Proportionality and Australian Constitutionalism

BRIAN F FITZGERALD*

Introduction: Flipping the Diceyan Paradigm

As culture enters [or exits[1]] the postmodern epoch the role of government within our society still presents a perennial problem. It is fair to say that the classic liberal notion of limited government advocated by Locke[2] and contextualised by *laissez faire* has long since passed and been replaced by a positive notion of government, even in the minds of supporters of liberalism.[3] Government is no longer thought of as a nightwatchperson;[4] with the advent of medicare, workers' compensation and social security, the classic liberal role of the state once envisaged by Locke has been lost in the haze.[5]

In the march towards the empowerment of government (in a positive as opposed to negative sense), there has sometimes been a tendency to move completely away from, or simply ignore, respect for the citizen.[6] To a large degree, this has been generated by the

---

* BA (GU), LLB (Hons) (QUT), BCL (Oxon); Lecturer in Law, Griffith University, Brisbane. This article is a product of ideas which have been given impetus by Griffith University Law School students and staff and, in particular, Christine Parker. I am thankful for their contributions. Suzanne Fitzgerald helped me to get the project off the ground, while Professor Michael Tilbury gave me the opportunity and encouragement to present the ideas. To those two I am sincerely indebted. This article is an attempt to generate ideas and debate in a framework for which I am (to some degree) responsible.

1 Smart, B, *Postmodernity*, London, Routledge, 1993, at 12.

2 Locke, J, *Two Treatises on Government*, Cambridge, Cambridge University Press, 1967; Ashcraft, R, *Locke's Two Treatises Of Government*, London, Unwin Hyman, 1987, Chapter 6.

3 Raz, J, *Morality of Freedom*, Oxford, Oxford University Press, 1986. Raz talks of his motivating criterion of autonomy living and flourishing through collective action. See also the discussion of limited government at 18 - 19.

4 Cf Nozick, R, *Anarchy State and Utopia*, New York, Basic Books, 1974.

5 Davis, G, Wanna, J, Warhurst, J and Weller, P, *Public Policy In Australia*, Sydney, Allen and Unwin, 2nd ed, 1993, Chapter 2; see, for a historical perspective, Fry, G, "Who Killed Laissez-Faire" in *The Growth of Government*, London, Frank Cass, 1979, Chapter 3.

6 What is being suggested here is that the citizen has been at the mercy of the legislators and (under the notion of parliamentary sovereignty)

classic liberal writings of Dicey which, reinforced by the liberal tradition of limited government, gave Parliament unlimited power - on the premise that parliamentary representatives shaped in the style of English gentlemen would do little to harm the individual: "they must go mad before they could pass a law ordering the murder of all blue-eyed babies and the subjects would need to be idiotic before they could submit to it".[7] Unfortunately, gentlemen (whether English or Australian) did not always do the right thing and parliamentary supremacy[8] - a doctrine born out of liberation from the tyranny of monarchy - became a despot in itself. Parliamentary supremacy had been necessary in relation to the Monarch, but its definition in respect of the people was left in abeyance. The nineteenth century English may have known the conventional limits of parliamentary supremacy but, for many Australians who have lived under the concept since, the definition has not always been readily apparent.

---

could theoretically be extinguished. While it is conceded that review of administrative action develops out of notions of the individual and the social contract, these heads of review (especially before the exercise of prerogative power could be reviewed) were, and still are, primarily contingent upon the doctrine of parliamentary sovereignty; although procedural fairness since *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 is seen to arise from a common law principle, rather than from presumed statutory intent. However, this common law right is not constitutionally guaranteed and may be overridden by legislation. Thus sovereignty is still very much in the picture (Bayne, P, "The Common Law Basis of Judicial Review" (1993) 67 *Australian Law Journal* 781). In this context the citizen has been totally powerless (except for the vote) in demanding respect.

7 Dicey, A, *Law of the Constitution*, London, Macmillan, 8th ed, 1924, at 77 - 79, and at Chapter IV, where Dicey presents the notion that the rule of law protects individual freedoms. As Ivor Jennings points out in *The Law and the Constitution*, London, University of London Press, 2nd ed, 1938, at 54 - 55, Dicey, in the Lockean mould, thought government was all about protection of the individual; and thus expunging arbitrary or discretionary power from the constitutional map through the rule of law removed what Dicey thought to be the biggest threat to individual freedom.

8 Dicey's term is "sovereignty" but as Jennings points out (work cited at footnote 7, at 135 - 139) "supremacy" is more appropriate, and even more so today with the advent of wider powers of judicial review. A usual response is that Diceyan sovereignty has never existed in Australia, where we have always had limited legislatures. As Jennings points out (at 141) legislatures like those in Australia are said to be "sovereign within power" and this is understandable if sovereignty is seen as a legal phrase for legal authority to pass any sort of laws. In this article, Diceyan sovereignty is meant to connote the notion of sovereignty within power; that is, a concept which focuses on the ability to make any sort of law regardless of respect for the citizen once power is established.

For too many years Dicey's theory of legal sovereignty residing in the parliament and political sovereignty existing in the people[9] has been used by those in power to the disadvantage of the ultimate generators of power, the people. Political sovereignty was a high ideal but it was political, not legal, and served no purpose when a citizen was unnecessarily subjected to restraint by the government. It is not surprising that in this age of postmodernity the walls are crashing down around the undefined and unruly notion of parliamentary supremacy both in England and Australia. In this age of postmodern technologies (presenting perfect tools of surveillance, even from outer space, and manipulation), it would be frightening if government were to be the recipient of the same (ignorant) trust that Dicey reposed in it. It might be said that the Diceyan paradigm of understanding government (the liberal tradition) is giving way to a new paradigm of constitutional thought.[10]

In England the sea change has been ushered in through the EC.[11] In Australia the solution has been generated by judicial creativity and integrity.[12] Justice Toohey, in delivering his now infamous Darwin "Bill of Rights speech", suggested that grants of power to government should be interpreted as though they did not permit infringement of individual liberty unless clear words attaching to the grant so permitted.[13] The solution has not been developed exactly as Toohey J envisaged. The Australian change has been ushered in by greater judicial appreciation of the need for a political theory to underpin constitutional understanding; judicial approval of implied constitutional guarantees (which act as direct

---

9 On these notions of legal and political sovereignty, see Dicey, work cited at footnote 7, at 72 - 74.

10 As Schlag, P, "Normativity and the Politics of Form" (1991) 139 *University of Pennsylvania Law Review* 801, points out, new Kuhnian paradigms are in themselves still constructs or products of surrounding circumstances and environment, and perhaps a true paradigmatic change only occurs when we deconstruct the bureaucracy that surrounds us. On the notion of paradigm, see Kuhn, T, *The Structure of Scientific Revolution*, Chicago, University of Chicago Press, 2nd ed, 1970.

11 MacCormick, N, "Beyond the Sovereign State" (1993) 56 *Modern Law* Review 1.

12 For an interesting description of this creativity and integrity, see Doyle, J, "At the Eye of the Storm", unpublished paper of 24 February, 1993, at 24 - 31, where Doyle portrays the High Court as creators of the Constitution in an ever-changing world. The paper echoes very much a view of law as historically contingent, a hallmark of the postmodern approach to law ("Postmodernism and Law: A Symposium" (1991) 62 *Colorado Law Review* 439).

13 Toohey, Justice John AC, "A Government of Laws, and Not of Men" (1993) 4 *Public Law Review* 158, at 170.

limits on parliamentary sovereignty); and the principle of proportionality.[14] The focus of this article is on the latter: the way Diceyan sovereignty has been redefined by proportionality.

Part I: Evolution of the Proportionality Ethic

Republican Underpinning: Representatives as Fiduciaries

Over the last ten years the High Court of Australia has developed pockets in laws pertaining to government where proportionality is a criterion of validity of the exercise of government power. The High Court's approaches remained fragmented until the decisions in *Australian Capital Television Ltd (No 2) v Commonwealth*[15] (hereafter referred to as *ACTV*) and *Nationwide News P/L v Wills*[16] (hereafter referred to as *Nationwide).* Chief Justice Mason in *ACTV* and Deane and Toohey JJ in *Nationwide* explained what they perceived to be the essence of representative democracy. More than the rest of the Court, those three judges defined representative democracy as a system of government driven by and accountable to the people. It is fair to say they (literally) deconstructed Diceyan parliamentary sovereignty and in its place planted a republican thesis of government by the people.[17] The change in focus has meant that, in those cases at hand and in the future, actions of the executive and legislature are required to be generated and performed in "the interests of the people".[18]

Republicanism as political theory (as opposed to the goal of emancipation from monarchy), sees government being by the people in the name of a common or public good, achieved through reflection and debate leading to consensus.[19] Concepts of citizenship,

---

14 This concept is shorthand for terms such as "reasonable proportionality"; "disproportionate"; and "reasonable and appropriate". It connotes the idea that the exercise of government power should be proportionate to the object to be achieved.

15 (1992) 66 ALJR 695.

16 (1992) 66 ALJR 658.

17 One might immediately question why such a reformulation of representative government ignores corporatist, feminist or public choice theories of government. What of government by big business or trade unions? Does the sexual contract rate a mention? Is government really necessary? These are questions people are currently asking in response to the recent High Court decisions.

18 *ACTV*, per Mason CJ at 703; and *Nationwide*, per Deane and Toohey JJ at 680.

19 On modern approaches to republicanism, see Craig, P, *Public Law and Democracy in the UK and USA*, Oxford, Oxford University Press, 1990, Chapters 10 and 11. Republicanism can, in some writings, be tantamount to pluralism: for example, in James Madison's writings in *Federalist*. Cass Sunstein presents an interesting overview of

participation, equality, civic virtue and common good have been aspects of republican theory from Athenian times to the present day. Strains of republican thought can be seen in the judgments in *ACTV* and *Nationwide*. The three judges considered that our representative government is one in which people participate[20] - a notion Dicey could not comprehend yet Athenians cherished. Furthermore, Deane and Toohey JJ spoke of voters' knowing what is in the best interest of the nation; of voters not being islands, and of voters of the Commonwealth as a whole being able to communicate.[21] Similarly, Mason CJ talked of "the people" governing and the representative taking account of all views in order to make an "informed" judgment.[22]

No matter what theory these judges saw as underpinning representative government, they definitely rejected the notion that government is removed from the people. Although the three judges alluded to the role of interest groups in the political process, it can hardly be said that a pluralist notion of representative government (in which interest groups compete for the legislator's vote) was adopted. The fact that the Court believes in community values (a hallmark of republicanism) is further evidenced in Sir Anthony Mason's extra-curial speeches on adjudication[23] and Brennan J's judgment in *Dietrich v R.*[24]

Accordingly, three judges of the High Court are supporting a fundamental ethic of government, a value that requires governmental action to be in the interests of the people. The *Report of the Royal Commission into Commercial Activities of Government and Other Matters (1992)* (commonly referred to as the *WA Inc Report*) describes this as the "trust principle". The trust principle prescribes that "[t]he institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public".[25]

---

republicanism in "Beyond the Republican Revival" (1988) 97 *Yale Law Journal* 1539.

20 *ACTV*, per Mason CJ at 703; *Nationwide*, per Deane and Toohey JJ at 680.

21 *Nationwide*, at 680.

22 *ACTV*, at 703.

23 For example, "Future Directions in Australian Law" (1987) *Monash Law Review* 149, at 155 ff.

24 (1992) 67 ALJR 1.

25 Part II of the report, at 1 - 9. Professor Sampford in "Law Institutions and the Public/Private Divide" (1992) 20 *Federal Law Review* 185 introduces the notion of "institutional law", a concept which straddles the public/private divide. Such an approach in this instance might advocate a fiduciary duty for institutions generally, and regardless of public or private nature, rather than seeing the developments as one of

Whether one accepts that the Court is adopting a republican notion of representative government or not, it is undeniable that Mason CJ and Deane and Toohey JJ require government to be undertaken pursuant to the ethic of acting in the best interests of the people.[26] To act as such is the right way to act because it achieves the purpose of government.[27]

Having set up this foundation ethic it is easy now to sew together the fragmented fabric of proportionality. It is the doctrine of proportionality, ingrained with the notion of governing in the interests of the people, that legally reinforces the ethic. Proportionality is itself an ethic generated from the touchstone of the interests of the people. It is an ethic[28] which says that good government is government that is to the point, clear, precise and necessary and, in the context of constitutional guarantees, respectful of those guarantees. It is the practising of this ethic that produces government in the best interests of the people (along with greater openness, accountability and participation). The ethic of proportionality requires that government objectives be carried out only in the most direct (and, in the case of guarantees, respectful) way and, in doing so, instils a respect for the citizen that Dicey's paradigm ignored. Talking of proportionality as an ethic is apt as it represents more than legal regulation. It represents a positive guideline or value (reinforced by law) as to how (government)

---

public trust. Note that Dicey refuted any notion of "trust" (work cited at footnote 7, at 72 -73); cf Locke and the notion of a fiduciary duty (Kelly, J, *A Short History of Western Legal Philosophy*, Oxford, Oxford University Press, 1992, at 215 - 219.

26 The *WA Inc Report* shows how this ethic (and now principle of law) can be reinforced in a system of representative and responsible government through certain measures designed to foster openness, participation and accountability (see Part II). Professor Finn has intimated that the "public trust" doctrine is a rough fit in our current governmental landscape, and that moving towards it will entail reform in the processes of government and the practice of government (Finn, P, "Integrity in Government" (1992) 3 *Public Law Review* 243). Along with notions like increasing openness, real, as opposed to token, participation, and accountability, the proportionality principle can work to generate government in the best interests of the people. Proportionality is a reform of the process and practice of government.

27 See how this principle has been applied in thought-provoking style by the Information Commissioner (Qld) to the *Freedom of Information Act* 1991 (Qld) in *Eccleston v Department of Family Services and Aboriginal and Islander Affairs* (unreported 30 June, 1993); see also *Official Information (Integrity in Government Project Interim Report 1)*, Canberra, 1991.

28 Ethics may have a gender determinant (Gilligan, C, *In A Different Voice*, Cambridge, Harvard University Press, 1982); Menkel Meadow, C, "Portia in a Different Voice: Speculation on Women's Lawyering Process" (1985) 1 *Berkley Women's Law Journal* 39.

institutions should operate. Proportionality is both a legal principle and an institutional and professional ethic. It is arguably an ethic of institutions generally, whether of public or private status.[29]

In summary, proportionality has arrived to reinvigorate the system of representative government and to ameliorate the excesses of parliamentary sovereignty and, in so doing, to instil an ethic of efficiency, responsibility and accountability in government action. At bottom, the citizen and the people are ideally to be saved from excesses of power and corruption and from a non-respectful leviathan.

A motivating cause for the trust principle and proportionality is, no doubt, the cultural change we are currently experiencing. The proportionate conduct we display in the servicing of the latest technology, hoping not to unnecessarily impinge upon other high tech components, is a metaphor for the proportionality government must exude. In an era where millions of people could be exposed to devastating risks by the mere push of a button, it becomes understandable why the High Court is requiring an ethic of necessity of action.[30] Unnecessary or excessive action in many shapes and forms has the potential to unjustifiably encroach on, or restrain, the lives of citizens.

With the development of this ethical and legal principle as part of the Australian constitutional landscape, one is led to ask whether proportionality has any ancestry.

