PROPORTIONALITY IN AUSTRALIAN CONSTITUTIONAL AND ADMINISTRATIVE LAW

ANTHONY GRAY*

This article suggests that a consistent approach should be taken to the use of proportionality in public law, including constitutional and administrative law. It documents the partial use of the doctrine in constitutional law, notably with respect to some heads of power, but more in the area of express and implied rights. However, its use in the administrative law realm has been more hesitant. This article argues this hesitancy is misplaced. Its use in both constitutional and administrative law should be consistent, reflecting acknowledgement of the great powers government has, and an insistence they be used carefully, with restraint, and with sensitivity to human rights. Proportionality can assist in meeting this goal.

I INTRODUCTION

There is growing interest in the concept of proportionality in Australian public law including constitutional and administrative law. It is of deep lineage and of interest to comparative law scholars. Discourse about proportionality in Australian public law today typically refers to its German origins[1] and acceptance by European courts. The idea is traceable to Aristotle's *Nichomachean Ethics*,[2] and *Magna Carta*.[3] More recently,

* Professor of Law, School of Law and Justice, University of Southern Queensland. Thanks to the anonymous referees for their constructive feedback and suggestions, and to the editorial team for their very thorough work.

[1] 'Only the achievement of a weightier good for the whole can justify the state in demanding from the individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail … the [social] hardship which is to be averted through the restriction of the freedom of the individual has to be more substantial by a wide margin than the disadvantage to the individual (resulting) … from the infringement': Hermann Conrad and Gerd Kleinheyer (eds) *Vortrage uber Recht und Staat von Carl Gottlieb Svarez 1746-1798* (Verlag, 1960) 40; the German concept of *VerhaltnismaBigkeit* (proportionality) reflects similar ideas: *Bank Mellat v HM Treasury* (No 2) [2014] AC 700, 788 (Lord Reed) ('*Bank Mellat*').

[2] 'What is just, then, is what is proportionate, and what is unjust is what is counter-proportionate': Aristotle, *Nichomachean Ethics* (Aristotle, Ross and Urmson, Oxford University Press, 1980) bk V 1131b, [20]; cited in *Bank Mellat* (n 1) 788 (Lord Reed).

[3] *Magna Carta* (1215) regarding a fine for wrongdoing being proportionate.

it has been rationalised as an aspect of the social contract,[4] where individuals cede limited rights to government in return for government services like defence and protection of property rights. The extent to which rights are ceded to government is limited, preserving individual liberty.[5] Today this would be recognised as a classic liberal idea. In this way, it is compatible with the common law.[6]

Much of the modern discussion of proportionality in Australian public law centres upon its use in relation to the implied freedom of political communication in constitutional law. This is understandable given the clear move by a majority of members of the High Court in *McCloy v New South Wales*[7] to embrace a structured proportionality analysis in relation to this freedom. However, many years prior to *McCloy,* the Court had undertaken proportionality analysis in public law, albeit not in a structured manner and often without articulating the concept overtly.[8] This article will consider the use of proportionality in two aspects of public law – constitutional law and administrative law. This occurs because there is sense in considering congruence between how proportionality applies as a concept in these two branches of public law, concerned as they both are with limitations on government power and the legality of the purported exercise of government power.[9]

There is authority for such a congruent view. In Canada, an approach to proportionality originally developed in the context of constitutional human rights was subsequently applied in the administrative law context.[10] This was on the basis that the exercise of discretionary executive power was effectively an exercise of power delegated to the executive by the

---

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

[5] Edelman J acknowledges proportionality's deep roots: *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448, 545 ('*Clubb*').

[6] Ibid 546 (Edelman J); rejecting the view of Gageler J in the same case: at 530.

[7] (2015) 257 CLR 178 ('*McCloy*').

[8] See Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2012) 27 *PLR* 109.

[9] Recently, in the constitutional context of the use of proportionality, scholars suggested use of standards developed in administrative law: Gabrielle Appleby and Anne Carter, 'Parliaments, Proportionality and Facts' (2021) 43(3) *SLR* 259, 280.

[10] *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038.

legislature. Thus, the same standards applicable to the exercise of legislative power should be applied to the exercise of administrative power.[11] In Germany, from whence modern conceptions of proportionality emanated, its use began in an administrative law context before being extended to become a fundamental doctrine of constitutional law.[12] The High Court, in applying proportionality analysis in the context of the constitutional guarantee of freedom of trade, commerce and intercourse in Australia, noted the guarantee applied both to legislative *and executive* power.[13]

Whether utilised in relation to legislative or executive power, the common root of proportionality is to require the government to justify its use of power to curb the rights and liberties of individuals. It is consistent with notions of a liberal state that the default should be the liberty of the individual.[14] Of course, this liberty is not absolute. However, limitations on it need to be carefully *justified*.

The essential argument made in this article is that just as the use of proportionality has increased in Australian constitutional law, it should be accepted and utilised in Australian administrative law, much more than the tentative way that has occurred to date. Further, it should be applied more generally in constitutional law to all heads of power, not just those that are deemed to be purposive in nature. The article will suggest that proportionality should be applied more broadly in the review of legislative and administrative action. Constitutional and administrative law share common objectives, the need to limit the intrusion of the state upon an individual. Use of proportionality in both contexts will help to build a culture of justification, that governments must carefully consider the impact of their laws upon individuals, ensuring that intrusions upon liberties are carefully considered and calibrated.

Part I of the article discusses proportionality in Australian constitutional law, including in relation to heads of power and rights and freedoms. Part

---

[11] Ibid 1078-1079 (Lamer J).

[12] Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *UTLJ* 383, 385.

[13] *Palmer v Western Australia* [2021] HCA 5, [117] (Gageler J) ('*Palmer*'), though Gageler J (in the minority) did not apply proportionality analysis in this context, a majority of the other justices did.

[14] Barak (n 4) 177.

II of the article considers how proportionality has and might be utilised in administrative law, with a discussion of both United Kingdom and Australian contexts. Part III discusses a culture of justification as an overarching theory supporting the use of proportionality in both public law contexts. Part IV concludes.

I PROPORTIONALITY IN AUSTRALIAN CONSTITUTIONAL LAW

A Heads of Power

The orthodox manner in which the High Court has determined whether a given Commonwealth law is within a head of power in the Australian *Constitution* depends on whether the head of power relates to a particular *subject matter*, or whether it is related to a particular *purpose*. In the former case, a test of sufficient connection was/is applied – whether the law is sufficiently connected to the relevant head of power.[15] In the latter case, the question is whether the law is reasonably appropriate and adapted to achieving the purpose of the power.[16] This is sometimes equated with proportionality.[17] An example of the latter head of power is defence, where the validity of a law said to be supported by that head of power depends on whether the Commonwealth can demonstrate that the law sufficiently relates to a defence purpose.[18] There is conjecture regarding which powers are purposive.[19] There is valid criticism that nothing in s 51 expressly

---

[15] *Re Maritime Union; Ex Parte CSL Pacific* (2003) 214 CLR 397, 414 (Gleeson CJ, McHugh, Gummow Kirby, Hayne, Callinan and Heydon JJ).

