:

> "[74] In the present case, regard might be had to the scope and purpose of the power to adjourn in s 363(1)(b), as connected to the purpose of s 360(1). With that in mind, consideration could be given to whether the Tribunal gave excessive weight – more than was reasonably necessary – to the fact that Ms Li had had an opportunity to present her case. So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached. However, the submissions in this case do not draw upon such an analysis"

What appears to be a general widening of the *Wednesbury* test has been picked up in the Federal Court and discussed in the context of *McCloy*.

Minister for Immigration and Border Protection v Stretton[80] was, as is obvious, a migration case, and the ground of review was alleged unreasonableness.

In following *Li*, Allsop CJ observed this:

> "[2] The proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another. Both concepts concern the lawful exercise of *power*. For that reason alone, any attempt to be comprehensive or exhaustive in defining when a decision will be sufficiently defective as to be legally unreasonable and display jurisdictional error is likely to be productive of complexity and confusion. One aspect of any such attempt can be seen in the over-categorisation of more general concepts and over-emphasis on the particular language of judicial expression of principle. Thus, it is unhelpful to approach the task by seeking to draw categorised differences between words and phrases such as arbitrary, capricious, illogical, irrational, unjust, and lacking evident or

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77 (1936) 55 CLR 499.
78 (1949) 78 CLR 353 at 360.
79 *Wright v Wright* (1948) 77 CLR 191 at 210; *Commissioner of Stamp Duties (NSW) v Pearse* (1953) 89 CLR 51 at 63-64; [1954] AC 91 at 112.
80 (2016) 237 FCR 1.

> intelligent justification, as if each contained a definable body of meaning separate from the other."

After referring to various authorities, his Honour then said this:

> "[10] This concept of legal unreasonableness is not amenable to minute and rigidly-defined categorisation or a precise textual formulary. For instance, in argument, the submission was put that [76] of *Li* in the judgment of Hayne, Kiefel and Bell JJ contained two (different) 'tests': (1) if upon the facts the result is unreasonable or plainly unjust and (2) if the decision lacks an evident and intelligible justification. The submission reflected the dangers of overly emphasising the words of judicial decisions concerning the nature of abuse of power, and of unnecessary and inappropriate categorisation. The plurality's discussion of unreasonableness at [63]-[76] in *Li* should be read as a whole — as a discussion of the sources and lineage of the concept: [64]-[65], of the limits of the concept of reasonableness given the supervisory role of the courts: [66], of the fundamental necessity to look to the scope and purpose of the statute conferring the power to find its limits: [67], of the various ways the concept has been *described*: [68]-[71], of the relationship between unreasonableness derived from specific error and unreasonableness from illogical or irrational reasoning: [72], of the place of proportionality or disproportion in the evaluation: [73]-[74] (as to which see also French CJ at [30] and see also *McCloy v New South Wales* (2015) 89 ALJR 857; 325 ALR 15 at [3] (French CJ, Kiefel, Bell and Keane JJ)), of the guidance capable of being obtained from recognising the close analogy between judicial review of administrative action and appellate review of judicial discretion: [75]-[76]."

Allsop CJ has regarded *Li* as a fundamental step in the development of the jurisprudence of unreasonableness as a ground of review and importantly for present purposes regarding proportionality reasoning as appropriate and useful in the assessment.

Griffiths J in the same case also endorsed proportionality reasoning in the concept of *Wednesbury* unreasonableness. His Honour said:

> "[57] The concept of 'unreasonableness' can accommodate individual heads of judicial review, including a 'proportionality analysis by reference to the scope of the power' (at [73]). Thus, although the argument was not presented in this way in *Li* itself, the plurality stated that, if the Migration Review Tribunal gave 'excessive weight' to the question whether the visa applicant had had an opportunity to present her case, 'an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached' (at [74]). It may be interpolated at this point that, in the recent decision in McCloy v New South Wales (2015) 89 ALJR 857; 325 ALR 15 at [3], French CJ, Kiefel, Bell and Keane JJ described the term "proportionality" in Australian law as describing a class of criteria:

> … to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done. (Emphasis added.)

This may indicate that the concept of proportionality is an aspect of judicial review of administrative action.