The Heritage of Proportionality: "Using a Sledgehammer to Crack a Nut"

One might legitimately introduce this part by saying that proportionality has its origins in the rule of common sense that one ought not use a "sledgehammer to crack a nut", for in so doing one uses excessive and unnecessary force or means.[31]

---

29 See on this issue, Sampford, work cited at footnote 25.

30 It seems that the High Court is shaping the evolution of a new form of government. It is by no means telling the governments how to govern and what policy to make, but it is determining the framework through which government and policy can and must operate.

31 See Jowell, J and Lester, A, "Proportionality: Neither Novel Nor Dangerous" in Jowell, J and Oliver, D (eds), *New Directions in Judicial Review*, London, Stevens and Sons, 1988, at 54. Other similar sayings are "one ought not use a cannon to shoot a swallow", or "one ought not use a sledgehammer to crush a fly".

It is no surprise then that proportionality has strong links with international law on armed conflict and the use of force. "Force" may be seen as a metaphor[32] for governance. However, Cover has described legal interpretation as violence[33] and, in this context, governance may be seen as the use of force minus any (traditional) metaphorical nuance.[34]

Judith Gardam argues that proportionality was part of the Christian doctrine of just war, but that in this framework if the cause was legitimate, proportionality followed.[35] She states of St Augustine's theory:[36]

> As a result once the cause was just, any means to achieve the end was permissible.

The development of secular theories of just war saw the separation of the notions of legitimate types of force and the proportionate exercise of such force. Just war emanated from a notion of retribution, but with the advent of the nation state war came to be regarded as a matter of state policy.[37] The laws of force and the laws of armed conflict were a product of this development.

Up to this day we see in the law of armed conflict the pursuit of a legitimate military goal requiring proportionality in selection of means of war and proportionality in the execution of those means; proportionality being referable to the preservation of life and stability of the other state.[38] As Gardam explains, the use of force under the UN Charter, which is limited to the notion of self defence, contains notions of proportionality although this has been largely ignored in academic discussion.[39]

Proportionality is a principle used also by European countries and now the EC. The proportionality principle is well-known to the German legal system while it has some traces in the

---

32 "... metaphor is a fundamental component of human reasoning. Metaphor enables us to see systems of analogies not previously recognised." (Winter, S, "The Metaphor of Standing and the Problem of Self-Governance" (1988) 40 *Stanford Law Review* 1373, at 1383.)

33 Cover, R, "Violence and the Word" (1986) 95 *Yale Law Journal* 1601.

34 For further development of the violence theme, see Minow, M, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 *Yale Law Journal* 1860, at 1897-1911.

35 Gardam, J, "Proportionality and Force in International Law" (1993) 87 *American Journal of International Law* 391, at 395.

36 See footnote 35.

37 Gardam, work cited at footnote 35, at 396.

38 Gardam, work cited at footnote 35, at 406 - 407.

39 Gardam, work cited at footnote 35, at 404.

Netherlands, France and Belgium. Since the establishment of the EC, Greece and Denmark have confirmed their use of the principle and Italy and Spain have begun to use it. Portugal has the principle recited in its Constitution in relation to specified activities.[40]

Germany presents perhaps the best example of how the proportionality principle has been successfully utilised at a constitutional and administrative law level for many years.[41] The rejection of excessive burdens on the individual and the doctrine of primacy of individual freedom outside necessary collective action give the doctrine a strong rights focus in Germany. German law requires that the measures or means be *suitable, necessary and not disproportionate to the restrictions involved.* The first two requirements, suitability and necessity, are commonly described as the necessity principle. The last requirement is referred to as proportionality in the strict sense and is aimed at outlawing excessive or unreasonable measures.[42] Such a requirement, due to its intimate connection with the notion of legitimate purpose, is unlikely to have universal application in Australia. The excessive measures test requires balancing the rights of the individual against the public interest in securing the government objective through the measures at hand. If the measures are excessive (meaning that the interests of the individual are unreasonably sacrificed to that of the collective), then they are not justified as means to a legitimate purpose; and in this sense define the legitimacy of purpose.

In Australia the scarcity of fundamental legal rights (that is, constitutionally guaranteed rights) means that the excessive measures test can only be activated in those rare instances where a fundamental legal right is in issue. If no such right is at stake then proportionality in the strict sense could have no operation, as the legitimacy of any particular government measure or objective outside the constitutional guarantees context is a political question. Whether the means to the objective are necessary is, however, a question for the courts in the realm of purposive powers and thus this principle has ready application in Australia.

In Canada proportionality has risen to the fore in the context of s 1 of the *Charter of Rights and Freedoms*, which allows "rights and freedoms to be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In this context the Supreme Court of Canada

---

40 Schwarze, J, *European Administrative Law*, London, Sweet and Maxwell, 1992, at 680 - 702.

41 Schwarze, work cited at footnote 40, at 685 - 692. Australia, for all intents and purposes, is following a very similar line.

42 Schwarze, work cited at footnote 40, at 685 ff.

has suggested that, to establish that a limit is reasonable and demonstrably justified in a free and democratic society, there must be an objective of sufficient importance to warrant overriding the right, and the means chosen to pursue this objective must be proportionate. Proportionality requires the means to be carefully designed to meet the objective, the means must impair as little as possible the right in question and must display a proportionality between the effects of the measures and the objective being pursued. In this third aspect, proportionality suggests that an excessive measure is not justified by the objective it pursues. That is, an excessive measure defines an illegitimate objective.[43] This is similar to the German position and thus one might suggest that the excessive measures aspect of proportionality will only have operation in Australia where the Court can inquire into the legitimacy of purpose (usually in cases concerning constitutional guarantees).

The Australian Approach: Necessity and More

The Australian development of a notion of proportionality has been theoretically vague. As the following analysis will show, proportionality has developed over the last ten years in a framework that looks to the purpose of the government action (and in some cases, for example, those concerning guarantees, determines the legitimacy of purpose) and asks whether the means employed are proportionate to the achievement of the end. Yet there still remains a great amount of uncertainty as to whether proportionality is simply a principle requiring necessity of action, or whether it is a substantive doctrine which can invalidate government objectives.[44]

If one were to say that the German or Canadian proportionality doctrines could be imported wholesale into Australian constitutional law one would be seeing our constitutionalism as far removed from what it is. The German and Canadian notions, in their third aspects, see proportionality as a doctrine which weighs the means of obtaining the government objective against the effect such measures have on the rights of the citizen. If the measures are excessive in effect, they are disproportionate and invalid. Such an approach suggests proportionality is a substantive limit on legislative power.

Arguably, the general application of proportionality in Australia has hitherto been seen as premised on the necessity

---

43 *R v Oakes* (1986) 26 DLR (4th) 200, at 227 - 228.

44 See Schwarze, work cited at footnote 40, at 695-697, where it is suggested that proportionality in the strict sense has little operation in the face of parliamentary sovereignty.

principle. That is, proportionality, as evidenced in the cases, presents as a doctrine concerned with the necessity of government action. If the government action is unnecessary then it is invalid. However, such invalidity is more procedural than substantive in that what is being invalidated is not the government objective, but the means by which the government objective can be obtained.

The cases show that the legitimacy of a government objective is usually a political question which the Court will not assess. Thus where proportionality is applied in the context of purposive core powers and incidental powers, the necessity of the measure is the important issue, not the excessive effect or impact the measure has upon respect for the citizen. That is, the cases suggest proportionality in regards to purposive powers is simply a necessity principle. In this context, the Court may decide to develop the notion to one of proportionality in the strict sense. However, such a proposal will meet with claims that the Court is usurping the political arm of government to too great a degree.

The foregoing discussion is not meant to imply that proportionality in the strict sense is in no way evident in the case law. The existence of constitutional guarantees makes the picture somewhat more complex. These guarantees work so as to limit legislative power. However, they are not absolutes and all of them are subject to regulation in the name of a legitimate objective. The legitimacy of such an objective, though, is something the Court is only too willing to assess. Therefore the balancing of the citizen's constitutional guarantee against the welfare of the collective is a process the Court will undertake. If the government objective does not trump the sanctity of the guarantee, then the objective is not legitimate and any measures pursuing that objective, even though they may be necessary and suitable, are invalid - that is, they are disproportionate in the strict sense.

The case law suggests that proportionality in the strict sense only operates in Australia in relation to guarantees, and equates with what the Court has labelled a legitimate government objective or interest. The German and Canadian approach is to talk of lack of proportionality of the means. However, if the objective is a legitimate one, means necessary for the achievement of that objective must be valid (and proportionate in the strict sense), while necessary means that create unacceptable deleterious effects do not represent pursuit of a legitimate objective. The position must be to find proportion between the interference with respect for the citizen and the factors legitimating the objective. Arguably, proportionality in the strict sense entails the same process as determining whether the measures pursue a legitimate objective.

In this context, establishing whether measures are proportionate requires one to ask at a threshold level whether the guarantee can be regulated for the purpose claimed by the government (this is the threshold component of proportionality in the strict sense). If the answer is in the affirmative, one then assesses the necessity of the measures used. If the measures are necessary then proportionality in all senses is satisfied. If the answer is in the negative then proportionality as necessity is breached, as more than likely will be proportionality in the strict sense, because the objective actually pursued will be illegitimate as an excessive intrusion on the guarantee.

Support for the foregoing analysis of Australian law is found in the two free communication cases (*ACTV* and *Nationwide*) which are discussed at length in the text that follows. It is apparent that in both of those cases the legitimate objectives claimed to be pursued were, at a threshold level, accepted as legitimate. However, the judges found the means to those ends unnecessary and consequently found the objectives pursued to be unacceptable intrusions on (political) respect for the citizen, and thus disproportionate in the strict sense. This latter claim was made pursuant to the finding that the measures were not pursing the (threshold) legitimate objective. Hence, even though the threshold test of legitimate objective is satisfied, if the measures are unnecessary the legitimacy of the objective pursued will more than likely not be established. A finding of invalidity on the basis of necessity would have been sufficient. However, it is clear that the judges mixed the notions of necessity and strict sense proportionality together, as the latter, in more cases than not, will flow as a consequence of the former.

It is important, for the purpose of highlighting the role of proportionality in the strict sense in Australia, to distinguish the judgments in *ACTV* and *Nationwide* that relied on the implied guarantee to free speech concerning political and public affairs, from those in *Nationwide* that relied on characterisation of the incidental power. For example, Mason CJ in *ACTV* relied on the implied guarantee and argued that it can be regulated. To establish justifiable restrictions of the guarantee, he explained, requires a balancing of the public interest in the existence of the guarantee against the public interest in the attainment of the specific government objective (that is, proportionality in the strict sense),[45] and a finding that such restrictive measures are *necessary* (that is, proportionality as necessity) to the attainment of the balanced public interest.[46] Likewise, Brennan J saw there is a legitimate

45 *ACTV*, at 705.

46 See footnote 45.

interest or end (proportionality in the strict sense) which the restrictive measures must proportionately serve (the necessity principle).[47] Justices Deane and Toohey in *ACTV* talked in the context of restrictions in the name of public interest and legitimate democratic ends[48] and held the argument that the provisions at hand were *necessary*, to be unconvincing.[49] Justice Gaudron asked whether the means are reasonably and appropriately (necessity) adapted to achieve some end within power (proportionality in the strict sense).[50]

In *Nationwide* Mason CJ decided the case on the basis that the law was not a valid exercise of an incidental power. In so doing, the Chief Justice explained that the measures must be for a purpose within power and must be proportionate to that purpose.[51] It is suggested that the Chief Justice never assessed the legitimacy of the purpose (as he did in *ACTV*) and therefore he used proportionality as necessity, not in the strict sense. The Chief Justice said that a lack of proportionality in this context is evidenced by *unnecessary and undesirable* measures which, in turn, can be assessed against the causing of adverse consequences unrelated to the achievement of the object and, in particular, adverse consequences on fundamental values.[52] Chief Justice Mason, although hinting at proportionality in the strict sense by referring to desirability, seems committed to proportionality as necessity in the context of purposive powers and in the absence of any question of a constitutional guarantee. On the other hand, Deane and Toohey JJ decided the case in terms of the implied guarantee and, in so doing, spoke in terms of the public interest to which the restrictive measures must be conducive. They decided the case on the basis that the provisions at hand went far beyond what is needed to support the public interest, and they also seemed to suggest that the public interest was not furthered by the scheme (proportionality in the strict sense).[53] Therefore, we see in the one case Mason CJ relying on proportionality as necessity and not inquiring into the legitimacy of purpose (as Dicey's paradigm would suggest) while, on the other hand, Deane and Toohey JJ use (what amounts to) proportionality in the context of a constitutional guarantee to determine necessity of measures and the legitimacy of the measures (the strict sense

47 *ACTV*, at 710 - 713.

48 *ACTV*, at 716.

49 *ACTV*, at 718 - 719.

50 *ACTV*, at 737. For an end to be within power it must be consistent with a free society governed by principles of a representative democracy.

51 *Nationwide*, at 662.

52 *Nationwide*, at 662.

53 *Nationwide*, at 682 - 683.

notion). With these complexities in mind, it is appropriate to return to the historical development of Australian proportionality.

Proportionality in Australia has, to this stage, developed under the rubric of "characterisation"; for a law cannot be for a specific purpose if it is disproportionate. However, this should not remove the focus from disproportionate means. As far as ethical standard-setting is concerned, it would seem that highlighting the notion of disproportionate means is more appropriate where measures are unnecessary than telling legislators and administrators they are acting for the wrong purpose.[54]

Purpose in the proportionality framework connotes government power purpose. It is a criterion of exercise of the external affairs power, the various incidental powers, purposive core powers (defence, implied nation power), and laws overriding guarantees (such as the implied freedom of communication on political affairs: ss 92 and 117).[55] It is important to note that purposive interpretation is distinguished by the Court. Purposive interpretation is used to determine the meaning of the core power[56] but, in determining validity of the law against the core power, purpose in most cases is eschewed. In essence, the Court defines the meaning of core powers by looking to purpose, then ignores purpose in the characterisation or matching stage. This is a questionable approach and perhaps gives too much to legislative judgment.

The year 1992 represented "the year that was" in Australian constitutional law and, as a consequence, proportionality came of age, although it had been hovering in the rafters for some ten years.

---

54 In *Nationwide*, at 689, Gaudron J acknowledged the dual function of the test.

55 See Gaudron J in *Nationwide*, at 689; Deane J in *Richardson v Commonwealth* (1988) 164 CLR 261, at 308. In *Goryl v Greyhound*, argued before the High Court in October 1993, it was suggested that reasonable proportionality was the criterion of validity of a law treating out-of-State residents differently. In this type of situation, discovery of a legitimate purpose may be a key question. On s 117, see also *Waters v Public Transport Corporation* (1991) 173 CLR 349, at 364 where Mason CJ and Gaudron J seemed to demand the presence of "difference" which might justify different treatment. The different treatment must be proportionate to the difference. Where this leaves the notion of legitimate objective or purpose in the name of regulation is not clear; however, some type of purpose is obviously demanded against which to assess the proportionality of the different treatment, as a difference cannot exist without a context: *Castlemaine Tooheys Ltd v SA* (1990) 64 ALJR *145*, at 155. But what determines legitimacy of the objective?