[16] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 344 (Barton J), 358 (O'Connor J); both approvingly citing *McCullough v Maryland* 4 Wheat 316, 421 (Marshall CJ) (1819).

[17] *Commonwealth v Tasmania* (1983) 158 CLR 1, 260 (Deane J) ('*Tasmanian Dams Case*'); *Richardson v Forestry Commission* (1988) 164 CLR 261, 311 (Deane J), 346 (Gaudron J) ('*Richardson*').

[18] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 142 (Latham CJ), 200-201 (Dixon J), 207 (McTiernan J), 223 (Williams J), 253 (Fullagar J), 273 (Kitto J) ('*Australian Communist Party*'). This orthodoxy has been criticised: *Leask v Cth* (1996) 187 CLR 579, 635 (Kirby J) ('*Leask*'); Paul Loftus, 'Proportionality, Australian Constitutionalism and Governmental Theory – Changing the Grundnorm' (1999) 3 *SCULR* 30, 73; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020).

[19] Gabrielle Appleby, 'Proportionality and Federalism: Can Australia Learn from the European Community, the US and Canada?' (2009) 26(1) *UTLR* 1, 31.

contemplates such distinction,[20] and that the distinction is difficult at the level of principle and not part of the legal system from whence the High Court sourced the concept of proportionality.[21] Chordia points to Dixon J in *Stenhouse v Coleman*[22] as the source for the apparent distinction between purposive and non-purposive powers but, respectfully, it is not a distinction that was strongly reasoned or justified.

It is an orthodox principle of statutory interpretation that recourse should be had to the purpose of the legislation in giving it meaning.[23] This implies that all legislation has a purpose. Thus, it may be argued that the fundamental statute of the nation, the *Constitution*, has a purpose, as do each of its provisions, including the heads of power accorded to the federal government. On this basis, the view that (most) heads of power are non-purposive is incorrect; all heads of power would be seen as purposive. It is recognised that is something of a radical position and is not reflected in current orthodoxy.

There are certainly suggestions in the case law that the orthodox position that a test of sufficient connection should be applied to non-purposive powers, and a proportionality test to purposive powers, may need to be re-cast. For example, in *Nationwide News Pty Ltd v Wills*,[24] Mason CJ indicated (concededly in the context of discussion of an incidental power) that, in applying the sufficient connection test, 'it is material to have regard to the purpose of the provision and to the reasonableness of the connection between that law and the subject matter of the power'.[25] He added that 'this Court has held that, in characterizing a law as one with respect to a permitted head of power, a reasonable proportionality must exist between

[20] Chordia (n 18) 111.

[21] 'It is difficult in principle to embrace the proposition that proportionality might be an appropriate criterion for some paragraphs of s 51 of the *Constitution* yet impermissible in respect of others': *Leask* (n 18) 635 (Kirby J).

[22] (1944) 69 CLR 457, 471.

[23] *Acts Interpretation Act 1901* (Cth) s 15AA(1); *Heydon's Case* (1584) 3 Co. Rep. 7a.

[24] (1992) 177 CLR 1 ('*Nationwide News*').

[25] Ibid 27-28.

the designated object or purpose and the means selected by the law for achieving that object or purpose'.[26] Others defend the traditional view.[27]

Even on the assumption that the traditional view continues to be maintained, sometimes members of the Court have applied a sufficient connection test to apparently purposive powers.[28] Further, some powers may have a chameleon nature, either subject matter or purposive, depending on the context in which they are utilised.[29] For example, constitutional consideration of treaty implementation under s 51(29) may be purposive,[30] in that the court considers the extent to which the objective of the legislation is treaty implementation, as suggested by the closeness in terms between them and the absence of bad faith on the Commonwealth's part. However, use of s 51(29) to regulate things physically beyond Australia may involve a subject matter exercise of the power, warranting application of a sufficient connection test.[31] In relation to use of s 51(29) to implement treaties to which Australia is a signatory, the Court has utilised 'reasonably appropriate and adapted',[32] though the comparison is with the law enacted and the treaty upon which it is based. Members of the Court have considered the constitutionality of legislation implementing a treaty based on whether parliament's judgment on the content of the legislation 'could reasonably be made or that there (was) a reasonable basis for making it'.[33]

It was in this context that the link was drawn between reasonably appropriate and adapted and proportionality:

> Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said

---

[26] *Nationwide News* (n 24) 29; *Leask* (n 18) 616 (McHugh J), 635 (Kirby J).

[27] *Leask* (n 18) 600 (Dawson J).

[28] *Australian Communist Party* (n 18) 243 (Webb J); *Richardson v Forestry Commission* (n 17) 334 (Toohey J).

[29] Mason (n 8) 115.

[30] *R v Burgess; Ex Parte Henry* (1936) 55 CLR 608, 674-675 (Dixon J).

[31] *Australian Communist Party* (n 18) 300 (Dawson J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 529 (Mason CJ), 552 (Brennan J) ('*Polyukhovich*').

[32] *Tasmanian Dams Case* (n 17) 86 (Mason J), 259 (Deane J); *Richardson* (n 17) 300 (Wilson J).

[33] *Richardson* (n 17) 296 (Mason CJ and Brennan J).

> to provide it with the character of a law with respect to external affairs is a need for there to be reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.[34]

This suggests 'reasonably appropriate and adapted' and 'proportional' are effectively interchangeable.[35] Though use of proportionality in this context was expressly endorsed by Gaudron J,[36] and referred to by Wilson J,[37] subsequently the Court indicated the concept in relation to s 51(29) 'will not always be particularly helpful'.[38] In the context of a judgment endorsing use of the 'reasonably appropriate and adapted' concept,[39] this suggests disagreement with the view the concepts are identical or virtually so.

In determining whether a law was within the inherent nationhood power (an executive power), the High Court determined some powers granted to an executive authority were 'grossly disproportionate' to its legitimate objectives.[40] This supported a conclusion that aspects of the scheme were unconstitutional. In determining whether the law was proportional, the Court considered whether the law had adverse consequences, including infringement of fundamental values unrelated to that object.[41] It is relevant to the court's determination as to whether a law is supported by the Commonwealth's incidental powers.[42]

In summary, on the use of proportionality in defining the scope of heads of power, there is an orthodox distinction between subject matter powers and

---

[34] *Tasmanian Dams Case* (n 17) 260 (Deane J); *Richardson* (n 17) 311 (Deane J), 346 (Gaudron J).

[35] For a similar suggestion, see *Nationwide News* (n 24*)* 30; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 (Gummow, Kirby and Crennan JJ) ('*Roach*'); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (all members of the Court) ('*Lange*').

[36] *Richardson* (n 17) 346.

[37] Ibid 301.

[38] *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 488 (Brennan CJ, Toohey Gaudron, McHugh and Gummow JJ).

[39] Ibid 487.

[40] *Davis v Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ) ('*Davis*').

[41] *Cunliffe v Commonwealth* (1994) 182 CLR 272, 297 (Mason CJ).