> By analogy with the approach in House v The King [1936] HCA 40; (1936) 55 CLR 499 (House) (i.e. that an appellate court should not interfere with the exercise of a discretionary power by an inferior court merely because the appellate court would have taken a different course), it must be evident in a judicial review of the exercise of a statutory power by a tribunal that there has been some error in exercising the discretion (at [75]). The plurality's statement at [76] is also relevant and is set out in [18] above."

Various Federal Court decisions since *Stretton*[81] all contain caveats against the recognition of proportionality as a separate and distinct ground upon which jurisdictional error could be found.

As can be seen from *McCloy* itself, proportionality is not an independent concept of the constitutional law. Indeed, it doesn't appear as an established set of principles. It exists as a tool to use in some circumstances to test the application of established constitutional principles and tests.

Proportionality doesn't exist as a separate ground of judicial review, nor does it exist as a separate ground upon which jurisdictional error might be found, if there is relevantly here a difference in those two concepts. However, just like the application of constitutional principles, proportionality seems to be gaining some foothold as a tool for use in assessing the lawfulness of administrative action.

However, no case has been decided where *Wednesbury* unreasonableness, as a ground has been substituted for a three tier proportionality test; the type of approach that Gageler J described as "standardised proportionality analysis".

Unreasonableness as a ground of administrative review will no doubt continue to be considered in terms of the width of the power that has been bestowed by the statute and whether the

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81 *Lobban v Minister for Justice* [2015] FCA 1361, *Renzullo v Assistant Minister for Immigration and Border Protection* [2016] FCA 412 and *DJS16 v Minister for Immigration and Border Protection* [2019] FCA 254 all reviewed and considered in *DBP16 v Minister for Home Affairs* [2020] FCA 781, *ANZ15 v Minister for Immigration and Border Protection* [2016] FCA 1195.

decision under review is such that it is one beyond the power. That excess of power is identified by unreasonableness.[82]

The Federal Court cases were recently reviewed by Justice Banks-Smith in *DPB16 v Minister for Home Affairs*[83] which was a case concerning a Sri Lankan national who unsuccessfully applied for a protection visa. One of the grounds of review was unreasonableness.

Her Honour referred to *Stretton*[84] and then observed:

> "[93] However, care must be taken in assuming that the concept of proportionality may be applied outside the recognised contexts of subordinate and delegated legislation and constitutional review, and outside the context of legal unreasonableness. In *Lobban v Minister for Justice* [2015] FCA 1361, McKerracher J said the following:
>
> > '[96] While disproportionality may be a factor to take into account in considering a legal unreasonableness submission, it does not, under Australian law as it presently stands, taken in isolation, offer a stand-alone basis for concluding there has been jurisdictional error in the exercise of the decision. (Nothing said in *McCloy v New South Wales* [2015] HCA 34 (delivered since argument in this application) concerning proportionality as a tool in construing legislative power, rather than administrative action, affects the position.)
> >
> > [97] The fourth ground is, in truth, only an element of the third ground. It would be necessary, as the Chief Justice has said in *Li* (at [30]), to conclude that the disproportionate exercise of the administrative discretion was in itself irrational or unreasonable as it exceeds, on any view, what is necessary for the purpose it serves. The Minister's decision to surrender cannot be so characterised. It is but one final step in the administrative process, which is governed by other legislative safeguards.'
>
> [94] Those reasons were published prior to the delivery of *Stretton*, but later in *Renzullo v Assistant Minister for Immigration and Border Protection* [2016] FCA 412, McKerracher J said the following:
>
> > '[40] Mr Renzullo also relies on [*McCloy*] (at [3]) in relation to the argument that the Decision was disproportionate, as a case in which the role of 'proportionality' in determining whether an administrative act is within power was recently affirmed. In my view, *McCloy* is not particularly helpful in this instance because *McCloy* did not involve the judicial review of ministerial administrative action. Rather, *McCloy* concerned the examination of State legislation in which issues of constitutionality arose.'

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82 *Minister for Immigration and Citizenship v SZIAI* (2009 83 ALJR 1123.

83 [2020] FCA 781.