56 Doyle, work cited at footnote 12, at 2 - 5 and 17 - 19.

Development in Australia: the External Affairs Power and Federalism

"Proportionality" as an ethic of government action was given impetus by Deane J in the *Tasmanian Dams* case[57] and by the majority of the High Court in the *Lemonthyme* case.[58] Although judges of the High Court had long demanded[59] that the means be "appropriate and adapted to" the end of implementing the treaty, it was Deane J that hit upon the notion of "reasonable proportionality". Spurred on by the great debate over the federal purpose of our Constitution which surrounded the *Dams* case, Deane J quietly, yet forcefully, changed the focus of the "appropriate means" test by bringing in the positive ethic that "means must be proportionate to ends".

The change was born out of the circumstances. In trying to salvage some meaning for the federal compact, the judges (Deane J in particular) hit upon the notion of demanding that the legislative action be of a certain ethical standard. The legislative action had to be proportionate. However, what was proportionality referable to? "Means to ends", of course, but a deeper analysis was needed to make sense of this trite response. Justice Deane, in his attempt to

---

57 *Commonwealth v Tasmania* (1983) 158 CLR 1, at 259 - 260. In this case Deane J found that blanket prohibitions in s 9 of the *World Heritage Properties Conservation Act* (1983) (Cth), other than s 9(1)(h), were not reasonably proportionate means to implement the international convention. Justice Brennan came to the same result. However, he seemed to adopt a view that the blanket prohibition was one no reasonable person could support. Furthermore, the conditional lifting of the prohibition was not effective enough to introduce proportionality.

58 *Richardson v Commonwealth* (1988) 164 CLR 261, at 291, 301 - 302 and 311 - 312. In this case Deane J, dissenting, held s 16 of the *World Heritage Properties Conservation Act* (1983) (Cth), a blanket prohibition, to be disproportionate means to achieving the ends of the international convention. "Excessive" and "unnecessary" are notions that emanate from Deane J's judgment, and it would seem that he has gone beyond any simple notion of reasonableness; although outside the context of blanket prohibitions it is uncertain how deferential to legislative judgment Deane J will be. Justice Brennan, who had rejected the validity of a blanket prohibition in the *Dams* case because it never had or would never have legitimate application to all those prohibited from action, found along with Mason CJ that the blanket prohibition in the *Lemonthyme* case was valid because it potentially could have legitimate application to all those prohibited from action. Cf the approach in the administrative law decision of *Clements v Bull* (1953) 88 CLR 572, at 586 where Taylor J said: "the head of power cannot support a regulation prohibiting a course of conduct within the port merely because it is possible that such conduct may, on some occasions or in some circumstances, impede the efficient working of the port".

59 *Airlines of New South Wales Pty Ltd v New South Wales No 2* (1965) 113 CLR 54, per Barwick CJ at 86.

salvage federalism, was in essence espousing a theory of federalism. It was a theory left largely undefined but obviously respected the need for the States. Proportionality became referable to a notion that Commonwealth government action should be to the point and should not unnecessarily trample upon the legislative domains of the States. In *Richardson* Deane J evidenced a dual foundation for his finding of disproportionate means: namely, the rights of citizens to respect and immunity from unnecessary government interference; and the right of States to govern on State issues. He said:[60]

> ... there has been no real effort to confine the prohibitions of the overall protective regime, with the overriding of the ordinary rights of citizens and the ordinary jurisdiction of the State of Tasmania which it would involve, to activities which it might be thought represented some real actual or potential threat ... to natural or cultural heritage.

Thus Deane J, in introducing reasonable proportionality, may well have been resurrecting the "ghosts of reserve powers".[61] However, it may be more instructive to say, in this age, that he was giving effect to a theory of federalism that underlies our Constitution. What that theory actually prescribes is a moot point but, in utilising reasonable proportionality, it is obvious that Deane J sees some value in the notion that federalism connotes the decentralisation of power, at least on regional issues. A more concerted effort to throw off the shackles of the *Engineers* case[62] and explain a coherent theory of our federal compact would have been much more impressive.[63] As it stands, the ethic of proportionality is given definition by an implied notion that the States are important. Of course, Deane J has shown in cases like *Leeth v Commonwealth*[64] and *Breavington v Godleman*[65] that he, like Detmold, is keen to see Australia as "one nation". What Deane J's theory of federalism will look like in this "one nation" context is left hidden. We at least know Detmold is headed towards a unitary system at a world-wide level.[66]

If we have a theory of federalism we can work out whether people have rights in that federal structure. For example, if we

---

60 *Richardson*, cited at footnote 58, at 317.

61 To this effect, see Detmold, M, "Australian Law: Federal Movement" (1991) 13 *Sydney Law Review* 31, at 58.

62 (1920) 28 CLR 129.

63 In this regard, see the ideas of Andrew Fraser in *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity*, Toronto, University of Toronto Press, 1990.

64 (1992) 107 ALR 672.

65 (1988) 166 CLR 41.

66 Detmold, work cited at footnote 61.

were to adopt Galligan and Walsh's Madisonian vision of Australian federalism as decentralised and enhancing pluralist democracy, then it becomes obvious that "federalism" rights exist because the Madisonian thesis bestows upon the people the right to government (institutional processes) by "appropriate entities". Thus, if the matter is a local, regional or State matter, the Madisonian thesis of federalism[67] demands the local entity to be the one with the authority to do the job of governing. People come to possess rights to government by and through an appropriate entity - in this instance, the State entity or government. Although we have traditionally thought of the Constitution as a power-sharing agreement it is undeniable that a Madisonian-type theory of our current structure demands that people have rights to proper government. After all, that is the reason for having a federal system. It is not suggested that Madison's theory, as interpreted by Galligan and Walsh, is the only theory of federalism. There may be more strength in the argument that a classic republican-inspired thesis would better describe our federal system and underpin a notion of a "federalism" right.

Therefore if we create a modern theory of federalism and if it gives a role to the States, reasonable proportionality becomes an ethic that describes how the Commonwealth government should govern. It should govern so as to foster the interests of the people; and in this instance that is (in part) government by the appropriate entity. If the Commonwealth were to be excessive or sloppy in implementing international obligations it might then invade *unnecessarily* the right of the States to govern and the right of the individual or group to be governed by and through the appropriate entity. Detmold in unitary mode would reply that "rights like love define no permanent local".[68] The maturation of the doctrine of proportionality informs us otherwise.

It should also be noted that, under Deane J's approach, proportionality can shape the exercise of the external affairs power so that its legislative product will not unnecessarily infringe on citizens' rights in a more general (and non federalist) sense.

---

67 Galligan, B and Walsh, C, "Australian Federalism - Yes or No" in Craven, G (ed), *Australian Federation*, Melbourne, Melbourne University Press, 1992. On Madisonian republicanism, see Krouse, R, "Classical Images of Democracy in America" in Duncan, G (ed), *Democratic Theory and Practice*, Cambridge, Cambridge University Press, 1983; Sunstein, work cited at footnote 19, is sceptical of such approaches and believes one should not downplay the republican influences brought to bear in framing the USA Constitution.

68 Detmold, work cited at footnote 61.

Thus proportionality[69] as an ethic had been set, and its touchstone, as the foregoing analysis suggests, was to be the rights and interests of the citizen (primarily to government by the appropriate entity).

Section 92: Proportionality v Protectionism

Proportionality was next to make a significant appearance in the case of *Castlemaine Tooheys Ltd v SA.*[70] This case developed the notion of free trade formulated in *Cole v Whitfield.*[71] *Cole*, the landmark case which jettisoned the Dixonian ideal of a *laissez faire* inspired individual rights theory of s 92, introduced the notion of discriminatory burdens of a protectionist character as the defining factor of freedom of interstate trade.[72] The whole motivation of the federal compact to unify Australia socially and economically was given impetus in the reinterpretation of this pivotal section.[73] The High Court was to decide that individual rights were dead, but that a right to interstate trade unencumbered by discriminatory burdens of a protectionist character existed. Since 1901 Australians had a right to trade free of discriminatory burdens.[74]

The Court made the reservation that some laws interfering with interstate trade may pursue legitimate government ends; namely, regulation of commercial conduct in the name of fair dealing, health or safety.[75] If those laws had as their object regulation in the public interest, they were more than likely to be valid so long as they did not discriminate against interstate trade to the point that warranted characterisation of the law as protectionist.[76] The criterion for determining excessive regulation was not clearly articulated in *Cole*. However, in *Cole*, the agreed facts seemed to allow the Court to accept an alternative argument

---

69 It seems proportionality in this context is referred to in its necessity mode.

70 (1990) 64 ALJR 145 (hereafter "*Castlemaine*").

71 (1988) 62 ALJR 303 (hereafter "*Cole*").

72 Cf Lane, P, *Fifth Cumulative Supplement to Lane's Commentary on the Australian Constitution*, 1993, at 167, where protectionism is seen to be the key word.

73 *Cole*, at 311.

74 See footnote 73.

75 *Cole*, at 317.

76 *Cole*, at 317. The laws being characterised in the two s 92 cases mentioned here were State laws and thus these cases did little to infuse s 51 with a proportionality criterion. This is one of the main reasons for analysing them separately.

that the regulations were a "necessary means" of enforcing the prohibition against the catching of undersized crayfish.[77]

However, two years later in *Castlemaine*, the Court made it clear that pursuit of a legitimate object (through legislative measures appropriate for, and adapted to, achieving the object) would allow regulation of interstate trade so long as the means adopted were "not disproportionate to the object to be achieved". [78] The Court said that the object to be achieved and the legislative measures used were primarily political questions for Parliament and that all the Court was interested in was the proportionality of the means used to achieve those ends.[79] Thus, in theory, deference to legislative judgment plays a part. However, the Court will find the regime inappropriate if the means are disproportionate,[80] and as a consequence, if the means are disproportionate the government objective will more than likely be illegitimate as an excessive intrusion on the guarantee of free trade.

In *Castlemaine* the South Australian Government had, through legislation, made it disadvantageous to sell beer in South Australia in non-refillable bottles. The object of the law was, at a very general level, to protect the environment through litter control and conservation of finite resources used to make glass beer bottles. The High Court decided that the law placed a discriminatory burden on interstate trade which could not be justified in the name of regulation. The means adopted to achieve the end of environmental protection and conservation (the threshold legitimate object) were not necessary to the attainment of the object and, as a consequence, their real focus was a discriminatory burden (an illegitimate objective), not regulation. The Court intimated that if the purported regulation is not proportionate and effects discrimination, then it must be invalid under s 92.[81] Thus, under s 92, proportionality will be the criterion of whether a law that interferes with interstate trade in a discriminatory way is protectionist or mere regulation. If a purported regulation is excessive and unnecessary, the conclusion to be drawn is that the law

---

77 *Cole*, at 318; see what was said about this in *Castlemaine*, at 150.

78 *Castlemaine*, at 153.

79 Cf Staker, C, "Section 92 of the Constitution and the European Court of Justice" (1990) 19 *Federal Law Review* 322, at 337 - 338.

80 *Castlemaine*, at 153. The way the High Court formulated its approach leaves the impression that proportionality defines whether a statutory regime is appropriate and adapted to a justified (in power) end. How the end is justified is a bit of a mystery. Does the end have to be one that is necessary for the functioning of a democratic society? The Court referred to legislation for the well-being of the people of the State (at 152). On this point, see Staker, work cited at footnote 79, at 338 - 339.

81 *Castlemaine*, at 153 - 154.

has as its purpose discrimination of a protectionist kind. Justices Gaudron and McHugh appeared to require that discrimination be the primary criterion and that where there is "unequal treatment of equals" discrimination must be found, regardless of the objective and the proportionality.[82] However, as Gaudron and McHugh JJ pointed out, the proportionality criterion will in most cases find such discrimination amongst equals a disproportionate means to the object, although, as they suggested, this is not guaranteed by the test adopted by the majority.

Proportionality in this instance protects the express constitutional guarantee to trade in Australia free of protectionist burdens which, like the freedom of communication, can be regulated for a legitimate democratic purpose, provided such regulation is proportionate to the end to be achieved. Proportionality is generated and given purpose by the right it regulates and the end to be achieved. What is proportionate is what is necessary to achieve the end, while an unnecessary intrusion upon the right produces disproportionate means (the inverse of reasonable proportionality).[83] What is necessary must be determined by a contextual test generated by the circumstances; however, the nature of the right and the end to be achieved must inform this necessity. Necessity is born out of a need for the interests of the people through collective action to trump the interests of the people in having the guarantee to free trade. Effective government will demand the use of the most ethical means by which to regulate the guarantee, for if the governors are vague in their actions and *unnecessarily* impinge the guarantee to free trade, government action is unethical and unlawful.

The *Castlemaine* case was decided primarily on the basis of the unnecessary means employed (proportionality as necessity). But as a guarantee was involved, the legitimacy of the objective was assessed (proportionality in the strict sense).

Part II: Proportionality in Characterisation: the Sledgehammer Departs

As has been shown, during the 1980s proportionality was used as a criterion of the validity of two specific categories of law: viz, laws implementing treaties and State laws *regulating* interstate trade. This article will now chart the development of proportionality as a

---

82 *Castlemaine*, at 156.

83 A similar approach is used to the free movement of goods in the EC (Schwarze, work cited at footnote 40, at 773 ff; Staker, work cited at footnote 79.

criterion of the exercise of Commonwealth powers under s 51 of the Constitution.

It might be said that the first case to invoke proportionality in the characterisation (meant here to refer to the process through which the validity of a Commonwealth law is established) process was the *Communist Party* case[84] in which the defence power, one of the few core purposive powers,[85] was held not to support legislation which disproportionately pursued the purpose of defence.[86] The legislation[87] was held not to be within the power of the Commonwealth because its lack of proportionality meant it was not for the purpose of defence. Of course, proportionality, as such, was not mentioned but the decision is certainly a precursor to such a doctrine.

It was not until 1988 that proportionality was to consolidate its position in Australian constitutional jurisprudence regarding characterisation. In *Davis v Commonwealth*[88] Mason CJ and Deane and Gaudron JJ suggested that sections of the *Australian Bicentennial Authority Act* 1980 (Cth) protecting the name and the symbols of the Authority could be justified, if at all, under an implied legislative power designed to further the purposes of Australian nationalism or the incidental legislative power (s 51(xxxix)) in its support of executive government.[89] Both heads of power, it might be noted, are purposive: the first furthering the purpose of nation building; the second, the purpose of the better effectuation of executive government. Chief Justice Mason and Deane and Gaudron JJ held, though, that the legislative provisions protecting the symbols employed by the Authority were draconian and disproportionate to the purpose to be achieved. They said the use of basic terms such as "Melbourne" and "Sydney" in conjunction with expressions such as "1788" and "1988" could be regulated under the Act in many (ordinary and everyday) circumstances where the integrity and operation of the Authority was not at stake. It was only a small step for these judges to decide then that the means adopted to achieve the purpose of protecting the Authority were not proportionate to the object to be achieved. Chief Justice Mason and Deane and Gaudron JJ said:[90]

---

84 (1950) 83 CLR 1. The case was decided on a number of grounds of which the infant proportionality doctrine was one.

85 Case cited at footnote 84, per Dixon J at 192 - 194.

86 Case cited at footnote 84, in particular per Dixon J at 197 ff.

87 The *Communist Party Dissolution Act* 1950 (Cth).

88 (1988) 166 CLR 79.

89 Case cited at footnote 88, at 98 - 99.

90 Case cited at footnote 88, at 100.

> Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.