[42] Ibid 296 (Mason CJ).

purposive powers. The use of proportionality has been more prevalent with respect to the latter rather than former type of head of power. That said, as others have noted, nothing in the *Constitution* requires the distinction, and things get 'messy' when one aspect of a given head of power is considered a subject matter power, and another aspect purposive. On occasion, the High Court has mixed the tests up, applying proportionality to a subject matter power. Frankly, one wonders about the continuing utility of the distinction. Arguably, it cannot bear the weight that is placed upon it. On one view, all powers are purposive. Highly respected jurists have voiced concern with the orthodox position, and it may be time for a re-think. This might herald broader application of the proportionality doctrine in Australian constitutional law.

B Constitutional Freedoms

In contrast with its use in relation to heads of power, use of proportionality in relation to at least some constitutional freedoms has become mainstream. The Court discerned an implied freedom of political communication in the *Constitution* in the early 1990s.[43] Proportionality was considered in some judgments. In *Nationwide News Pty Ltd v Wills*, Mason CJ stated that in applying proportionality analysis, it was relevant to consider to what extent the challenged law went beyond what was reasonably necessary or desirable to achieve legitimate objectives. Further, it was important to consider whether the law infringed fundamental common law values.[44] Of those justices less enamoured with proportionality, they have accepted its use in relation to limitations on legislative power.[45]

By the late 1990s, it applied a test to laws challenged under this freedom that involved considering whether the impugned law was 'reasonably appropriate and adapted' to achieving a legitimate end compatible with representative and responsible government.[46] The Court noted there was

---

[43] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*Australian Capital Television*'); *Nationwide News* (n 24).

[44] *Nationwide News* (n 24) 30-31, 101 (McHugh J). In contrast, Dawson J denied proportionality was relevant to constitutionality, except for purposive powers: at 88-89. See also *Australian Capital Television* (n 43*)* 143 (Mason CJ), 150, 157-159 (Brennan J), 235 (McHugh J).

[45] *Leask* (n 18) 594-595 (Brennan CJ), 606 (Dawson J), 614-615 (Toohey J).

[46] *Lange* (n 35) 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

little difference between reasonably appropriate and adapted and proportionality.[47]

In *McCloy v New South Wales*,[48] and subsequently, a majority of the Court held proportionality was to be considered as part of the reasonably appropriate and adapted analysis. It comprised three considerations – whether the law was suitable, necessary and adequate in its balance.[49] Notably, this was *structured* proportionality, focussing on specific factors. A focus on the *suitability* of the law was not whether the legislature might have approached its task differently; it considered whether there was rational connection between the provision and the statute's legitimate purpose. A focus on the *necessity* of the law considered whether there were other means to achieve the objective of the legislation less invasive of the relevant freedom, which were obvious and compelling.[50] Again, the court would be deferential to the legislature's right to choose from a range of competing means to achieve objectives.[51] Provided it chose one means minimally invasive of the freedom, having regard to alternatives and the objective sought to be achieved, the law would 'pass' this requirement. Thirdly, the court considered *adequacy of balance* between the extent to which the law infringed the freedom and the public importance of the measure. The greater the restriction upon the freedom, the more justification required.[52]

Chapter III enshrined the role of the court in ensuring that legislation was within constitutional power.[53] Three members of the Court did not apply proportionality analysis.[54] Subsequently, one of these justices applied it in

---

[47] Ibid 567.

[48] *McCloy* (n 7). Kiefel CJ has consistently advocated for proportionality: Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *PLR* 85.

[49] *McCloy* (n 7) 217.

[50] *Brown v Tasmania* (2017) 261 CLR 328, 371-372 (Kiefel CJ, Bell and Keane JJ), 428 (Nettle J) ('*Brown*'). Occasionally, it is described as requiring that an alternative both be obvious and compelling *and* impose a *significantly* lesser burden on the freedom: *Clubb* (n 5) 510 (Nettle J), 548 (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373, 401 (Kiefel CJ, Bell, Keane and Nettle JJ).

[51] *Brown* (n 50) 371 (Kiefel CJ, Bell and Keane JJ), 418 (Nettle J); *Clubb* (n 5) 470 (Kiefel CJ, Bell and Keane JJ).

[52] *McCloy* (n 7) 219.

[53] Ibid 219-220.

[54] Ibid 234-238 (Gageler J), 259 (Nettle J), 288-289 (Gordon J).

the context of the implied freedom of political communication.[55] Edelman J has accepted proportionality analysis in this context.[56] More recent appointees also support it - Gleeson J was party to a joint judgment which applied it,[57] and Steward J accepted it as useful.[58]

Another example of the High Court's use of proportionality analysis has occurred in relation to s 92. Suggestions the Court would apply it in that context appeared earlier,[59] but a majority of the Court in *Palmer* accepted its applicability there.[60] Specifically, laws otherwise infringing s 92, discriminatory against interstate trade and commerce compared with intrastate, might be saved if the court considered the law was suitable, necessary and adequate in its balance, having regard to the public benefit of the challenged measures, and the extent to which they impacted freedoms.

The High Court also discerned an implied right to vote in the *Constitution*, derived from ss 7 and 24.[61] Gleeson CJ referred to UK case law which considered whether limits on voting entitlements were disproportionate to achieving the legitimate purpose of the legislation. Here, the question of whether the legislation was rationally connected with a legitimate objective and minimally impaired freedoms in pursuit of it was relevant.[62] Gleeson CJ cautioned about uncritical translation of proportionality from overseas into Australian law, expressing fear its use might create a relationship between legislative and judicial power, different from that reflected in the *Constitution*.[63] Nonetheless, he found overseas decisions 'instructive' in discerning an implied right to vote,[64] concluding legislation purporting to

[55] *Brown* (n 50) 418-425 (Nettle J).

[56] *Clubb* (n 5) [408]; *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18, [194] ('*LibertyWorks*').

[57] *LibertyWorks* (n 56) [46].

[58] Ibid [247].

[59] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Betfair Pty Ltd v Western Australia (No 1)* (2008) 234 CLR 418, 476-477 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[60] *Palmer* (n 13).

[61] *Roach* (n 35) (Gleeson CJ, Gummow, Kirby and Crennan JJ).

[62] Ibid 178.

[63] Ibid 179; mirroring fears expressed by Dawson J in *Cunliffe* (n 41): at 356.