84 Paragraphs [91] and [92].

> [95] In *AMZ15 v Minister for Immigration and Border Protection* [2016] FCA 1195 Katzmann J rejected an argument based on the primary judge's 'failure to undertake a proportionality analysis by reference to the scope of power', an argument said to be based on *Li*. The Tribunal in that case had rejected evidence on credibility grounds. Katzmann J considered there were several difficulties with the appellant's argument. For example, in contrast to *Li*, the appellant's case was not a case about the exercise of discretion. Her Honour concluded:
>
> > '[77] It will be a rare case indeed in which a disproportionate response will lead to a finding of jurisdictional error. As *Stretton* well illustrates, even where a decision under review is a discretionary one, there are real dangers in applying a proportionality analysis to an administrative decision without sliding into merits review.'
>
> [96] Subsequent to *Stretton*, Griffiths J also commented on the need for judicial restraint in assessing proportionality as an aspect of unreasonableness: *Malek Fahd Islamic School Limited v Minister for Education and Training (No 2)* [2017] FCA 1377 at [68].
>
> [97] Against the backdrop of those cases and some uncertainty as to the role of proportionality in judicial review, the context in which the appellant seeks to call in aid proportionality must be recalled. This case does not concern constitutional or legislative grants of power or delegated legislation. This is not to ignore the fact that reference has been made in the authorities to proportionality in the context of judicial review and legal unreasonableness. However, that is not the context of this case. This case is about the decision-maker's credibility assessment."

The latest case from the Full Federal Court which mentions proportionality in the context of *Wednesbury* unreasonableness is *Ogawa v Carter of the Department of Home Affairs (as the Second Delegate of the Finance Minister)* that was decided in February 2021.[85] There, an administrative decision had been made under the provisions of the *Public Government, Performance and Accountability Act* 2013 (Cth) concerning the repayment of a debt owed by Dr Ogawa to the Commonwealth. She challenged the decision and one of the grounds of challenge was *Wednesbury* unreasonableness.

In a joint judgment, Logan, Katzmann and Jackson JJ referred to various statements by Mason J (as his Honour then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[86] to the effect that it was generally for the decision-maker to determine what was relevant and not to the making of the decision and then turned to the question of *Wednesbury* unreasonableness. In that context, their Honours then said this:

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85 [2021] FCAFC 16.

86 (1986) 162 CLR 24.

> "The observations made by Mason J in *Peko-Wallsend*, at 41, to which we have just referred have never been disapproved by the High Court. His Honour elaborated in retirement on his understanding of the unreasonableness jurisdictional error ground in an article, *The Scope of Judicial Review* (2001) 31 AIAL Forum 21 in which he expressed the opinion that proportionality was a concept which "should inform our understanding of *Wednesbury* unreasonableness". The reference to *"Wednesbury"* was a reference to observations as to the content of this jurisdictional error ground made by Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury Corporation* [1984] 1 KB 223 (*Wednesbury*). In *Wednesbury*, at 234, Lord Greene had allowed that an administrative decision might be set aside as unreasonable if an administrative decision-maker had "nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it".[87]

The court then went on to consider *Li,* with no mention of *McCloy* and no mention of strict three-tiered proportionality testing.

Statutory proportionality

I referred earlier to the fact that many statutes import general notions of proportionality. However, there seems little doubt that the *Human Rights Act* 2019 has incorporated features of the three tiered European proportionality approach.

Section 58 of the *Human Rights Act* makes it unlawful for a public entity to "act or make a decision in a way that is not compatible with human rights". Section 8 provides that, relevantly here, "a decision is compatible with human rights if it does not limit the human right" or, critically, "limits a human right only to the extent that it is reasonable and demonstrably justifiable in accordance with section 13".

Section 13 provides:

> "**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;

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87 *Ogawa v Carter (Delegate of Finance Minister)* [2021] FCAFC 16 at [46].

(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)."

Section 13(2)(a) to (g) show more than a passing resemblance to three tiered proportionality reasoning.

In many cases, the s 13 test (or its equivalent in other states) has been described as a proportionality test. The section's resemblance to European styled proportionality reasoning was expressly recognised by Justice Garde sitting in the Victorian Supreme Court in *Certain Children (by their Litigation Guardian, Sister Marie Brigid Arthur) v Minister for Families and Children & Ors*.[88]

That case concerned the impact of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) upon a decision made to establish a youth detention centre in part of an adult prison.

The case is an important one concerning the Victorian human rights legislation which is in much the same terms as the later Queensland Act.