It is reiterated though that the purposive nature of the power allowed proportionality as necessity to enter the fray. Characterisation of a core power, as we traditionally know it, is not a purpose-driven exercise and thus proportionality is ignored. In an age of rights-consciousness it may only be a matter of time before core characterisation becomes influenced by proportionality (at least) as necessity.[91]

Characterisation of a purposive core power of course entails consideration of proportionality. The distinction between purposive and non-purposive core powers is perhaps a formalist[92] distinction that might be better done away with; this is very much an urgent question for constitutional law.[93]

Davis introduced us to the notion of freedom of speech (which has now been more fully developed in *ACTV* and *Nationwide*) and, in this regard, is very important in defining the content of proportionality as necessity in the characterisation process. The interesting thing is that their Honours were here talking about a general liberty to free speech, not just one enlivened by a political context. Thus we do not even need an implied constitutional freedom or right to define proportionality as necessity. As *Davis* explains, in characterisation we need to take care of fundamental values and thus characterisation (where purpose is in issue) is now seen as an avenue through which to infuse notions of ethical government. It is in this process that the High Court requires necessity of action as defined in large part by the unnecessary infringement of fundamental values.

The two cases that placed proportionality firmly on the characterisation map were *ACTV* and *Nationwide*.[94] Admittedly,

---

91 If we limit the operation of proportionality to the characterisation process regarding purposive powers, it becomes a little artificial to exclude proportionality from all characterisation. All heads of power are conferred for the purpose of furthering the interests of the people. Thus proportionality should direct government action under all the heads; it should say government action is only good under any head if it is a proportionate route to achieving its ends.

92 On this notion, see Unger, R, "The Critical Legal Studies Movement" (1983) 96 *Harvard Law Review* 561 - 616.

93 See Doyle, work cited at footnote 12.

94 Justice Dawson in both cases adopted a much more literalist and deferential approach than the other judges. His approach is not within

the majority of judgments in these two cases talk of proportionality in regards to the characterisation of a law regulating a constitutional guarantee and, as such, do not deal directly with pure s 51 characterisation. Nevertheless, these cases give insight into the future of "normal" characterisation as well as usher in what may become a frequently recurring characterisation process; one which operates hand-in-hand with s 51. Therefore these cases are, it is submitted, seminal cases for the characterisation process.

ACTV: the Dawning of a Rights-Consciousness, the Creation of Dangerous Supplements and the Need for Proportionality

The 1992 High Court year produced somewhat of a "glorious revolution" for Australians as the liberation from the tyranny of parliamentary supremacy (over the people) came much more closer. The High Court explained that certain freedoms are inherent in our Constitution and that for Parliament to excessively and unnecessarily trench upon them was sacrilege. There was one catch in all of this glory and revolution: freedoms were subject to regulation for purposes necessary to a democratic society; enter what Rousseau may have termed a "dangerous supplement". This means that while the freedom holds a privileged status, it needs collective action to reinforce and fulfil it, and thus a supplement of a very dangerous kind is introduced. Dangerous, because once one introduces the supplement the privileged status of the freedom is put at risk.[95] To protect against such danger the High Court introduced the concept of proportionality; a kind of dangerous supplement exterminator.

The Facts

The plaintiffs in *ACTV* sought a declaration that Part IIID of the *Broadcasting Act* 1942 (Cth) ("the Act") was an invalid exercise of legislative power. Part IIID had been inserted in the Act in 1991 and had as its focus the regulation, control and intellectualisation of political advertising at election time. The statutory scheme introduced a general prohibition on political advertising at election time, while imposing obligations on broadcasters to provide free time to what, in essence, were the political parties currently represented in Parliament. The free time was to be allocated on certain conditions relating to style and content.

---

the scope of discussion in this article, although his judgment in *Nationwide* does provide an insight into how a traditional view of deference to legislative judgment relates to the current doctrine of proportionality.

95 On the notion of the dangerous supplement, see Frug, G, "Ideology of the Bureaucracy" (1984) 97 *Harvard Law Review* 1276, at 1288 ff.

The consequence was that the statutory scheme severely impaired the freedom of citizens to discuss public and political affairs, in that it restricted broadcasting of political speech by regulating the access of political parties, groups, candidates and people generally to express views with respect to public and political affairs on radio and television.[96] The Commonwealth's response was that there needed to be some control on political advertising and the funding that it required. Corruption and undue influence, it was suggested, were possibilities in such an environment of large financial commitment.[97] Two further consequences that the Commonwealth suggested would result from the statute were that the regulation of political advertising would place all in the community on an equal footing, and also prevent the trivialising of political debate.[98] The level-playing-field approach could not be justified in this scheme as the allocation of free time, to 90% of the available time, favoured members and parties of the present Parliament. This, the Chief Justice pointed out, in what may be a recognition of a pluralist democracy inhabited by interest groups, prevented a number of interest groups and people who were not putting forward candidates for election from receiving an allocation of free time.[99]

The issues then were as to whether Part IIID of the Act contravened an implied guarantee of freedom of speech in the political process. It was clear that if it was not for an implied guarantee, the legislative power resided in the Commonwealth Government.[100]

Chief Justice Mason

The Chief Justice accepted that the Act could be characterised as a law with respect to the core power in s 51(v) and various powers concerning elections. In so doing, he found it unnecessary to allude to the role proportionality might play in the characterisation of a core power, although it is unlikely he would have restructured the notion of characterisation of a core power in the framework of proportionality.[101] Having a *prima facie* valid law at hand, the

---

96 *ACTV*, at 699.

97 *ACTV*, at 699.

98 *ACTV*, at 700

99 *ACTV*, at 700. I consider that Mason CJ, in his reference to groups, is referring more to a notion of interest group republicanism (Sunstein, work cited at footnote 19, at 1585 - 1589).

100 *ACTV*, at 701.

101 See the traditional approach to characterisation being applied by the High Court in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth of Australia* (1993) 112 ALR 87, at 94.

Chief Justice proceeded to see if the law was "subject to any limits under the Constitution".

Was there an implied right to freedom of communication regarding public affairs and political discussion? The Chief Justice explained that the doctrine of responsible government was probably the main reason why the framers of the Constitution were disinclined to include a Bill of Rights in our Constitution.[102] He said:[103]

> The framers accepted in accordance with prevailing English thinking that the citizens' rights were best left to the common law in association with the doctrine of parliamentary supremacy.

Such thinking might have prevented the framers from implying rights to free communication, but it was not going to stop the Chief Justice (in a postmodern age) from doing so on the basis of the plaintiff's argument that representative government had as an essential component the right to free communication regarding political and public affairs.

Representative government was, then, the key to making an implication of free communication. It had been established by Sir Owen Dixon that the *Engineers* case did not prevent the drawing of constitutional implications.[104]

The Chief Justice has provided our most recent definition of representative government and, in doing so, has appeared to resort back to notions of classic republicanism.[105] It is unfair though to think of the Chief Justice's definition as backward-looking, for it ushers us into a new era of government accountability. His touchstone is the notion of government in the best interest of the people; representatives as fiduciaries; government according to the trust principle.[106] Chief Justice Mason defined representative government as: [107]

> Government by the people through their representatives. Translated into constitutional terms it denotes that the sovereign power which resides in the people is exercised on their behalf by the representatives.

---

102 *ACTV*, at 702.

103 *ACTV*, at 702.

104 *ACTV*, at 701.

105 On recent approaches to republicanism, see Michelman, F, "Traces of Self Government" (1986) 100 *Harvard Law Review* 17; Sunstein, work cited at footnote 19, at 1539.

106 See *WA Inc Report*, cited at text to footnote 25.

107 *ACTV*, at 703

This approach seems to explode the Diceyan notion that legal sovereignty resides in the Parliament while only political sovereignty resides in the people.[108] For Mason CJ the sovereignty resides in the people and they are the ultimate governors. The Parliament can no longer make or unmake any law to kill all blue-eyed babies for people are sovereign and, in this sense, control the power to make laws. Parliament is seen as a repository of power for the people and in no way can it be turned on the people, as it could theoretically be in Dicey's notion of parliamentary sovereignty. This is a sea change in our constitutional jurisprudence. We have thrown off the Diceyan paradigm for a notion of government by the people.

Chief Justice Mason's formulation extends to both the Parliament and the Executive in that Parliament and Ministers exercise their legislative and executive powers as representatives of the people. They are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose account they act. He added:[109]

> Indispensable to that accountability and that responsibility is freedom of communication at least in relation to public affairs and political discussion. Only by exercising this freedom can a citizen communicate his or her views on a wide range of matters that may call for or are relevant to political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none had been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the call of the people.

Communication is not one-way; the representatives must also explain their actions.

> Absent such a freedom of communication representative government would fail to achieve its purpose, namely government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and in that sense would cease to be truly representative.[110]

Free communication regarding political affairs is not just citizen to representative, but also citizen to citizen and/or interest groups. A swirling mass of political discussion makes the system go around.

In consequence, Mason CJ was willing to imply from the existence of representative government in the Constitution a

---

108 Dicey, work cited at footnote 7.

109 *ACTV*, at 703.

110 See footnote 109.

guarantee of freedom of communication on matters relevant to public affairs and political discussion.[111] Could the guarantee be regulated? Chief Justice Mason explained that the concept of freedom of communication was not an absolute. The guarantee does not postulate that freedom must always and necessarily prevail over competing public interest. Chief Justice Mason was happy enough for the guarantee to be restricted for a legitimate democratic purpose, although he said that it was far more unlikely to find the legitimate democratic purpose where the restriction related to ideas rather than process. The Chief Justice saw the issue as one of balancing the public interest in free communication against the public interest in fulfilling the end the restriction is designed to serve.[112] He said:[113]

> If the restriction imposes a burden on free communication that is disproportionate to the attainment of the competing public interest, then the existence of the disproportionate burden indicates the purpose and effect of the restriction is in fact to impair freedom of communication.

Chief Justice Mason, while giving some respect to legislative judgment, found the scheme as a whole invalid. His great concern was with the allocation of free time and the way it excluded outsiders.

Justice Brennan

Justice Brennan found a guarantee of freedom of communication regarding political and economic matters as necessary to the facilitation of representative government. He explained that the guarantee was not a personal right, like those existing under a Bill of Rights, the scope of which must be determined before legislative power can be ascertained. For Brennan J the guarantee is a limit on an already existing legislative power.[114] In an atmosphere of growing rights-consciousness it could be said that Brennan J's view will date in years to come, and one hopes it is only a placatory device which he will jettison in the future.

---

111 *ACTV*, at 704; such a guarantee had earlier been implied in Canada.

112 *ACTV*, at 705. Sunstein argues that concepts like permissible ends are public values generated through reflection and debate. These public values act as restraints on the raw exercises of political power which a pluralist system might generate. In fact, Sunstein argues that notions like permissible ends are (republican) bulwarks against a pluralist democracy (Sunstein, C, "Naked Preferences and the Constitution" (1984) 84 *Columbia Law Review* 1689, at 1729).

113 *ACTV*, at 705.

114 *ACTV*, at 708.

One of the most important parts of Brennan J's judgment in *ACTV* (at least for the purpose of this discussion) is his definition of the notion of proportionality:[115]

> To determine the validity of a law which purports to limit political advertising it is necessary to consider the proportionality between the restriction which a law imposes on the freedom of communication and the legitimate interest in which the law is intended to serve.

That is, if the restriction is not disproportionate to the objects to be achieved it is valid. In his assessment of proportionality, Brennan J was willing to allow a "margin of appreciation" to the Parliament. He explained that if Part IIID tangibly minimised the risk of political corruption the restrictions it imposed were proportionate to the object to be achieved, and that he was willing to defer to the judgment of Parliament as to whether corruption would be reduced, so long as it was reasonable. In this regard, Brennan J seemed to adopt a legislative deference, or unreasonableness, test of proportionality, much like he has done in the context of external affairs. However, how he practises law through this test is left to his judicial discretion which, in many cases, will coincide with the more liberal approach of the majority.

Justice Brennan thus held the scheme, other than provisions 95D(3) and (4), to be valid. Provisions 95D(3) and (4) were invalid because they purported to ban political advertisements at a State level. Pursuant to the implication Dixon J had drawn in *Melbourne Corporation v Commonwealth*,[116] Brennan J said the Commonwealth could not regulate free communication at State level; it was invalid because it fettered the functioning of the States.[117]

Justices Deane and Toohey

Justices Deane and Toohey held Part IIID to be invalid. They did not need to look at the way the Act related to States and Territories.[118] They did indicate that s 122 is encumbered by such an implication and were adamant the implication applies to discussion of all levels of government.[119]

---

115 *ACTV*, at 711.

116 (1947) 74 CLR 31.

117 *ACTV*, at 714.

118 *ACTV*, at 719.

119 *ACTV*, at 716.

Justices Deane and Toohey saw the important question as being whether[120]

> the purported interference with the freedom of political communication could be justified as being in the public interest for the reason that it was either conducive to the overall availability of the effective means of such communications or did not go beyond what was reasonably necessary for the preservation of an ordered and democratic society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society.

They seemed to be worried that a legitimate purpose was not being pursued, although they said the reduction of corruption was a legitimate end. It appears they decided that the means being disproportionate indicated the suggested legitimate ends of stamping out corruption and levelling the playing field were not being pursued.

Justice Gaudron

Justice Gaudron also found implied in the notion of representative government a freedom of political discourse. Paying homage to the foresight of Murphy J, Gaudron J intimated that a range of other freedoms may be implied including a full freedom of expression.[121] Along with the approach of Deane and Toohey JJ in *Nationwide* one sees in Gaudron J's judgment an inclination to interpret the Constitution in light of fundamental principles (for example, separation of powers, representative government, federalism and responsible government).[122] For Gaudron J the regulation of the freedom is contingent upon the law being "reasonably and appropriately" adapted to some end within power. What is reasonable and appropriate will, to a large extent, depend on whether the regulation is of a kind that has been traditionally permitted.[123] Justice Gaudron found the legislation to be invalid.

Justice McHugh

In holding Part IIID invalid, McHugh J said that regulation of the right to participate in the electoral process must not "be disproportionate to the object to be achieved".[124] He found the

---

120 *ACTV*, at 718.

121 *ACTV*, at 735.

122 *ACTV*, at 734 - 735.

123 *ACTV*, at 737. This is an interesting point as it suggests necessity may to some extent be defined by existing legal principles, which is a very Dworkian approach.

124 *ACTV*, at 744.

electoral process to be the generator of free communication on electoral issues.

Summary

In summary, the case shows how proportionality in government is demanded by the notion of implied freedoms. Where an implied freedom is in issue the government action must be proportionate; must be the necessary way to the legitimate end. Government action must be direct and precise, not unnecessary and vague.

Nationwide: The Dangerous Supplement is Once Again Resisted but in a Variety of Ways

Nationwide concerned s 299 of the *Industrial Relations Act* 1988 (Cth), which made it an offence to "by writing or speech bring a member of the Commission into disrepute". Nationwide News P/L published in the *Australian* newspaper an article by Maxwell Newton which stiffly criticised the Commission and its judges. Nationwide was prosecuted and, in defence, claimed the Act was invalid.