[64] Ibid 179.

deny short-term prisoners that right was invalid on the basis of arbitrariness.[65] Gummow, Kirby and Crennan JJ stated the test to determine whether the impugned measure was constitutionally valid was whether voting disqualification was for a substantial reason, one reasonably appropriate and adapted to achieving a legitimate end consistent with representative and responsible government. They opined there was 'little difference' between this concept and proportionality.[66]

Subsequently, proportionality was considered in relation to the constitutional validity of laws that closed electoral rolls just after the election was called.[67] A majority held this law to be constitutionally invalid, infringing the constitutional imperative of a parliament chosen by the people and not reasonably appropriate and adapted to a legitimate end consistent with representative and responsible government. French CJ held the measure invalid because the benefits it purported, to provide of a smoother and more efficient electoral system, were 'disproportionate' to the damage it wrought on the franchise.[68] Gummow and Bell JJ referred with evident approval to the passage in *Roach,* where Gummow, Kirby and Crennan JJ had referred to the similarities between proportionality and the reasonably appropriate and adapted test.[69] Crennan J cautioned against the use of proportionality.[70] However, it was championed by Kiefel J. After noting proportionality was derived from German law before subsequently being adopted in European law, she noted

> Nevertheless, the question to which it is directed is common to these systems and our own. It is how to determine the limit of legislative power, where its exercise has the effect of restricting protected interests or freedoms. The methods used to test the principle of proportionality are rational and adaptable. Some bear resemblance to tests which have already been utilised in this Court. Further, proportionality is a principle having its roots in the rule of law. That rule is reflected in the judgments of the majority in *Roach*, which rejected the legislative disqualification as arbitrary and therefore

[65] Ibid 182.

[66] Ibid 199.

[67] *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

[68] Ibid 39.

[69] Ibid 59.

[70] Ibid 118.

> disproportionate. It should not be assumed that the application of identifiable tests of proportionality will lead to widening, impermissibly, the scope of review of legislation. The statement…of the tests employed in…proportionality should result in a more rigorous and disciplined analysis and render the process undertaken more clear.[71]

Having applied proportionality analysis in the context of s 92, implied freedom of political communication and implied voting rights, it would not be surprising if the High Court extended proportionality analysis to other express rights in the *Constitution*, including s 116 (freedom of religion) and s 117 (protection from discrimination based on residence). In relation to characterisation of Commonwealth laws, it is possible the use of proportionality will extend over time beyond the purposive powers and incidental aspects of legislative powers.[72] Good arguments can be made for both developments.

II PROPORTIONALITY IN UNITED KINGDOM AND AUSTRALIAN ADMINISTRATIVE LAW

A Essential Preliminary Points

To understand the place of proportionality in Australian administrative law, it is necessary to understand its place in administrative law of the United Kingdom, since much of what exists in Australia is traceable to those origins. Prior to doing so, some preliminary points must be made. Firstly, the UK traditionally reflects a system of parliamentary sovereignty/supremacy, under which laws made by parliament are, by definition, valid. Understandably, this has greatly restricted the ambit of judicial review.[73] The Australian High Court has confirmed that this

---

[71] Ibid 139-140.

[72] *Leask* (n 18) 635; Jeremy Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality' (1997) 21 *MULR* 1, 37.

[73] Lord Diplock noted, 'courts in England, lacking … experience of judicial review, were slow to recognize the need to control administrative acts and decisions and hesitant to assume the role of doing so. The supremacy of parliament … pointed to parliament itself as the appropriate body to control the unfair exercise by the administration of powers which parliament had itself conferred and could itself withdraw': Lord Diplock, 'Foreword' in Bernard Schwartz and Henry William Rawson Wade (eds), *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon Press, 1972).

principle is not directly applicable to Australia,[74] given the country's written *Constitution* and limited conception of government powers.

Secondly, the *Constitution* enshrines formal separation of powers between the three arms of government,[75] which finds no direct counterpart in UK constitutional law. Thirdly, the UK is a signatory to the *European Convention on Human Rights* ('*ECHR*') and has enacted it via the *Human Rights Act 1998* (UK). Interpretation of the *ECHR* has been influenced by the German Constitutional Court's acceptance of proportionality as a fundamental principle,[76] and this has been the main conduit through which principles of proportionality have entered into UK public law. Fourthly, proportionality is inextricably linked with notions of 'reasonableness', as was also demonstrated in the context of Australian constitutional law, as outlined above.

Fifthly, the fundamental consideration is that the scope of judicial review in administrative law is limited. Courts constantly emphasises this, avoiding any suggestion administrative decisions are being reviewed on their merits.[77] Mere disagreement, though strong, with the administrative decision or action is insufficient to justify successful judicial review. This is important here, in that some argue against proportionality on the basis it effectively morphs into merits review. [78] Sixthly, some argue proportionality may not be relevant to Australian administrative law in the way that has become relevant in the UK law because its acceptance and use is necessary due to the *ECHR*, a document with no direct bearing on Australian law.[79]

---

[74] 'The (Australian) *Constitution* displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature': *Lange* (n 35) 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[75] *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[76] *Handyside v United Kingdom* [1976] ECHR 5; Mason (n 8) 112-113.

[77] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-41 (Mason J); Mark Aronson, 'Unreasonableness and Error of Law' (2001) 24 *UNSWLJ* 315, 318; *Brown* (n 43) 420 (Nettle J).

[78] *Cunliffe* (n 35) 357 (Dawson J); Sophie Boyron, 'Proportionality in English Administrative Law: A Faulty Translation?' (1992) 12 *OJLS* 237, 262; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *MULR* 468, 470, referring to proportionality as involving courts 'second-guessing' the legislature.

[79] William Gummow, 'Rationality and Reasonableness as Grounds for Review' (2015) 40 *Australian Bar Review* 1, 4; Janina Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43 *FLR* 59, 60.

B Proportionality in United Kingdom Administrative Law

The UK courts have had a long-recognised power to review administrative decisions based on unreasonableness.[80] This was often expressed in terms of reviewing power being used in an arbitrary[81] or capricious[82] manner. In that context, an important principle was established in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation*.[83] Legislation gave an authority power to grant licences to show movies upon such conditions as the authority saw fit. The authority granted the plaintiff a licence on the condition those under the age of 15 should not be admitted to Sunday screenings. The plaintiff unsuccessfully challenged the condition, but the Court of Appeal acknowledged the decision could be challenged based on 'reasonableness'. However, this requirement was interpreted very strictly, to mean that, in order that a court quash the decision, it had to be so unreasonable that no reasonable person could have come to the decision.[84] It was not a question of the court stepping into the role of decision maker and determining what it considered reasonable; rather it was a court's determination that a reasonable person could have reached the same decision that the authority did. This test became known as '*Wednesbury* unreasonableness'. It was a high hurdle for those challenging administrative decisions to overcome.[85] This may have been deliberate, in order to avoid courts second guessing administrative decisions, on one view offensive to the constitutional design and proper distribution of functions within arms of government.[86]

---

[80] *Sharp v Wakefield* [1891] AC 173, 179 (Lord Halsbury LC) ('*Sharp*'); *Rooke's Case* (1597) 77 ER 209, 210 (discretion bound by the rule of reason and law, and not to do 'according to their wills and private affections').

[81] *Leader v Moxton* (1773) 95 ER 1157, 1160 (Justice Blackstone); *Sharp* (n 73) 179 (Lord Halsbury LC); *MacBeth v Ashley* (1870-1875) LR 2 Sc. 352, 360 (Lord Selborne); and relatedly, 'partial and unequal' operation of administrative decisions: *Kruse v Johnson* [1898] 2 QB 91, 99-100.

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

[83] [1948] 1 KB 223 (CA) ('*Wednesbury*').

[84] Ibid 230 (Lord Greene MR, Somervell LJ and Singleton J agreeing at 234).