When considering s 7(2) of the Victorian Charter, which is very similar to our s 13(2), his Honour observed:

"207. Section 7(2) provides:

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 –

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88 (2016) 51 VR 453.

(a) the nature of the right;

(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; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

208. The factors in s 7(2)(a) to (e) broadly correspond to the proportionality test identified in *R v Oakes*[89] by the Supreme Court of Canada.[90] In that case, the Court said:

> There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'."[91]

R v Oakes[92] is a decision of the Supreme Court of Canada concerning the *Canadian Narcotic Control Act*. That Act contained a provision which reversed the onus of proof against a person charged with trafficking a dangerous drug once it was proved that he or she was in possession of the dangerous drug. The section read as follows:

> "If the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking."

And later:

> "If the accused establishes that he was not in possession of the narcotic for the purpose of trafficking he shall be acquitted of the offences charged."

And later:

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89 [1986] 1 SCR 103.

90 Defendants' submissions [136] citing *Re Application under the Major Crimes (Investigative Powers) Act* 2004 (2009) 24 VR 415, [148]; *PJB v Melbourne Health* (2011) 39 VR 373, [304]–[317].

91 *R v Oakes* [1986] 1 SCR 103, [43] (citations omitted).

92 (1986) 1 SCR 103.

> "If the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking he shall be convicted of the offence as charged and sentenced accordingly."

Canada has a constitutionally enshrined Charter of Rights and Freedoms which are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". That gives rise to proportionality reasoning which was described in the passage considered by Justice Garde in the *Certain Children's* case. Ultimately, the Supreme Court of Canada struck down the provisions.

Certain Children v Minister for Families and Children is an important decision for various reasons and has been considered on numerous occasions. His Honour's comments about proportionality have been adopted by the Supreme Court of the Australian Capital Territory in *Islam v Director-General, Justice and Community Safety Directorate*.[93]

Whether the words of a particular statute do or do not import notions of European style proportionality may largely be of only academic interest as ultimately the meaning of the provision must be determined upon application of the usual principles of construction.[94]

This was raised in a Queensland case, *State of Queensland v Deadman; Thompson v State of Queensland*.[95] There, the Court of Appeal considered provisions of the *Criminal Proceeds Confiscation Act* 2002. The Act operated so that upon conviction of an offender for certain drug offences against the *Drugs Misuse Act* 1986, the sentencing court had to issue a serious drug offence certificate which had the effect of forfeiting all of the offender's property to the Crown unless "… the court is satisfied that it is not in the public interest to issue the certificate …". The point on the appeal was as to how the public interest test was to be construed and applied. No doubt the assessment of the public interest involves at least general considerations of proportionality. However, a submission was made that proportionality reasoning could be looked at in determining the scope of the discretion, or in other words could be used in the exercise of construing the relevant sections. That submission was dismissed, with Philippides JA, who wrote the judgment of the court, stating:

> "Proportionality is a concept used in administrative law and has relevance in determining the constitutional validity of legislative enactments. It is not of

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93 [2021] ACTSC 33 at [42]-[45].
94 *Moncilovic v The Queen* (2011) 245 CLR 1 at [26] and [34].
95 (2016) 261 A Crim R 128.

> particular assistance in relation to the question of statutory interpretation to be determined in this case."

The authority given by her Honour in support of that proposition was *McCloy*.

Conclusions

General notions of proportionality are well-entrenched in many areas of the law including administrative law. The last limb of the *House v The King* test introduces questions of "reasonableness" of a decision. The assessment of whether the exercise of a particular power based on a particular understanding of the facts constitutes a reasonable exercise of power, naturally gives rise to considerations of proportionality.

The present debate though is in relation to the impact of the three tier proportionality test which has its origins in European law. Of some interest perhaps is the fact that in *McCloy* itself the court was unanimous in its result. The application of three tiered proportionality applied by some of the judges gave exactly the same result as the application of the *Lange* principles without applying the rigour of standardised proportionality. That in itself indicates that proportionality reasoning is probably inherent in the *Lange* test in any event.

The real issue over time will be the extent to which proportionality reasoning impacts upon *Wednesbury* reasonableness. At present, there is not a huge appetite for that approach at either trial or intermediate Court of Appeal level. That is hardly surprising though as any seismic shift in a test which has had so much attention from the High Court, must surely come from the High Court itself or the legislature.