Chief Justice Mason

Chief Justice Mason chose to find invalidity by saying the Act was not a valid exercise of the incidental power implied in s 51(xxxv) of the Constitution. The Constitution, Mason CJ explained, contains implied incidental powers within each head of power, and an express incidental power stated in s 51(xxxix) which covers matters incidental to the exercise of the various powers vested in the three arms of government.[125]

Chief Justice Mason said that the validity of s 299 could only be sustained pursuant to the incidental power inherent in section 51(xxxv). To sustain such validity it must appear that there is a relevant and sufficient connection with the subject matter of the power.[126] Whether there is reasonable connection, Mason CJ explained, was not merely a matter for Parliament although the Court would give weight to the view of Parliament.[127] The Chief Justice explained that the characterisation process entails the finding of reasonable proportionality between the designated object and the means selected to achieve that object.[128] In this regard, Mason CJ seems to be referring to characterisation of an exercise of

125 *Nationwide*, at 660 - 661.

126 *Nationwide*, at 660.

127 *Nationwide*, at 661.

128 *Nationwide*, at 661.

inherent incidental power which is, by its very nature, purposive or core powers that are purposive, such as the defence power. If the characterisation is not of a purposive core power or an inherent incidental power, proportionality gives way to the sufficient connection and direct legal effect tests.[129] The direct legal effect approach allows the subject matter of a law to be determined by the direct legal effect of the statute and then the characterisation process is completed by asking whether the law has sufficient connection with a head of power in the Constitution. In characterising a law referable to a purposive head of power, the purpose (substance over form) of the statute is all important. Proportionality takes over from sufficient connection and direct legal effect. It replaces direct legal effect in that a law representing proportionate means to a constitutional purpose or end will evidence a statute pursuing an *intra vires* purpose. This latter inquiry looks to what the statute actually does in context (substance), rather than just the direct legal effect of the provisions in a vacuum (form).

Chief Justice Mason referred to *Davis* and said it established two propositions:[130]

> Firstly that even if the purpose of a law is to achieve an end within power it will not fall within the scope of what is incidental to the substantive power unless it is reasonably and appropriately adapted to the pursuit of an end within power, ie, unless it is capable of being considered to be reasonably proportionate to the pursuit of that end.
>
> Secondly in determining whether the requirement of reasonable proportionality is satisfied it is material to ascertain whether and to what extent the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object to be obtained and in so doing causes adverse consequences unrelated to the achievement of the object. In particular it is material to ascertain whether the adverse consequences result in an infringement of fundamental values traditionally protected by the common law such as freedom of expression.

The Chief Justice found that the purpose of s 299 was to protect the Commission and its members' reputations and to maintain public confidence in their determinations. He felt those purposes were *prima facie* within power, but found the means chosen lacked reasonable proportionality and were far too restrictive of the freedom of expression. Therefore no reasonable connection existed between the purpose within power and the purpose pursued. Two factors supported Mason CJ's conclusion. He found that s 299 went far beyond the protection offered by the law of contempt to the

---

129 See *Northern Suburbs Cemetery*, cited at footnote 101; see *Nationwide*, per Dawson J at 686 - 687, and per Gaudron J at 689.

130 *Nationwide*, at 662.

administration of justice in general. The second factor was that the impact on the fundamental freedom of expression was large and disentitling.

Chief Justice Mason suggested that proportionality is, to a large extent, defined by fundamental freedoms such as the freedom of expression.[131] What Mason CJ is saying here is that disproportion is clearly evidenced when an exercise of incidental power impinges upon a fundamental freedom unnecessarily. Note that in this case Mason CJ does not rely on an implied right to freedom of communication of political and public affairs, but rather the infringement of a common law freedom of expression. This suggests that the operation of proportionality in a *Davis* or *Nationwide* situation will be widely determined against a back-drop of fundamental freedoms.

Justice Brennan

For Brennan J the implication of a right to political speech meant that s 299 exceeded the legislative power of the Commonwealth. In essence, he suggests, without using the word "proportionality", that although the (threshold) objective was admirable the section "goes much further than is needed to achieve a proper protection of repute"; that is, the means were excessive.[132]

Justices Deane and Toohey

Justices Deane and Toohey held that the issue at stake was not one purely of s 51 characterisation, for s 51 was "subject to this Constitution". Implied in the Constitution through the notion of representative government was a right to freedom of communication. This right meant that s 299, although fine in purpose, was invalid because it disproportionately overrode the implied guarantee.[133] The judges never mentioned the term "proportionality" in invalidating the section; however, they went through the motions of a "means and ends" process and declared that s 299(1)(d)(ii) of the Act "goes far beyond" the achievement of a legitimate democratic purpose.

An interesting aspect of the judgment is that Deane and Toohey JJ suggested there are four principles (that is, federalism,

---

131 *Nationwide*, at 663.

132 *Nationwide*, at 671.

133 *Nationwide*, at 682 - 683. These judges suggested that the implied freedom of communication should also shape the exercise of State legislative powers as the States also have representative government as an underlying principle of government.

representative government, separation of powers and "arguably" responsible government) underlying our system of government which inform provisions of our Constitution.[134] If responsible government is an underlying principle then we may well see s 64 being given a much more democratic interpretation than it was in 1975 by Sir John Kerr.

Justices Deane and Toohey also suggested that the ultimate power of government resides in the people which, like Mason CJ's reformulation, suggests a rejection of Dicey dogma.[135] They followed a similar republican line which sees our system of representative government as driven by citizens who govern through voting and further participation in debate and reflection. Justices Deane's and Toohey's judgment is seminal in its discussion of the Australian democracy and will, along with Mason CJ's definition of representative government in *ACTV*, fuel debate as to the role of the people in government. Both approaches are republican in style and demand that people be considered the generators of government.

Echoing their thoughts in *ACTV*, Deane and Toohey JJ said that overriding the implication is more easily justified where the speech is controlled incidentally to the regulation of another subject, rather than where it is the focus or subject matter of the regulation.[136] The prevention of criminal conduct is a subject matter which may incidentally touch free speech. They said such regulation is more than likely valid while s 299, with its focus on political speech, needed stronger justification; that is, justification on the ground that it is needed to preserve order, peace or dignity in society.[137] Justices Deane and Toohey found that the section went far beyond protecting the Commission from unfounded and illegitimate attack and, therefore, the means were excessive. They consequentially denied the claim that a legitimate purpose was being followed.

Justice Gaudron

Justice Gaudron held the law to be within the ambit of s 51, but said that s 51 being "subject to this Constitution" was subject to an implied guarantee of freedom of political communication. That guarantee could be regulated to secure an end within power so long as the means were reasonably and appropriately adapted to that end.[138] She held s 299 to pursue an end within power, but that it was

---

134 *Nationwide*, at 679 - 682.

135 *Nationwide*, at 679.

136 *Nationwide*, at 682.

137 *Nationwide*, at 682.

138 *Nationwide*, at 589.

not proportionate in achieving those ends for the same reasons that Mason CJ had given in finding a lack of proportionality in his characterisation of the incidental power.[139] Justice Gaudron introduced proportionality in relation to the implied guarantee, while Mason CJ had used proportionality in characterisation of the exercise of an incidental power. For Gaudron J, proportionality only ever enters the characterisation process where purpose must be discerned, for example, in s 92 or s 117; or where purpose is relevant to s 51 characterisation. The fact that Gaudron J found s 299 to be within the purpose of the incidental power of s 51(xxxv) shows that her appreciation of purpose and proportionality in that context is much wider than that of Mason CJ. It is interesting to note that Gaudron J suggested that reasonable proportionality has a dual nature or function. It can discern whether the purpose in issue is a legitimate purpose in that disproportionate means can suggest you are pursuing a different purpose. The other side is that reasonable proportionality defines whether the means are appropriate to the achievement of a legitimate purpose.[140]

Justice McHugh

Justice McHugh, like Mason CJ, found s 299 to fail characterisation as an exercise of the incidental power of s 51(xxxv) because it was not reasonably proportionate to the object to be achieved, in that it unnecessarily impinged upon freedom of speech. Justice McHugh did not, and did not need to, draw an implication of freedom of communication of public affairs inhering in the Constitution because he resorted to the (common law?) concept of freedom of speech to define proportionality.

Summary of Approach

ACTV and *Nationwide* inform us as to how government power is to be exercised in the purposive realm of the legislative sphere. A law will not be characterised as one pursing a legitimate legislative purpose if it is disproportionate in execution; while one that is reasonably proportionate will be characterised as such.

That being so, clarity and uniformity is still some way off. The relation between implied constitutional freedoms and common law freedoms and their roles in defining proportionality remain uncertain. Justice Brennan is far more deferential in *ACTV* than in *Nationwide* and leaves one unsure as to how he will practise proportionality in the future. Justice Gaudron is deferential to legislative judgment where the incidental power is concerned, but

---

139 *Nationwide*, at 690.

140 *Nationwide*, at 689.

not when an implied freedom is in issue. Another slight difference is that Mason CJ does not want the substance of speech regulated, while Deane and Toohey JJ are reluctant to allow means that have as their focus the prohibition or control of speech relating to government. Nonetheless, the judgments represent perfect examples of proportionality in action.

The notion of a legitimate purpose remains a slightly clouded issue. However, it is expected that the High Court will be deferential to the legislature on the threshold legitimacy of purpose on most occasions, while being willing to concentrate on the proportionality (necessity) of the means.

In practicing the concept of proportionality the High Court will be subject to the criticism of those who, like Dawson J, believe Parliament should decide these issues. The response must be that legislators and administrators have to be made accountable if we are to be sure they are acting in the best interests of the people. As the traditional Westminster arguments are limited in effect, policing accountability initially must reside with the courts. In time, administrators informed by the ethic of proportionality will hopefully make judicial review unnecessary.

Lim: the Seducing of Core Characterisation and the Possibility of a Characterisation Revolution

As has been intimated, the majority of the core powers still remain outside the reach of proportionality. In a way, the implied (for example, freedom of communication) and express (for example, s 92) constitutional guarantees turn some of those core powers into purposive powers through the legitimate and proportionate regulation test, but that is still a limited innovation. In *Chu Kheng Lim v Minister for Immigration*[141] Gaudron J suggested that characterisation of the core of s 51(xxvi) involved the notion that the law be for the benefit of the race. She also suggested[142]

> that a law imposing special obligations or disabilities on aliens which are unconnected with their entitlement to remain in Australia and which are not appropriate and adapted to regulating entry or facilitating departure as and when required is not ... a valid law under s 51(xix) of the Constitution.

In a sense, Gaudron J is adopting a purposive approach to the aliens power in saying that the power can only be used to facilitate

---

141 (1992) 110 ALR 97.

142 Case cited at footnote 141, at 136 - 138. It may be that underlying Gaudron J's approach is a belief in many more implied constitutional guarantees. If this is so, the rise of implied guarantees will make the non-purposive core powers look much more purposive.

the purpose of regulating the entry and exit of aliens. Justice Gaudron purported to be treating the power as a "people" power which, she explained, is different from a subject matter or purposive power. A "people" power allows laws relating to people in a particular capacity. For example, laws regarding aliens are only valid if they relate to people in their capacity as aliens. That is, the laws must relate to things like entry into or exit from Australia by the person. Regulation of the alien regarding an activity that is not specific to alien status is *ultra vires*. This still seems very much a purposive exercise and, in fact, Gaudron J seemed to confirm this by reverting to proportionality rhetoric.

It is submitted that Gaudron J may have reached the same conclusion if she had simply said that laws designed to fulfil a government objective of facilitating entry and departure of aliens are disproportionate means when they unnecessarily tamper with the human rights or claims to respect of the alien. In this way, proportionality could redress the excessive legislative means while still preserving within Parliament a wide power over aliens.[143]

The seducing of the core power awaits further consideration. However, it is submitted that the ethic of proportionality (as necessity) needs to be reinforced as legal principle in the widest ambit so that the governments of Australia can be made accountable for their actions and be driven towards achieving the fundamental ethic of governing in the best interests of the people. As well, the full range of powers exercised by State governments which remain free (except to the extent that the implied freedom of communication and other constitutional guarantees apply to them) of a proportionality requirement need to be reassessed in light of the criterion of the best interests of the people. In a constitutional era where substance is privileged over form, the refusal to give proportionality a global operation represents an anomaly.

---

143 Emanating from *Mabo v Commonwealth No 2* (1992) 66 ALJR is talk of a multifaceted fiduciary duty to Aboriginal people which will shape (though not invalidate) the exercise of legislative power by remedying breach with compensatory damages. It builds on the classic private law notion of acting in the best interests of the beneficiary, much like Mason CJ's trust principle. Proportionality is likely to become an integral part of such a concept, as acting in one's best interest involves not unnecessarily hurting that person or his or her interests. Indigenous peoples have interests and rights in their culture and heritage which should not unnecessarily be trampled upon by government. For a brief overview of current developments, see Behrendt, J, "Fiduciary Obligations" (1993) Vol 3, No 63 *Aboriginal Law Bulletin* 7.

Colonising the core powers in the name of proportionality (as necessity[144]) would appear to be theoretically possible in light of *ACTV* and *Nationwide*. Core powers that are not purposive are said to be subject matter powers (and non-purposive). This is where the problem starts. We know after the free communication cases that people govern through representatives in the best interests of the people - what may be called the republican ideal. With this in mind, the next logical step is to say that the Parliament is given power over various subject matters so that collective action can further the needs of the people. The people give Parliament the power in its capacity as fiduciary. Therefore it is but a short step to say that power over a core subject matter is given for the *purpose of governing in the best interests of the people.* For example, the aliens power is given for the *purpose* of governing that subject matter in the best interests of the people; and the best interests of the people are not achieved by the disproportionate means of unnecessarily restricting the liberty of aliens.

Purpose then becomes a dominant theme in characterising the core, and with purpose must come proportionality. If the Parliament unnecessarily tramples on the freedoms of citizens in following the purpose of governing the subject matter in the best interests of the people, then the law cannot be characterised as one in pursuit of that purpose.

Where a traditional purposive power is in point, it is suggested that two purposes are really at play but are subsumed into one in most circumstances. This duality of purpose should not trick us into believing that core subject matter powers do not have purposes. In the case of a traditional purposive power (for example, the defence power), the inquiry is whether the Parliament is governing in the best interests of the people (the base purpose) the defence of the nation (the power purpose). Traditionally, power purpose has been the focus and, practically, this is acceptable because if one uses proportionate means to pursue defence one is (as far as the courts should determine) pursuing defence in the best interests of the people (the base purpose).

Determining whether Parliament has acted in the best interests of the people is primarily a political matter, and one for the Parliament and the people to generate. It is of no doubt that the further development of openness, accountability and participation would reinforce this trust principle. However, it is a principle of law that disproportionate governmental action is not in the best

---

144 The colonising of the core powers in the name of proportionality in the strict sense (or its equivalent legitimate object) would be a much more difficult process.

interests of the people. The people own the political process and it is idle for the law to sit by and watch the process used against the people. Thus government action that unnecessarily tramples on people's rights is, in a very strong sense, not in the best interests of the people and, if not monitored, could cause major damage to the whole political process. An arbiter is needed to correct the imbalance. Until Parliament removes itself from the Diceyan paradigm of parliamentary supremacy and infuses its work with the ethic of proportionality, people are at an unnecessary disadvantage.