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

[86] *Brind v Secretary of State for the Home Department* [1991] AC 696, 757-758, 762 (Lord Ackner) ('*Brind*'); '*Wednesbury* is concerned to ensure that any decision under review is not so utterly unreasonable that no one could properly have made the decision. In this way it

Links between this line of cases and the rule of law have been noted:

> The judicial role [in the cases just referred to] is very closely allied to the rule of law because it gives the judges a way of standing against arbitrary decision-making – and the rule of law, too, is opposed to arbitrary use of power. Understood in this way, the doctrine in *Wednesbury* supports the rule of law.[87]

The key point here is the linkage of *Wednesbury* unreasonableness with arbitrariness, and the linkage of arbitrariness with the rule of law. To some extent, Endicott also accepts connections between proportionality and arbitrariness.[88] Of course, it is not necessary to limit the ground of review in this area as narrowly as *Wednesbury* to reflect concern with arbitrary decision making and the rule of law.

In the latter 20th century, some UK justices suggested proportionality might be applied to test validity of administrative action.[89] These decisions *pre-date* the UK's domestic adoption of the *ECHR.* As has been noted, much of the content of the *ECHR* reflects common law rights.[90] The *Barnsley*

---

prevents decision makers exceeding the powers granted to them. This distinction is of profound significance. Were the test to be applied by courts on judicial review any more relaxed, they would effectively be engaging in merits review of the original decision': Timothy McEvoy, 'New Flesh on Old Bones: Recent Developments in Jurisprudence Relating to *Wednesbury* Unreasonableness' (1995) *AJAL* 36, 38.

[87] Timothy Endicott, 'Why Proportionality is not a General Ground of Judicial Review' (2020) 1 *Keele Law Review* 1, 12.

[88] Ibid. 'The real doctrine is that, where a local council ought to take some interest into account … the court will interfere with a decision that is *so disproportionate in its impact on that interest that it is arbitrary or capricious* or manifestly unjust or oppressive': at 18 (emphasis added).

[89] *R v Barnsley Metropolitan Borough Council* [1976] 1 WLR 1052, 1058 (Lord Denning MR), 1063 (Sir John Pennycuick) ('*Barnsley*'); *CCSU v Minister for the Civil Service* [1985] AC 374, 410 (Lord Diplock) ('*CCSU*'); *Brind* (n 86) 696, 751 (Lord Templeman); *Backhouse v Lambeth L.B.C.* (1972) 116 Sol. Jo. 802. In *CCSU*, Lord Diplock added the mere fact that an exercised power was derived from the common law rather than statute law did not mean it was immune from judicial review: at 410 (Lord Diplock, Lord Roskill agreeing at 417). Judicial reviewability of non-statutory powers was recently re-confirmed in *R (Miller) v Prime Minister* [2020] AC 373; see Jeffrey Jowell and Anthony Lester, 'Proportionality: Neither Novel nor Dangerous' in Jeffrey Jowell and Dawn Oliver (eds), *New Directions in Judicial Review: Current Legal Problems* (Stevens and Sons, 1988).

[90] 'Since the passing of the *Human Rights Act 1998* (UK), there has too often been a tendency to see the law in areas touched on by the *Convention* solely in terms of the *Convention* rights. But the *Convention* rights represent a threshold protection; and especially in view of the contribution which common lawyers made to the *Convention*'s inception, they may be expected, at least generally, … to reflect and to find their homologue in the common or domestic statute law': *Kennedy v Information Commissioner* [2015] AC 455, 504 (Lord

court referred to the administrative measure interfering with a 'common law right' to trade; *CCSU* referred to a legitimate expectation of consultation, based on past practices.[91]

In the UK, challenging issues arose with passage of the *Human Rights Act 1998* (UK) to incorporate the *ECHR* into domestic law. The *ECHR* embraces proportionality analysis, and is implicit in the way it protects rights, providing limited ways in which laws can interfere with them, in pursuit of legitimate policy objectives. Inevitably, the previously existing grounds of review in administrative law conflicted with the *ECHR*, and resolution was required. It occurred in a case where the UK Defence Department had a policy of discharging members of the military who were homosexual and/or engaged in homosexual activity. Members of the military who were discharged through this policy challenged it on *Wednesbury* unreasonableness grounds.[92]

In the UK courts, the government was successful; the court did not find 'unreasonableness' regarding this policy. It was not beyond the range of responses open to a reasonable decision maker. However, some justices indicated that the greater the extent to which executive action interfered with human rights protected by the *ECHR*, the greater justification required.[93] This presaged a move towards proportionality, though the judges did not so express this themselves. The decision was overturned by the European Court of Human Rights. The Court commented negatively on the standard of review applied, finding the test for unreasonableness had been set so high, it was contrary to proportionality analysis required under the *ECHR*.[94]

Subsequently, the House of Lords adopted proportionality analysis in the administrative law context, at least for *ECHR* cases. It indicated proportionality analysis was 'more precise and more sophisticated' than traditional grounds of review.[95] While often the results obtained from the

---

Mance, Lord Neuberger and Lord Clarke agreeing at 488, Lord Sumption agreeing at 533) ('*Kennedy*'); *Pham v Home Secretary* [2015] 1 WLR 1591, 1625 (Lord Sumption).

[91] *CCSU* (n 89) 401 (Lord Fraser).

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

[93] Ibid 554 (Sir Thomas Bingham MR), 564-565 (Thorpe LJ).

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

[95] *R (Daly) v Home Secretary* [2001] 2 AC 532, 547 (Lord Steyn, Lord Bingham agreeing at 546, Lord Cooke agreeing at 548) ('*Daly*').

two approaches would be identical, sometimes they would not be.[96] The Court emphasised proportionality analysis did not mean merits review.[97] The democratic mandate of the parliament and executive was recognised in this context, practically translating to some 'margin of appreciation'.[98] The UK court set out a three stage proportionality test,[99] like that applied in Canada.[100] The House accepted that, consistent with proportionality analysis, the greater the extent to which a measure impacted fundamental human rights, the greater the justification required.[101] This is consistent with flexible application of proportionality analysis. This can include the importance of the objective the government seeks to further with the

[96] Lord Steyn explained three differences: (a) proportionality might require the court to assess the balance struck by the decision maker, not merely whether it was within the range of reasonableness; (b) it may invite attention to the relative weight given to particular interests; (c) the court might consider in proportionality analysis the extent to which interference with rights met a pressing social need, and whether proportionate to the aim being pursued: *Daly* (n 95) 547-548.