As things stand, we have no Bill of Rights, nor do we have much reassessment of Dicey's ideas. The High Court is the logical arbiter and has shown itself willing in 1992 to take on that role. It has launched itself into a role of reshaping the ethic of government and of giving the Diceyan paradigm a fair hiding. The Court has been criticised in this regard but, in our system of government, until the impure constitutional theory we have inherited works itself pure through openness, accountability, participation and institutionalisation of the ethic of proportionality, the High Court is the most immediate and obvious reformer. The governments of this nation have been reluctant to reform the parliamentary supremacy concept and thus any criticism of the Court should keep this in mind. It is all too easy to say "leave it to Parliament to do", because Parliaments are disinclined towards, or uneducated in, the ethic of proportionality. And as for "leaving it to the people" to change, that is what the reforming process is trying to make possible.

The High Court should take on this role of infusing proportionality into the core power, but act sparingly and only in extreme cases of abuse. This is because it is necessary that a government be left a wide discretion on how to govern. The approach must see the High Court willing to strike down laws where the overriding of strong claims to respect (for example, freedom of expression) are in a causative sense *unnecessary* to the facilitation of the government objective; that is, *unnecessary* for government of the subject matter in the best interests of the people. This is not a reformulation of sufficient connection. Sufficient connection operates at a more specific level. This test is all about removing from the Parliament government over the subject matter in cases where interference with the citizen is extremely unlikely to assist, and unnecessary to achieve, the end of government in the best interests of the people. This could be a dangerous blue-print for a Court and a Parliament of different political minds, but it is up to Parliament to reform its own ways or be brought into line with the ethic of government in the best interests of the people. A Bill of Rights may cure some defects. However, a flexible approach in which governments institutionalise the ethic of proportionality and

are open to the rhetoric of claims for respect is perhaps more desirable. The suggested approach would not make any particular government objective unattainable, but merely require government legislative means be necessary to achieving the objective.[145]

The foregoing approach does appear to conflict with the High Court's decision in *Union Steamship Co of Australia P/L v King*[146] where it was said that the words "peace order and good government" are a bestowal of plenary power unencumbered by any notion of limitation based in public interest. Such an approach, which is Diceyan in flavour, is supported by precedent. However, the notion of representative government that inheres in our Constitution prevents unequivocal acceptance of the approach. The precedents referred to by the High Court were informed by the Diceyan paradigm, yet we know, after the free communication cases, that people govern through representatives; representatives are fiduciaries of a public trust. They are to act in the best interests of the people. Disproportionate action can never be in the interests of the people and thus "peace order and good government" cannot override our notion of representative democracy to authorise a lack of proportionality in the government of core subject matters. People own s 51, not the Parliament. People are guaranteed the right to proportionate government action pursuant to representative democracy, a concept that underpins s 51 - the free speech cases tell us that. It is conceded that what is in the best interests of the people is primarily political, but with the advent of proportionality it must be accepted that the Court can intervene to invalidate laws for the peace, order and good government if the laws breach this legal and ethical principle. The challenge to a Diceyan interpretation of peace, order and good government must be issued.

Under the foregoing approach s 51 would still be "subject to this Constitution" in that express and implied guarantees would operate to cut back legislative power. It is interesting though that if s 51 powers are seen to be given for the purpose of acting in the best interests of the people, then a valid exercise of those powers will give internally (through s 51) a result the guarantees present externally. The difference seems to be that the legitimacy of purpose can be challenged in relation to regulating guarantees, while the legitimacy of the government objective in s 51 is seen to be a purely political question.

---

145 On the other hand, the stronger proportionality in the strict sense/legitimate objective approach could invalidate a government objective.

146 (1988) 166 CLR 1.

No matter how far proportionality spreads, the ultimate solution now that the courts have raised our awareness is to get governments thinking about what is ethical, efficient and effective.

Part III: Proportionality and Administrative Law: the Next Frontier

It is important to clarify at the outset that reference to proportionality in recent English administrative law writings is to a concept encapsulating all three elements of the German approach.[147] These writings tend to blur the distinct components of proportionality, yet they are committed primarily to a doctrine which balances rights against the collective's interest; that is, proportionality in the strict sense. It is suggested that the Australian use of proportionality in administrative law, while only still developing, is based more on proportionality as necessity. This is not to say that proportionality in the strict sense should not be invoked. However, such a proposal (which is discussed later) requires a deep rethinking of the basis of administrative law.

As was previously explained, the exercise of power by administrators has traditionally (though not totally[148]) been contingent on the exercise of parliamentary power, less so though in the area of procedural fairness. Thus if parliamentary power is to be exercised proportionately, do we need to infuse the ethic of proportionality into administrative law?

It must come to pass that legislation (which itself is required to be proportionate) enabling the Executive to exercise governmental power be construed as not permitting disproportionate exercise of the power. In this structure the disproportionate exercise of power by the executive arm of government could never be regarded as legitimate or authorised. This could be called *source-based* proportionality and, in appropriate circumstances, would generate a claim for simple *ultra vires*. The problem with this approach is that not all legislation is subject to a proportionality guideline and thus, in many cases, restriction of the Executive would be unlikely. Legislation made pursuant to a core power can be disproportionate in itself or confer power on the Executive which can potentially be exercised with a lack of proportionality. Thus administrative law

---

147 On this topic, see Craig, P, *Administrative Law*, London, Sweet and Maxwell, 2nd ed, 1989, at 298 - 300; Jowell and Lester, work cited at footnote 31, at 51 - 72; cf the specific use of the term proportionality by Denis Galligan in *Discretionary Powers*, Oxford, Oxford University Press, 1986, at 330 - 332 and 368 - 369.

148 Administrators take non-statutory powers from prerogatives, common law, contract.

needs, out of considerations of accountability, to have some understanding of a *status-based* proportionality across its spectrum which, in appropriate circumstances, would generate a claim for extended *ultra vires*. It might be asked why the Parliament is to have unlimited power in the core areas, yet administrators are to be restricted in the execution of this power. Fine distinctions (based on the Westminster tradition and direct accountability of parliamentary representatives) can be drawn, but the most principled response is that proportionality as a general requirement of administrative action cannot be fully justified until the source of the stream is purified; that is, until proportionality infects all legislative powers.

Paul Craig has suggested that Dicey constructed administrative law through a framework which saw a *parliamentary monopoly* over government power. This was a vision of a unitary democracy in which everything theoretically passes through Parliament. Craig, in an attempt to infuse the rhetoric of pluralism into administrative law and theory, wishes to explode Dicey's view. Craig suggests that legislating, and governing in general, is a multifaceted activity which stretches beyond Parliament and into the realm of private power. For Craig, the notion that administrative law is all about the intent of Parliament is deficient, especially in light of the fact that such theory premises the basis of judicial review on the theoretical control of Parliament over the Executive through ministerial responsibility.[149] Even if we agree with Craig that Dicey's view of administrative law is awry, then source-based proportionality should still stand as a simple *ultra vires*-type restraint on administrative action. It might be argued that if proportionality were to be applied to legislation generally, then source-based proportionality would represent constitutional principle founded in the best interests of the people and thus would influence any type of administrative action. Therefore Craig's attacks on Dicey would change little about source-based proportionality which is clear evidence of the intention of Parliament (or, more generally, the people through constitutional principle) on how executive power is to be exercised in any particular case.

If source-based proportionality is not sufficient then status-based proportionality is the key. Peter Bayne has recently suggested that judicial review on the basis of extended *ultra vires* is based on common law (perhaps constitutional) principle, rather than any imputation of statutory intent.[150] This is an interesting approach and one that would fit very well with a republican thesis

---

149 Craig, work cited at footnote 147, at 4 - 33.

150 Bayne, work cited at footnote 6.

of government. It could be said that the common law basis of judicial review is an avenue through which the exercise of administrative power is assessed in light of the best interests of the people. The courts take on the non-political role of determining the legality of administration; for legitimate administration is in the best interests of the people in that it assists participation and accountability and generates respect for the citizen. The acceptance of such an approach depends upon seeing proportionality as a constitutional fundamental governing the exercise of administrative power. However, if this step can be taken there is no reason why all legislation should not be informed by proportionality, and this leads back to source-based proportionality. Or is it that status generates a unique constitutional principle? These are questions for the future, but perhaps the rise of review of non-statutory public and private powers will add weight to the development of a constitutional fundamental regarding status-based proportionality.

The Electoral and Administrative Reform Commission (EARC) (Qld) Bill of Rights (hereafter referred to as the "EARC Bill") requires the Executive to observe the fundamental rights embodied in the Bill.[151] At common law such a position seems to be slowly developing (at least in regard to delegated legislation), although only Murphy, Brennan and Deane JJ have given it much credence (in the proportionality as necessity sense) before 1992.[152]

Tanner: the Mood is Changing, at Least in Dissent

All of the judges in *South Australia v Tanner*[153] held that the making of delegated legislation is governed by reasonable proportionality.[154] However, Wilson, Dawson, Toohey and Gaudron JJ, in their judgment, practised a very watered down view of proportionality. They said that (delegated) legislative judgment must be given deference and that the delegated legislation must be so lacking in proportionality as not to be a real exercise of power to be invalidated.[155] Justice Brennan, in the only other judgment, said that grants of power to make delegated legislation should be

---

151 Clause 4(1).

152 One prominent question for proportionality in administrative law concerns the use of blanket prohibitions with or without a power to lift the prohibition in certain circumstances. A vague discretion to include a person within a prohibition, even though it may be invalidated on exercise, also has the potential to offend proportionality.

153 (1989) 83 ALR 631.

154 On this notion generally, see Bayne, P, "Reasonableness, Proportionality and Delegated Legislation" (1993) 67 *Australian Law Journal* 448.

155 (1989) 83 ALR 631, at 636 (hereafter "*Tanner*").

construed narrowly because Parliament should be seen as the primary lawmaker in a democracy.

Proportionality is applied forcefully by Brennan J, but he gave it no clear defining factor. His approach though is much more liberal and less deferential to (delegated) legislative judgment. From the practice of law in the two judgments one discerns in Brennan J a commitment to proportionality while the majority are looking for an extreme lack of proportionality. The whole practice of law evidenced by the judgments shows Brennan J's concern for proportionality as a bulwark of freedom. The majority, on the other hand, did not dispel the argument placed by Doyle QC that so long as there is sufficient nexus between the means adopted and the ends to be achieved, proportionality is in the discretion of the Governor. This is simply not a persuasive argument. Proportionality belongs to the people, not the government; after all, people govern - they are sovereign.

The departure point between the majority and minority is evidenced in the following pronouncement by Brennan J:[156]

> If the directness and substantiality of the connection between the likely operation of the regulation and the statutory object is so exiguous that the regulation could not reasonably have been adopted as a means of fulfilling the statutory object, the regulation is invalid. Moreover it must be borne in mind that the fulfilling of the statutory object is a limitation on the power to make the regulation. A regulation which is so widely drawn as needlessly to embrace a field of operation which is quite unconnected with the statutory object cannot reasonably be adopted in the exercise of power so limited.

Justice Brennan's emphasis on the notions of width and necessity echoes what we know, after the free speech cases, is our doctrine of proportionality. Contrast the majority, who required that "the regulation must be so lacking in proportionality as not to be a real exercise of power".[157] The majority went on to decide the case by saying that "we are unable to conclude that it was not reasonably open to the legislator to determine all aviaries ... should be absolutely prohibited in furtherance of the stated purpose".[158] This rhetoric is very different from that of Brennan J, who employed Dixon J's approach in *Williams v Melbourne Corporation*[159] in light of Lord Diplock's judgment in *McEldowney v Forde*[160] which said

---

156 *Tanner*, at 645.

157 *Tanner*, at 636.

158 *Tanner*, at 636.

159 (1933) 49 CLR 142.

160 [1971] AC 632.

that "reasonably adapted to achieve purpose" includes an assessment of the effect of the regulation on lawful and property rights of citizens which neither cause nor contribute to the mischief being remedied by the regulation. The majority were happy enough if the regulation would do the job; they were not bothered to see if liberty and estate were unnecessarily impinged upon. The practice of law is completely different and, as to this, one only needs to point to the fact that Brennan J saw the regulation as too wide and unnecessarily impinging upon freedom,[161] while the majority just ignored the draconian effect of the regulation on liberty and estate. Justices Brennan and Murphy had displayed a similar dislike for disproportionate regulations in *Foley v Padley*.[162]

Peter Bayne suggests that in *Tanner* Brennan J followed the same test as the majority.[163] At face value this is correct, but in practising the concept Brennan J did not appear to follow the majority. He formulated a test which gives a primary focus to the unnecessary trampling of fundamental rights and freedoms. The majority were still stuck in a parliamentary sovereignty mode and the "so unreasonable" test.[164] It might be suggested that Brennan J was still operating under a test of unreasonableness as traditionally known; however, he, unlike the majority, included respect for the citizen as one of the criteria determining unreasonableness. It is fair to say that Brennan J, although still somewhat deferential to (delegated) legislative judgment, has moved towards a theory of administrative proportionality. This is a theory that requires the making of delegated legislation which does not trample unnecessarily on freedoms of the citizen. Peter Bayne, likewise, anticipates a theory of proportionality developing in administrative law.[165]

The two types of rights that define proportionality in the making of delegated legislation are the right of the individual to legislative government by Parliament, unless clear delegation is made; and the rights of the individual to such things as liberty and expression, so long as that does not impede collective goals or rights of other individuals. It is against those rights that proportionality

---

161 *Tanner*, at 646.

162 (1984) 58 ALJR 454, at 459 and 461 - 464. After the free communication cases *Foley* would arguably be a source-based proportionality case, while *Tanner* would most likely remain a status-based proportionality situation.

163 Bayne, work cited at footnote 154, at 450.

164 The two are not the same, cf Akehurst, M, "The Application of General Principles of Law by the ECJ" [1981] *British Yearbook of International Law* 29.

165 Bayne, work cited at footnote 154, at 452.

should be measured in administrative law. The right to legislative government by Parliament means that delegated legislation must not unnecessarily impinge upon the individual's right to government by Parliament. Just as important is that this characterisation process (which is what Brennan J called it) be set beside the rights of the individual to such things as liberty and expression.[166] Although the matter is by no means resolved, it would appear that courts would be more vigorous in enforcing proportionality where both rights are in question.

Magno: Rights Strike a Blow But Once Again in Dissent

In *Minister For Foreign Affairs and Trade v Magno*[167] Einfeld J endeavoured to introduce a wide approach to proportionality in the making of regulations. The case concerned protests by Timorese people at the Indonesian Embassy in Canberra and the placing of white crosses on the Embassy lawn. The crosses were removed pursuant to a Minister's certificate given under the relevant regulations (*Diplomatic Privileges and Immunities Regulation* (Cth)). The judge at first instance, Olney J, had held the regulations invalid because they allowed the issuing of a certificate in cases where the objects were not, in fact, a threat to the dignity of an embassy. His Honour held that the subjective opinion of the Minister could extend the objective operation of the Act beyond permissible boundaries.

On appeal, Gummow and French JJ (making up the majority) held that the issuing of the Minister's certificate was constrained by the purpose of the Act and thus the apparent excessive or vague operation of the regulations was avoided. The regulations were valid. But should not the exercise of administrative power, where it has the potential to impinge upon fundamental freedoms, be more precisely defined?[168]

Justice Einfeld did not agree that the regulations were valid and departed from the majority primarily on the ground that the regulation was too wide in ambit, regardless of whether the Minister's discretion could be confined.[169] He held that the regulation itself was disproportionate to the object to be achieved. In a passionate judgment Einfeld J explained that the purpose of the

---

166 Professor Bayne has suggested that a notion of proportionality in administrative law is likely to be rights-focused, especially in light of *ACTV* and *Nationwide* (see work cited at footnote 154, at 452).