[97] *Daly* (n 95) 548 (Lord Steyn); *Bank Mellat* (n 1) 771 (Lord Sumption, Baroness Hale, Lord Kerr and Lord Clarke agreeing at 763, Lord Reed agreeing at 789); *R (Keyu) v Foreign Secretary* [2016] AC 1355, 1444 (Lord Kerr) ('*Keyu*'). In *Keyu*, Lord Mance (with whom Lord Neuberger, Baroness Hale, Lord Kerr and Lord Hughes agreed), indicated he had expressed views regarding proportionality previously, similar to those of Lord Kerr in *Keyu*. This was a response to earlier dismissals of proportionality on the basis it would usher in merits review: *Brind* (n 86) 762 (Lord Ackner), 766-767 (Lord Lowry). Some maintain proportionality equates to merits review: 'the move from rationality to proportionality … would … have potentially profound and far reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision maker has struck between competing interests … and the weight to be accorded to each such interest': *Keyu* 1409 (Lord Neuberger). He concluded he might apply either unreasonableness or proportionality, depending on context.

[98] *Bank Mellat* (n 1) 771 (Lord Sumption, Baroness Hale, Lord Kerr and Lord Clarke agreeing at 763, Lord Reed agreeing at 795-796, Lord Neuberger agreeing at 814).

[99] (a) whether the objective of the legislation was sufficiently important to justify limiting a fundamental right; (b) whether the measures designed to meet the legitimate objective were rationally connected to it; and (c) whether the means by which the right were impaired where no more than reasonably necessary to achieve it: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Lord Clyde, for the Privy Council). It subsequently added a fourth element regarding fairness of balance between the rights of the individual and the interests of the community: *Bank Mellat* (n 1) 771 (Lord Sumption, Baroness Hale and Lords Kerr and Clarke agreeing at 763, Lord Hope agreeing at 805).

[100] *R v Oakes* [1986] 1 S.C.R. 103, 139. It is like structured proportionality articulated by Barak (n 4) 3.

[101] *Daly* (n 95) 541 (Lord Bingham, Lords Steyn (546), Cooke (548), Hutton and Scott agreeing at 549.

impugned measure.[102] If a challenged measure contains unjustified discrimination against individuals or groups, it is more likely to fail proportionality analysis.[103] Proportionality was applied flexibly - a court might accord greater deference to government decisions involving political or economic questions.[104]

In *Daly*, Lord Cooke added it would eventually be realised that *Wednesbury* was an 'unfortunately retrogressive decision in English administrative law' to the extent it suggested that only extreme unreasonableness could be the subject of remedy in administrative law.[105] Mark Aronson described *Wednesbury* unreasonableness as 'lunatic',[106] Paul Craig says the test is virtually practically impossible to meet;[107] Matthew Groves and Greg Weeks state it is a test any competent government counsel could meet,[108] and current justices have criticised it (extra-judicially and within judgments).[109] At present, however, UK courts apply proportionality analysis to Convention cases,[110] but continue to

---

[102] *Bank Mellat* (n 1) 771 (Lord Sumption, Baroness Hale Lord Kerr and Lord Clarke agreeing at 763, Lord Reed agreeing at 789).

[103] Ibid 773 (government unable to explain why its legislation was targeted at one bank in particular, and the majority held the measure failed proportionality analysis).

[104] *Kennedy* (n 90) 507-508 (Lord Mance, Lords Neuberger and Clarke agreeing at 488; *A v Secretary of State for the Home Department* [2005] 2 AC 68, 135 (Lord Hope), 160 (Lord Rodger).

[105] *Daly* (n 95) 549.

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

[107] Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 *CLP* 131, 161 ('there can be no pretence of any meaningful substantive oversight and it is difficult to think of a single real case in which the facts meet this [*Wednesbury*] standard'); Paul Craig, 'Proportionality, Rationality and Review' [2010] *NZLR* 265, 276, stating it was not coherent to 'pretend [*Wednesbury*] is any form of meaningful control over administrative decision making that will avail claimants'.

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

[109] Steven Rares, 'Judicial Review of Administrative Decisions: Should There be a 21st-Century Rethink?' (2015) 22 *AJAL* 157, 158-159; Jeffrey Jowell and Anthony Lester, 'Beyond Wednesbury: Substantive Principles of Administrative Law' [1987] *Public Law* 368; *Daly* (n 89) 549, where Lord Cooke referred to *Wednesbury* as an 'unfortunately retrogressive decision in English administrative law'.

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

apply *Wednesbury* to cases involving purely domestic public law principles.[111] This conflicts with earlier judgments of the UKSC that suggest proportionality analysis should *not* be confined to Convention cases.[112] It may be an example of the view of some judges that the whole approach to judicial review in the UK is now flexible,[113] that flexibility extending to a decision, whether *Wednesbury* review or proportionality review (or both),[114] is appropriate in given situations.

C Proportionality in Australian Administrative Law

Unreasonableness as a ground of judicial review is enshrined in the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[115] and state/territory equivalents.[116] It is applied by the High Court.[117] The *Wednesbury* unreasonableness definition has been accepted in judicial review statutes in Australia and case law.[118] Its stringency has meant there

---

[111] *R (On the Application of Friends of the Earth and Others) v Heathrow Airport Ltd* [2020] UKSC 52, [119] (Lord Hodge and Lord Sales, Lord Reed, Lady Leggatt and Lord Leggatt agreeing at [1].

[112] *Kennedy v Information Commissioner* (n 90) 508 (Lord Mance, Lords Neuberger and Clarke agreeing at 488, Lord Sumption agreeing at 533). In *Keyu* (n 97) 1446, Lord Kerr held that proportionality should be applied in situations where a fundamental right was not involved, albeit more loosely; see Paul Craig, 'Proportionality, Rationality and Review' [2010] *NZLR* 265, 271-272; Jeffrey Jowell and Anthony Lester, 'Proportionality and Unreasonableness: Neither Merger Nor Takeover' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 55.

[113] 'The common law no longer insists on the uniform application of … the so-called *Wednesbury* principle … the nature of judicial review in every case depends on the context': *Kennedy* (n 90) 506 (Lord Mance, Lords Neuberger and Clarke agreeing at 488, Lord Sumption agreeing at 533).

[114] 'The very notion one must choose between proportionality and irrationality may be misplaced': *Keyu* (n 97) 1444 (Lord Kerr).

[115] S 5(2)(g).

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

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

[118] *Judicial Review Act 1991* (Qld) ss 20(e), 23(g); *Judicial Review Act 2000* (Tas) s 17(2)(e), s 20(g); *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 5(1)(e), s 5(2)(g); *Chan* (n 118) 388 (Mason CJ), 392 (Dawson J), 408 (Toohey J); Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *PLR* 117, 117.

have been few successful challenges based on unreasonableness.[119] Broader application of the unreasonableness ground, through use of proportionality, was heralded in *Minister for Immigration and Citizenship v Li and Another*.[120] There the dispute arose because a Ministerial delegate had refused the applicant's visa request because information the applicant provided in support of her application was not genuine. The applicant challenged the decision in the MRT. While these proceedings were on foot, she sought an extension of time to obtain further information to support her request. The Tribunal refused, confirming the Ministerial delegate's decision. The applicant appealed against the Tribunal's actions on various bases, including unreasonableness. She succeeded.