167 (1993) 112 ALR 529 (hereafter "*Magno*").

168 The *Legislative Standards Act* (Qld), s 4 would seem to require such; see also, Murphy J in *Foley*, cited at footnote 162.

169 *Magno*, at 560 - 565.

regulations was to protect the dignity of the Embassy; a domesticated international obligation. The problem Einfeld J found was that the regulation, in preventing the placing of small white crosses on an Embassy lawn, was disproportionate in achieving its object. Justice Einfeld said:[170]

> ... the regulations permit in my opinion an unreasonable curtailment of freedom of speech so as to lack reasonable proportionality to their enabling purpose required before this court can strike them down.

Justice Einfeld also reasoned that the source Act (*Diplomatic Privileges and Immunities Act* 1967 (Cth)) displayed an intent to minimise, as far as possible, the infringement of freedom of speech and therefore he concluded that the regulations, in protecting the Embassy at the expense of freedom of speech, were not authorised by the Act in a simple *ultra vires* sense.[171]

On the proportionality reasoning, Einfeld J appears to be saying the regulations were for an authorised purpose but were disproportionate means to achieve that purpose. That is to say, in effect, they were not authorised in an extended *ultra vires* sense by the enabling purpose.

The proportionality approach is, in essence, that the end to be achieved (that of preserving the dignity of the Embassy) was pursued by excessive and unnecessary means which impinged upon the fundamental freedom of speech. The approach of Einfeld J was very similar to the High Court's approach to proportionality at a constitutional level. It seems, though, if free speech defines proportionality in this instance it is more appropriate in light of *ACTV* and *Nationwide* to say that the Act in its proportionality must be read down so as not to authorise unnecessary infringement of free speech.

Justice Einfeld obviously thought the Act could not authorise (in a simple *ultra vires* sense) the removal of the crosses, but nonetheless introduced the idea of proportionality (an extended *ultra vires* notion) in assessing the validity of the regulations, at least as an alternative basis of decision. The reasoning displays the confusion that may prevail over the meeting or disjuncture of proportionality at constitutional and administrative law levels. Assuming an implied freedom to communicate on public affairs existed, the Act would have had to have been for a legitimate purpose and its means would have needed to be proportionate. If the Act was made in this fashion its regulation-making power would have to be construed only to permit regulations that fit within the

---

170 *Magno*, at 580.

171 *Magno*, at 572 - 573, 575 and 580 - 581.

proportionality of the Act. If the source had to be proportionate the stream likewise must be proportionate; this is a notion of simple *ultra vires*.

For example, if the Act must respect free communication on public affairs, it simply cannot be read as authorising a disproportionate infringement of that freedom through regulations or discretion. Thus, in *Magno*, if the Act had to respect free communication (that is, not unnecessarily trample on it), then regulations unnecessarily trampling on it would be invalid as not being authorised (in a simple *ultra vires* sense); not because they were disproportionate in execution (an extended *ultra vires* notion), but because they lacked the proportionality required by the Act. The point to note is that proportionality in this case was generated from the source, whereas in *Tanner* it was generated by the fact that power is being exercised by the executive arm of government. If proportionality becomes a criterion for all legislation then proportionality in administrative law is apt to become source- or enabling purpose-based (simple *ultra vires*), rather than contingent upon the (administrative) status of the power holder (extended *ultra vires*). The role of proportionality in defining the external affairs power could also possibly have required the Act to be proportionate in its regulation of free speech.[172]

It seems that the majority differed in approach in that they regarded the use of the word "object" in the regulations as being *intra vires*. Justice Einfeld, on the other hand, seemed to say that the types of objects at hand could not be removed as they were less offensive than free speech which the treaty and its domestic implementation seemed to preserve. Thus, to Einfeld J, the regulation is beyond power in making the white crosses subject to removal as the Act never meant to authorise such. The majority said the white crosses could be removed if they threatened the dignity of the Embassy and that the Act did authorise such. In the end, protecting free speech or the international obligation to do so gave Einfeld J a determinant for proportionality of the Act which then informed the enabling purpose of the regulations.

Unreasonableness

In Europe, proportionality has long been a principle regulating the exercise of administrative discretion, especially in Germany.[173] In the EC, administrative action has also been regulated by the

---

172 In the *Tasmanian Dams* case, cited at footnote 57, Deane J appeared to use external affairs generated source-based proportionality to assess regulations. On that occasion, the regulations were valid.

173 Schwarze, work cited at footnote 40, Chapter 5.

concept of proportionality.[174] A description of the principle adopted by the Committee of Ministers of the Council of Europe in 1980 read:[175]

> *Proportionality.* An appropriate balance must be maintained between the adverse effects which an administrative authority's decision may have on rights, liberties or interests of the person concerned and the purpose which the authority is seeking to pursue.

This test seems to include proportionality in the strict sense. In terms of Australian administrative law it seems that proportionality will initially surface under the rubric of necessity. However, it is possible that an administrative action which, although it is a necessary means, may be so oppressive as to warrant classification of *ultra vires;* the action being, on the traditional approach, beyond the presumed intent of Parliament.[176] In light of the push to see judicial review as a product of the common law, proportionality in the strict sense will need to rise from a common law basis. It will most likely only do this where a constitutional guarantee is in issue. In such a case the source-based proportionality will govern the situation and the legitimacy of the object of the Act will require proportionality in the strict sense. It is unlikely that status-based proportionality will be held to be in the strict sense; however, the courts may decide this is justified where oppression is extreme, based on the notion of respect for common law values. This approach goes far towards blurring legality and merits, and law and politics. If it is not to be undertaken at a constitutional level, the distinguishing factor at an administrative level must originate purely from the status and institutional context of the decision-maker.

For administrative lawyers the task is now set to shape the application of proportionality to the exercise of executive power. In *Tanner* and *Magno* the exercise of power in question had been in the form of delegated legislation, but this does not mean the principle cannot be applied, as in Europe, to the exercise of administrative discretion, thus creating a new head of *ultra vires.*[177] In developing the new principle one needs to realise that the *Wednesbury* unreasonableness test is far more deferential to the act of government and is a product of the days of Diceyan parliamentary

---

174 Schwarze, work cited at footnote 40, at 718 - 719.

175 Recorded in Supperstone, M and Goudie, J, *Judicial Review,* London, Butterworths, 1992, at 136.

176 *Kruse v Johnson* [1898] 2 QB 91, at 99-100.

177 See Bayne, work cited at footnote 154, at 452.

sovereignty.[178] The proportionality principle confines the exercise of power to the necessary; it avoids unnecessary infringement of freedoms (although, as Bayne argues, the two tests may well merge or have merged[179]). As Bayne points out, some decisions under the unreasonableness test, especially where a fundamental freedom was concerned, come close to the proportionality test.[180] Take, for example, Brennan J's approach in *Foley v Padley*[181] in finding Council by-laws were not within power because the opinion needed to be held by the Council to allow it to make the by-law was not one that could reasonably be held. This finding appeared to be facilitated by the excessive intrusion upon fundamental freedoms. But was Brennan J only demanding the regulations be specific to meet *Wednesbury* unreasonableness, or was he asking for specific and proportionate regulations? Justice Murphy seemed to follow what we now know as proportionality, saying the regulations must not unnecessarily entrench upon freedom of expression unless this is specifically authorised by the Act.[182]

The recent case of *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd*[183] indicates that there will be problems introducing proportionality in place of unreasonableness. In this case Beaumont and Hill JJ seemed to equate proportionality with unreasonableness. This, it is submitted, arises from the confusion that surrounds the basis of proportionality. If proportionality is determined primarily by a claim for respect based in humanity, then it is easy to see from the free speech cases and Brennan J in *Tanner* and *Foley* that proportionality is much more alert and vigorous in judicial review than is unreasonableness. Proportionality in this instance becomes a positive ethic of government. Contrast the situation in *Austral Fisheries*, where the administrator's actions (not being certain whether they were legislative or administrative) impinged upon a corporation's claim for a commercial privilege or respect in relation to a common resource, viz, orange roughy. As the commercial activity of any country in this age is dominated by government regulation it may be that proportionality is a redundant term in this area, and that unreasonableness is more appropriate as it allows greater deference

---

178 Supperstone and Goudie, work cited at footnote 175, at 136, where it is suggested that the *Wednesbury* test is much narrower than the European proportionality approach.

179 Bayne, work cited at footnote 154, at 454. On the relationship between unreasonableness and existing heads of *ultra vires*, see Craig, work cited at footnote 147, at 281 ff.

180 Bayne, work cited at footnote 154, at 449 ff.

181 (1984) 154 CLR 349, at 371 ff.

182 Case cited at footnote 181, at 362.

183 (1993) 112 ALR 211.

to Parliament. The final solution must come down to how we value the right to trade, and commercial respect in general, and whether we see a need to protect this through the operation of proportionality. Some claims to commercial respect are guaranteed by the Constitution (eg, s 92) and proportionality governs their existence. However, in the case of individuals, as opposed to corporations, such a right to trade is integral to federalism which, on our Australian view, is integral to human development. The point to be made is that the vague equating of proportionality and unreasonableness in *Austral Fisheries* does little to help the advent of a dynamic new doctrine. It is suggested that disproportionate action, whether it impinges on commercial or human interests, is unethical. Yet it would be understandable if the courts were to pursue human-based proportionality more vigorously than commercial-based proportionality. However, if this is done, courts must explain precisely what they are doing so as to preserve the concept of proportionality.

In the United Kingdom the House of Lords has recently shown equivocal support for the adoption of proportionality (in the strict sense and as necessity) as a criterion governing the exercise of administrative power.[184] The judgments, however, paid little regard to the different aspects of proportionality and, although proportionality in the strict sense was mentioned, the case seemed more to concern the validity of a blanket prohibition, which is the domain of proportionality as necessity. The apprehension towards the use of the proportionality requirement in administrative law is because some see it as involving judicial officers in merits review; thereby breaching the separation of powers doctrine.[185] However, the doctrine of proportionality as necessity is not merits review but rather review of legality; the legality of unnecessarily infringing fundamental freedoms. It is an ethic of how to exercise government power. The use of proportionality in the strict sense, on the other hand, does shade into merits review.

It is conceivable that proportionality (as necessity and perhaps eventually including in the strict sense) will become an overarching principle or ethic of the exercise of administrative (and delegated legislative) power. It is an ethical and legal principle that underlies many of our current heads of review and would work

---

184 *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

185 Supperstone and Goudie, work cited at footnote 175, at 136-137; see also Allars, M, *An Introduction to Australian Administrative Law*, Butterworths 1990, at 190 - 193.

well (once institutionalised as an ethic of government) as the touchstone of a green light theory of administrative law.[186]

Part IV: Respect the Definitive Aspect of Proportionality

As the Chief Justice explained in *ACTV*, the determination of proportionality in the strict sense is one of balancing the public interest in free communication against the public interest in the end the restriction is designed to serve.[187] The determination of proportionality according to the necessity principle involves locating interests of the citizen that have been unnecessarily trampled upon.

Either way, it is suggested that the crucial determinant will be the right or freedom or interest of the citizen which demands respect. This is necessitated by the parliamentary supremacy framework and tradition which *prima facie* sees the exercise of parliamentary power as the pursuit of a legitimate public interest. The rights side of the coin, then, is the one that needs to infiltrate the system and do the convincing and thus it is to the rights side of the coin that close attention needs to be given. This seems to be the approach taken in Europe, where the concept has been used extensively.[188]

The implied and express constitutional guarantees[189] will instil in the exercise of many governmental powers a legitimate purpose and proportionate means (in the strict sense) test. Besides these constitutional guarantees, and any we may discover in the future, proportionality (as necessity) will need to take definition from the rights, interests and freedoms that society constructs and recognises.

---

186 On the difference between red and green light theories, see Harlow, C and Rawlings, R, *Law and Administration*, London, Weidenfeld and Nicolson, 1984, Chapters 1 and 2; see also, Arthurs, H, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osgoode Hall Law Journal* 1.

187 *ACTV*, at 705.

188 Schwarze, work cited at footnote 40, at 678 - 679; see the specific example of Germany, at 688 - 689; and the approach in the EEC, at 719 ff.

189 I would include in this an implied guarantee to government by the appropriate entity of the federation which is arguably an emanation of the *Melbourne Corporation v Commonwealth* implication and an emerging yet undefined theory of our federal system; one I suggest could be fruitfully based in republican theory. See also *Leeth v Commonwealth* (1992) 107 ALR 672, at 692.

Without an express Bill of Rights the process through which claims to rights can be asserted, and the notion of what are legitimate claims for rights, demands close attention. In essence, the process will need to determine which claims to respect the citizen can make and sustain through the doctrine of proportionality. Respect, a concept used by Rawls[190] and Dworkin[191] as foundational to their theories, embodies the essence of what the citizen is demanding. As far as "federalism"-based proportionality is concerned, respect can still be seen as a touchstone, for the citizen requires respect for rights born out of the federation. The s 92- (free trade) based claim for respect is primarily commercial, albeit with a human element. The notion of respect could, with some imagination, also be used in relation to corporations which will demand commercial respect through federalism-proportionality and proportionality emanating from "commercial" rights of companies. Respect is still the motivating concept but with corporations that respect is solely commercial in orientation. The focus of this article is on the human aspect of proportionality which, at this stage, promises to generate monumental changes in constitutional jurisprudence. It will be the case that corporations which receive commercial benefit from citizens' having human rights or claims will seek to enforce those human rights in the courts and thereby legitimately secure the commercial benefit. This is what occurred in *ACTV* and *Nationwide*. Individuals may also have claims for commercial respect which, ultimately, have a human aspect. The point is though that unnecessary government action is to be discouraged in all facets, but it may be that deference to legislative judgment is preferable in cases of corporations' demanding respect for claims to commercial respect generally. This is something the courts need to address in the immediate future: is proportionality just a human rights doctrine; or does it arise purely from unnecessary action whether that has human or commercial consequences?

The process of asserting respect in the postmodern age sounds as though it will unavoidably entail practising law according to some of the themes of postmodernist approaches to law. Experience and circumstances will inform courts as to how the rights and claims are to be accommodated; while administrators executing law will need to consider claims for respect based in experience and situation. Legislators will still be set the rationalist task of making laws that are attuned to accepted forms of respect, yet they too will, on different occasions in different types of laws, be informed by different claims for respect.

---

190 Rawls, J, *A Theory of Justice*, Oxford, Oxford University Press, 1971.

191 Dworkin, R, *Taking Rights Seriously*, London, Duckworth, 1977; Dworkin, R, *Law's Empire*, London, Fontana, 1986.

Rights, Freedoms, Interests and Claims

In the proportionality scheme rights are seen as positive ideas or tools that help the collective or community function while respecting people. In Australia we have no Bill of Rights and thus rights are left to the implied and express guarantees in the Constitution and the so-termed common law rights and freedoms. The flexibility of our system is dangerously supplemented by rights being contingent upon what public officials will recognise. It is out of such a system though that Australians must take the opportunity to claim rights through debate, court action and lobbying. In a sense, our system is postmodernist because it allows us to influence the exercise of power and its respect for citizens through a continual process of argumentation and lobbying; even though for outsiders the way in is particularly difficult without an invitation written in stone. It is uncertain how rights will be asserted in the future; be it through statutes or the more flexible common law. However, for now, we must take the system we have and work it to its best ability by claiming respect at every opportunity. The following discussion seeks to inform as to how rights may be perceived and asserted in our democracy.

Martha Minow has given us a thought-provoking concept of rights. Although we in Australia are just discovering a rights discourse the Americans were dealing with a legal conception of rights just after the First Fleet landing at Botany Bay. Thus it is not surprising that rights have recently been the subject of fierce criticism in the United States from both the left and right. Minow is an advocate for a regenerated rights discourse. She, like Patricia Williams,[192] sees rights as necessary for the achievement of insider status by outsiders. If outsiders are to gain reprieve from violence in the public or private sphere a rights discourse must flourish.[193] Minow talks of rights in the following terms:

> "Rights" can give rise to "rights consciousness" so that individuals and groups may imagine and act in light of rights that have not been formally recognised and enforced. Rights, in this sense, are neither limited to nor co-extensive with precisely those rules formally announced and enforced by public authorities. Instead, rights represent articulations - public or private, formal or informal - of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted. I mean, then, to include within the ambit of rights discourse all efforts

---

192 *Alchemy of Race and Rights*, Cambridge, Harvard University Press, 1991: a riveting tale of the lived experience of a black female/female black law professor.

193 Minow, work cited at footnote 34; Minow, M, "Partial Justice: Law and Minorities" in Sarat, A and Kearns, T (eds), *The Fate of Law*, Ann Arbor, University of Michigan Press, 1992.

> to claim new rights, to resist and alter official state action that fails to acknowledge such rights, and to construct communities apart from the state to nurture new conceptions of rights.

Rights for Minow become the tool through which to persuade. After all, to her rhetoric is power. Rights are a language through which power and violence is shaped, altered or banished.[194] Minow reclaims and reinvents rights rather than trashing them.[195] Rights become important and devastating rhetorical tools for challenging hierarchies of power.[196] Minow explains:[197]

> Rights are not "trumps" but the language we use to try to persuade others to let us win this round. Although particular rights by their very content may assert a power to "trump", both their origins and future viability depend upon a continuing communal process of communication. No rights are self enforcing. Enforcement remains contingent upon the willingness of community officials to signal their meaning to the community through force or threatened force.

Rights for Minow are not static or absolute. Rights as part of "legal language express claims that depend on particular choices, in specific contexts for their meaning"; they are interpretive and contingent.[198]

In the footsteps of Cover, Minow aims to reconsider the exercise of power within society. In true Foucaultian style she wishes to incorporate the private sphere into the power framework. This approach does not affect her view towards rights in the public and private sphere and thus her notion of rights could underpin a notion of rights in the proportionality framework.

Detmold sees rights as an aspect of love.[199] Rights-as-love also seems to fit the framework and may be taken on board.

The focus of this inquiry is "the relatively autonomous subject", a subject, it is argued, which is dead.[200] In its place, it is argued, must come the postmodern subject; a subject defined by

---

194 Cf EARC Bill, cl 4(4).

195 Minow, work cited at footnote 34, at 1910.

196 Minow, work cited at footnote 34, at 1910.

197 Minow, work cited at footnote 34, at 1876.

198 Minow, work cited at footnote 34, at 1876, fn 58.

199 Detmold, work cited at footnote 61, at 59.

200 See the many works of Pierre Schlag: "Fish v Zapp" (1987) 76 *Georgetown Law Journal* 37; "The Problem of Subject" (1991) 69 *Texas Law Review* 1627; "Normativity and the Politics of Form" (1991) 139 *University of Pennsylvania Law Review* 801.

circumstances and environment.[201] The subject is to become a contextualised concept and thus the approach to rights suggested here would need to substitute for the "relatively autonomous subject" a contextualised subject. This is a framework in which proportionality might be a different concept depending on whether you are gay, black, white, rich, poor, female or male. Schlag would argue that the subject of proportionality must escape the bureaucratic hegemony of normative legal scholarship by bringing the notion of subject into the equation. He would suggest that we are not all equal free-wheeling individuals, and that this facet of subject must be brought into the calculus of proportionality. It may well be that if our High Court jurisprudence is to be inspired by the tenets of poststructuralism and the postmodern condition it will take note of the plurality, situatedness and construction of subject.[202]

What Rights are Arguable?

The Chief Justice has long advocated respect for fundamental freedoms in the face of the state.[203] Peter Hanks, writing before the free speech cases, described the rights-oriented approach to Australian constitutional law as unorthodox.[204] It is undeniable that the High Court is rights conscious and that rights talk has become the orthodoxy. Admittedly, the High Court judges are taking things slowly and their approaches could be conservatively described as the development of process rights.[205] But this is to sell

---

201 This is the claim at least of James Boyle in "Is Subjectivity Possible: The Postmodern Subject in Legal Theory" (1991) 62 *Colorado Law Review* 489.

202 Cf Tay, A, "The Role of Law in the Twentieth Century: From Law to Laws to Social Science" (1991) 13 *Sydney Law Review* 247, at 253. This notion of "subject-decentering" is described by Foucault as follows: "In short it is a matter of depriving the subject (or its substitute) of its role as originator and of analysing the subject as a variable and complex function of discourse" (Foucault, M, "What is an Author" in Rabinow, P, *The Foucault Reader*, 1984, at 118).

203 Mason, Sir A, "A Bill of Rights for Australia?" (1989) 5 *Australian Bar Review* 79, at 85 - 90.

204 Hanks, P, "Constitutional Guarantees" in Lee, HP and Winterton, G, *Australian Constitutional Perspectives*, Sydney, Law Book Co, 1992, at 92.

205 See the assessment of the case by Associate Professor P Tahmindjis in EARC, *Report on Review of the Preservation and Enhancement of Individual's Rights and Freedoms*, August 1993, at 31 - 32. It is arguable that the free speech rights are mere process rights: ie, rights appendant to the institution of government, ensuring the effective working and participation of people in those institutions (Ely, J, *Democracy and Distrust*, Cambridge, Harvard University Press, 1980, Chapters 4, 5 and 6). The Ely-type distinction between process rights and substantive rights is hard to maintain in the context of free speech. Free speech is demanded by democracy not just as an aspect of means, but as evidence

the humanism that pervades the Court a little short. Doyle QC, while not alluding to the process nature of the rights up until now recognised, predicts "the Court will be faced with claims that rights are implicit in many features and provisions of the Constitution".[206] He adds that "the Court is extremely sensitive to intrusions on rights".[207] With this in mind, claims for respect by the citizen may well find a sympathetic ear in future High Court cases.

Basic claims to respect that we take for granted, such as life, liberty and estate, most certainly would be recognised as determinants of proportionality.[208] Nowhere is it said that one has a right to life, but this must be implied in the Constitution! Property is protected to some extent by acquisition on just terms so far as the Commonwealth is concerned.[209] Liberty has been supported recently by the confessions cases which, although they are not constitutional rights cases, are moving that way,[210] and the free speech cases. The urgent issue of the environment suggests a rights claim to a clean environment,[211] while *Mabo* is driven by a notion of equal concern and respect; an equality claim, or more properly a claim to cultural pluralism. The list awaits development but in the meantime the EARC Bill[212] and international instruments, such as the *ICCPR*,[213] provide some insights for generating future claims to respect which can be weighed in the proportionality balance. In this time of an emerging rights discourse people must be prepared to argue their claims with vigour.

---

of a more ingrained principle of equality and autonomy; speech itself is an end in the fulfilment of the human enterprise (Baker, E, *Human Liberty and Freedom of Speech*, New York, Oxford University Press, 1989, Chapters 2 and 3; Raz, J, "Free Expression and Personal Identification" (1991) 11 *Oxford Journal of Legal Studies* 303).

206 Doyle, work cited at footnote 12, at 23.

207 See footnote 206.

208 A right the EARC Bill of Rights protects in cl 11. See the Report, cited at footnote 205, at 101 - 103, where the right to life is described as the most fundamental human right. Respect for economic rights is probably more contentious.

209 See EARC Bill, cl 30; Report, cited at footnote 205, at 282 - 288.

210 EARC Bill, cl 19.

211 EARC Bill, cl 44; Report, cited at footnote 205, at 352 - 354.

212 EARC Report, cited at footnote 205.

213 For an overview of arguments favouring domestic application of the *ICCPR*, see Einfeld J in *Magno*. See also my own paper, "International Human Rights and the High Court of Australia" in *Proceedings of the First Annual Meeting of the Australian and New Zealand Society of International Law*, at 85.

Part V: Legislative Standards Act: Further Shaping the Ethic of Proportionality

The Queensland Parliament in 1992 passed the *Legislative Standards Act* 1992 (Qld). Section 4 of that Act requires that legislation have "sufficient regard" to the rights and liberties of individuals and for the institution of Parliament. These are referred to as the "fundamental legislative principles" which the Queensland Government aspires to uphold.

The Act requires that a proportionality test in the form of "sufficient regard" be applied before any legislation is drafted. It is unique legislation because, for all intents and purposes, the Queensland Parliament is empowered to make or unmake any law. The Act signals an ethical aspiration to see the excesses of parliamentary supremacy curtailed. The method of checking for sufficient regard goes on at a legislative drafting stage and in this is an admirable (and a fast becoming mandatory) innovation. The process is designed to self-regulate government and, in doing so, further infuse the ethic of proportionality into the heart of administration.

In short, the Act displays a commitment to avoid the excesses of parliamentary sovereignty and backs up this commitment through an institutional process of checking legislative initiatives against the Act. The Act cannot be used to enforce any rights mentioned in the Act and, until State legislative power is recognised as being subject to implied or other rights, the Act would not appear to prevent any particular government objective being pursued; that is, it does not seem to incorporate proportionality in the strict sense, although this is a point of uncertainty.

The Act presents an interesting development in the shaping of ethics of government in the postmodern age. In unison with the High Court's recent approaches it presents a new hope for effective and ethical government.

Part VI: Proportionality and Postmodernity

Postmodernism, postmodernity and poststructuralism are terms of the current age.[214] They invite ideas about the culture we

---

214 "Postmodern/ity" is used in this article to connote a notion of a "relatively novel 'condition' or 'mood' which both shapes and is increasingly expressed in conduct and experience" (Smart, B, *Postmodernity*, London, Routledge, 1993, at 23). On the relationships between the notions of "postmodernism", "postmodernity" and "poststructuralism", see Smart, at 11 - 23. In this article, "postmodernism" and "poststructuralsim" are "conflated" and

experience, the cultural products born of a new age, and the "perspectives for interpreting and evaluating the culture and its products".[215] It is redundant to analyse current trends in Australian constitutional law without involving these ideas in the discussion.

It is possible that the rapid rise of proportionality in High Court jurisprudence is a consequence of, or reaction to, postmodernity and to some small extent shaped by postmodernism. If we ignore claims about our current cultural condition when discussing law, much insight and explanation is lost. The times, the historical conditions, are part of our judges' lawmaking and must be recognised as part of the fabric of the practice of law.[216]

Proportionality is not postmodernist in that it claims a universality which postmodernism would reject. A postmodernist approach would find solution in the experience of government and may find lack of proportionality or other ideas appropriate in some cases. A postmodernist approach would reject totalisation, form and the meta narrative. Postmodernism advances detotalisations as it brings in notions of difference, discontinuity, disjuncture and displacement. The effort to even define a postmodernist approach is an attempt by rationality to colonise the negation of postmodernism.[217]

But just because our concept is not postmodernist does not mean that our rationalist/modernist ethic cannot be utilised in the postmodern condition.[218]

---

referred to under the label "postmodernism". "Postmodernism" is used to connote the notion of a new wave of perspectives on the interpretation of culture and cultural products; a wave that is clearly embodied in the feeling of lived experience.

On postmodern/ity and law, see Balkin, J, "What Is A Postmodern Constitutionalism" (1992) 90 *Michigan Law Review* 1966. Regarding postmodernism and law, consider "Postmodernism and Law: A Symposium" (1991) 62 *Colorado Law Review* 439.

215 Balkin, work cited at footnote 214, at 1967 - 1969.

216 Law contains traces of society and society contains traces of law. This is arguably an example of Derrida's notion of *differance* (Frug, work cited at footnote 95, at 1288 - 1290). Consider, in this regard, the context dependent and broad-brush theories which are becoming a hallmark of High Court jurisprudence, eg, unconscionability and procedural fairness which, in a sense, may be seen as reactions to the complexity of the postmodern age.

217 Schlag, P, "Missing Pieces: A Cognitive Approach to Law" (1989) 67 *Texas Law Review* 1195, at 1209 - 220; 1243 - 1244.

218 On this notion, consult Lyotard, J-F, *The Postmodern Condition: A Report On Knowledge*, Manchester, Manchester University Press, 1986.

Postmodernity does seem to represent a culture, experience, condition and time through which we are moving. A time of speed, of rapid change, of media culture, of extensive technological surveillance, of biological manipulation and of globalisation. Postmodernity, it is suggested, challenges us in reaction to find or sustain a humanness. Enter proportionality. Proportionality is no negative Bill of Rights. It is an ethical and legal principle that informs government of humanness, of doing things in the postmodern condition with precision. After all, vague and excessive use of power in an age of such complex elements could lead to devastating side effects on the citizen's claim for respect.

So the stage is set for the growth of constitutionalism for postmodernity; a constitutionalism that generates respect for the citizen in the face of massive social change. Government action is only part of the power that inheres in society and thus proportionality should not be looked upon as a saviour to all our concerns. Nonetheless, the citizen, instead of living in a postmodern Panoptican, can use proportionality as a device to realign power and violence in order to find escape from *unnecessary* view; to find respect and consideration. There is strong *reason* to believe that proportionality is an ethical principle of postmodern government.

Conclusion: Australian Proportionality Trumps Diceyan Sovereignty

As the foregoing text indicates, proportionality has arrived to invigorate the Australian constitutional landscape and in doing so promises to challenge the strong hold that Dicey's dogma has exerted over the exercise of governmental power. Proportionality as ethical and legal principle builds on a theory of government in the best interests of the people to inform governors and administrators of the proper way to do things.

The exact content of the doctrine of proportionality awaits further definition. However, the case law indicates that, at a general level, proportionality is embodied in the notion of necessity; while in relation to constitutional guarantees it takes on more of a substantive role which is closely aligned to the idea of legitimate purpose. It has been argued here that proportionality (at least as necessity) should inform the making of laws (generally) and the exercise of administrative powers.

The major issue for Australian constitutionalism is how far should proportionality in the strict sense or the notion of legitimacy of purpose govern the exercise of government power? A universal application of proportionality in the strict sense would, in essence, give fundamental common law values the same status as constitutional guarantees, as well as involve the High Court in a lot

more "political" adjudication. That these values should be accorded the status of guarantees may be acceptable to many; however, the questioning of the legitimacy of government objectives by the Court in light of these values is perhaps beyond the bounds of democracy.

It is suggested that, until Australians have some constitutional guarantee of rights, proportionality in the strict sense as common law constitutional principle represents a logical development of our democratic government. For the interim, it must be the High Court that instils respect for the citizen in the process and practice of government. In the long run, the development of greater participation, openness and accountability in government, along with educating legislators and administrators in the ethic of proportionality, may reduce the need for judicial review.

Australian proportionality promises to usher us into a new paradigm of constitutional thought; a paradigm which demands respect for the best interests of the people.