The Court explained its ability to review administrative decisions for unreasonableness on principles of statutory interpretation. It applied a default interpretation rule that parliament intended exercises of administrative discretion would be bounded by reasonableness requirements.[121] French CJ equated 'unreasonableness' with a decision that was arbitrary or capricious,[122] and/or contrary to the purpose/s for which power was given.[123] In this way, the principle engages the rule of law, which disfavours arbitrary exercise of government power. French CJ emphasised that unreasonableness review was not merits review or mere disagreement with the decision reached.[124] He introduced proportionality to explain unreasonableness review, that 'a disproportionate exercise of an administrative discretion…may be characterised as…unreasonable simply on the basis that it exceeds… what is necessary for the purpose it serves'.[125]

The joint reasons indicated dissatisfaction with *Wednesbury*:

> *Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal

[119] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377 (Gageler J) ('*Li*'); Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life After *S157*' (2005) 33 *FLR* 141, 152.

[120] *Li* (n 119) 350-352 (French CJ), 364 (Hayne, Kiefel and Bell JJ).

[121] Ibid 350-351 (French CJ), 362 (Hayne, Kiefel and Bell JJ), 370 (Gageler J).

[122] Ibid 351.

[123] Ibid 349.

[124] Ibid 351.

[125] Ibid 352.

> standard of unreasonableness should not be considered as limited to what is in effect an irrational…decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene M.R. be taken to have limited unreasonableness in this way in…*Wednesbury*.[126]

These reasons connected disproportionality with unreasonableness. They noted Gummow J had (in citing Allars) agreed that one example of unreasonableness was the disproportionate exercise of power.[127] He concluded that the administrative action taken there was not tainted by a 'disproportionately arbitrary manner (so) as to attract (*Wednesbury*) review'.[128] The joint reasons in *Li* added 'an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached'.[129] It framed an unreasonable decision as one lacking evident and intelligible justification.[130]

Obviously, the *Li* decision is significant in that four of the five judges stated proportionality analysis was relevant to the determination of whether administrative action was reasonable. Presumably, an administrative action considered to be disproportionate will be unreasonable. Because it is presumably implicit in the statute granting the decision maker power to make the decision that it will be exercised reasonably, exercise of the power tainted by disproportionality will confound this implication. It will thus be beyond the decision maker's jurisdiction.[131] The High Court's

---

[126] Ibid 364 (Hayne, Kiefel and Bell JJ).

[127] *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Livestock Corporation* [1990] FCA 139, [49]. The others involved capricious use of power to obtain a desired result, and illegitimate discrimination.

[128] Ibid [49].

[129] *Li* (n 119) 366. The judgment has been criticised for failing to articulate how proportionality analysis would apply in the administrative law context: *McDonald* (n 112) 132-133.

[130] *Li* (n 119) 367.

[131] McDonald (n 118) 128; 'Of course, it is a jurisdictional error for a Minister (or other official of the Commonwealth) to make a decision that is unreasonable or irrational': *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [289] ('*Brett Cattle*'); *Minister for Immigration v SZVFW* (2018) 264 CLR 541, 564-565 (Gageler J); *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *FLR* 463, 469: 'in a constitutional context the entrenched jurisdiction to review for jurisdictional error operates to impose limitations on parliament's capacity to confer arbitrary power on executive officers'.

power to provide a remedy in the case of jurisdictional error for actions of a Commonwealth officer is well recognised in s 75(v) as an exercise of its original jurisdiction. This jurisdiction, at least with respect to jurisdictional error, is not subject to statutory limitations on judicial review.[132] Despite the apparent broadening of the unreasonable ground to include proportionality, the precedent has been little utilised since; relatedly, there has been lack of articulation of the content of unreasonableness and how proportionality might be applied within it.[133]

In *McCloy*, the leading case in which the High Court applied proportionality analysis to the implied freedom of political communication in constitutional law, four justices noted:

> The term proportionality in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative *or administrative acts* are within the legislative grant of power under which they purport to be done (emphasis added).[134]

The Court did not refer to proportionality in considering an appeal based on the unreasonableness of an administrative decision in *Minister for Immigration v SZVFW*.[135] Kiefel CJ maintained *Wednesbury* was not the approach to take 'in every case', without elaboration.[136]

Elsewhere in administrative law, the High Court has accepted the legitimacy of proportionality reasoning. Specifically, it has applied proportionality in determining the validity of powers exercised under

---

[132] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 506 ('*Plaintiff S157*').

[133] Greg Weeks and Matthew Groves, 'The Enduring Mystery of Minister for Immigration and Citizenship v Li' (2017) 24 *AJAL* 145, 146-147. Proportionality was briefly considered in the context of unreasonableness by the FFC in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1, [77] (Allsop CJ, Robertson and Mortimer JJ).

[134] *McCloy* (n 7) 195 (French CJ, Kiefel, Bell and Keane JJ); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 49 (French CJ).

[135] (2018) 264 CLR 541 ('*SZVFW*'); nor was it mentioned in *TTY167 v Republic of Nauru* (2018) 93 ALJR 111.

[136] *SZVFW* (n 135) 551. Proportionality was not discussed recently where the unreasonableness of a public official's declaration was raised. The Victorian Supreme Court stated a challenge based on unreasonableness could only succeed if the decision was beyond the scope or purpose of the legislation pursuant to which it was made: *Loielo v Giles* [2020] VSC 722, [184] (Ginnane J); similarly, *Widgee Shire Council v Bonney* (1907) 4 CLR 977, 989 (Higgins J).

delegated legislation. An early example occurred in *Williams v Melbourne Corporation*.[137] There, the validity of a by-law made pursuant to local government legislation was considered. Dixon J did not specifically use the word 'proportionality'; however, he considered a concept that was very similar. He opined that one question to determine the validity of the by-law was whether it 'could not reasonably have been adopted as a means of attaining the ends of the power'.[138] In other words, whether there was a reasonable proportionality between the objective/s in the enabling legislation and the by-law purporting to be passed pursuant to it.

In *South Australia v Tanner*,[139] the Governor was empowered to make regulations under environmental legislation with respect to watersheds. The Governor made a regulation prohibiting the construction of a piggery, zoo, or feedlot on land within a watershed. The validity of the regulation was unsuccessfully challenged. Four members of the High Court accepted that the test for the validity of the regulation was whether it was 'capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose'.[140]

In *Attorney-General (South Australia) v Adelaide City Corporation*,[141] the High Court considered the validity of a by-law made under local government legislation prohibiting preaching, canvassing or distributing written material without Council permission. Different positions were evident among the justices on the use of proportionality in assessing the validity of delegated legislation. The judgment of Crennan and Kiefel JJ notes the affinity between the test espoused by Dixon J in *Williams* regarding the validity of a bylaw, and the test of proportionality.[142] These justices supported the use of proportionality in this context. Similarly, French CJ accepted the use of proportionality in reviewing the validity of

---

[137] (1933) 49 CLR 142 ('*Williams*').

[138] Ibid 155.

[139] (1989) 166 CLR 161 ('*Tanner*').

[140] *Tanner* (n 139) 165 (Wilson, Dawson, Toohey and Gaudron JJ); Brennan J preferred a test of whether the impugned measure 'could reasonably have been adopted as a means of fulfilling the statutory object': at 179. See *Commonwealth v Tasmania* (1983) 158 CLR 1, 236-237 (Brennan J), 264-265, 278-279 (Deane J).

[141] (2013) 249 CLR 1.

[142] Ibid 84.

delegated legislation.[143] Other judgments did not favour the use of proportionality in this context.[144]

A recent example of the use of proportionality in this context appears in the judgment of Rares J in *Brett Cattle Company Pty Ltd v Minister for Agriculture*.[145] What was particularly noteworthy there was the Court's application of structured proportionality of the kind developed by the High Court in constitutional law cases to proportionality in the delegated legislation context.[146]

In summary, while the High Court has been prepared to apply proportionality to resolve at least some constitutional law disputes, its use in relation to administrative law has been more hesitant. This is something of a paradox, given constitutional and administrative law are part of the public law 'family' which share in common the purpose of confining exercise of government power, with a view to protection of fundamental human rights. It is submitted that proportionality might be utilised more consistently across public law to consistently rationalise the scope of judicial review in such a context, and to provide law makers and decision makers with guidance as to how the legality of their actions will be assessed by courts. Part III will now focus on a theoretical basis for the use of proportionality based on notions of a culture of justification. This theoretical basis is applicable in both administrative and constitutional law as constituent elements of the 'family' of public law.

---

[143] Ibid. 'Proportionality criteria have been applied to purposive and incidental law-making powers derived from the Constitution and from statutes': at 37; 'the high threshold of reasonable proportionality should be accepted as that applicable to delegated legislation made in furtherance of a purposive power': at 40.

[144] Ibid. 'The question to be asked and answered is not whether the by-law is a reasonable or proportionate response to the mischief to which it is directed but whether in its legal and practical operation the by-law is authorised by the relevant by-law making power … no further inquiry into the proportionality of the by-law is permitted or required': at 59 (Hayne J, Bell J agreeing at 90). The other judge in the case, Heydon J, did not consider this specific question.

[145] *Brett Cattle* (n 131) [285]-[310].

[146] Ibid. 'I am of opinion that the explanation in *McCloy* of how proportionality operates as a tool of analysis in the constitutional context is apposite to the analysis of proportionality in determining the validity of delegated legislation': at [300].

III CULTURE OF JUSTIFICATION FOR USE OF PUBLIC POWER AGAINST INDIVIDUALS

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

> Liberal political rights are widely perceived as having special weight when competing with policy goals. The idea is expressed…by Dworkin's conception of rights as trumps and the corollary distinction between principles and policies, or by what Rawls calls the 'priority of the right over the good', or by Habermas' description of rights as firewalls. Ultimately these ideas can be traced back to a theory, most fully developed by Kant, grounded in the twin deals of human dignity and autonomy viewed as side constraints on the pursuit of the collective good.[147]

This liberty is not absolute, but limitations on it require justification.[148] These limitations can be in legislative or executive action. Government has potentially great powers, these must be carefully constrained. One means of doing so is insisting exercises of such power are proportionate.[149] In

---

[147] Mattias Kumm, 'Political Liberalism and the Structures of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart, 2007) 141-142.

[148] Janina Boughey, 'The Culture of Justification in Administrative Law: Rationales and Consequences' (2021) 54 *UBCLR* 403; Kai Moller, 'Justifying the Culture of Justification' (2019) 17(4) *International Journal of Constitutional Law* 1078; *Dore v Federation of Law Societies of Canada and Others* [2012] 1 S.C.R. 395, 404 (Abella J, for the Court); Etinenne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South Africa Journal of Human Rights* 31; Mosie Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (2013) 7; Mosie Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *AJCL* 463.

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

both the constitutional and administrative law context, the High Court has expressed limitations on power in terms of *justification*.[150] Former Australian Chief Justice Murray Gleeson spoke of it extra-judicially.[151]

Australia is a democracy, with sovereignty placed in the Australian people.[152] The sovereign people confer power upon their representatives to act on their behalf. The federal compact demonstrates these powers are limited. Representatives are accountable to the people at regular, free and fair elections. Jackson observes that another accountability mechanism is ensuring the executive has justified reasons for actions and decisions that affect the sovereign people, and that these actions are proportionate to achieve legitimate objectives and appropriately sensitive to their impact on the rights of sovereign individuals.[153] The same point may be made about the exercise of legislative power. The mere fact governments are accountable to the people periodically at election time ('procedural democracy') is insufficient protection against government overreach.[154] Barak refers to the need for 'substantive democracy', including separation of powers, rule of law, independent judiciary, and protection of human

QB 728, 754 (Simon Brown LJ), 'there are limits to the legitimacy of executive or legislative decision making'.

[150] *LibertyWorks* (n 56) [292] (Steward J); *Li* (n 120) 267 (Hayne, Kiefel and Bell JJ).

[151] Murray Gleeson, 'Outcome, Process and the Rule of Law' (Speech, 30th Anniversary of the Administrative Appeals Tribunal, 2 August 2006) 18-19, noted a culture of justification 'pervades modern liberal democracies … unless both merits review and judicial review of administrative action are understood against the background of a culture of justification, they are not seen in their full context'.

[152] *Australian Capital Television* (n 43) 137 (Mason CJ); John Locke, *Two Treatises of Government*, ed Peter Laslett (Cambridge University Press, 1960) 367; John Stuart Mill, *Utilitarianism, On Liberty, Considerations on Representative Government* (Everyman, 1993) 246.

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

[154] Grant Hooper, 'The Rise of Judicial Power in Australia: Is There Now a Culture of Justification?' (2015) 41 *Mon ULR* 102, 105.

rights.[155] As part of substantive democracy, constant protection of rights is required. Governments must demonstrate the need for particular incursions on liberty and be duly sensitive to human rights considerations in all decision-making.[156] The social contract and the consent of the sovereign people for governments to act on their behalf is premised on this power being used carefully and narrowly.[157] Locke expressed that legislative and executive power should be limited to the public good and not exercised arbitrarily.[158] Proportionality is a tool to appropriately curb excessive use of power in this space by focussing on whether government incursion on liberty is justified. It is consistent with the separation of powers and traditional judicial review.[159]

The structured nature of proportionality analysis is lauded. It permits decision makers to carefully consider proposed legislation/executive action and its implications for human rights. It encourages soundly drafted laws and careful exercise of power, logically related to clearly identified purposes and no wider than necessary to achieve legitimate objectives.[160] Use of proportionality implies balancing between different, competing interests. This is why it has been most prevalent in the context of express and implied constitutional human rights/freedoms in Australia. Europe and Canada have express human rights instruments; thus, it is readily possible to apply proportionality there. However, notably, in Europe, there are cases that have applied proportionality analysis where no express right in the

---

[155] Barak (n 4) 218.

[156] Moller says that it is only such exercises of government power that are 'legitimate': Kai Moller, 'The Culture of Justification' (2019) 17(4) *International Journal of Constitutional Law* 1078, 1078.

[157] Mattias Kumm, 'The Idea of a Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law and Ethics of Human Rights* 141, 168, stating the only exercises of government power that are legitimate 'must plausibly qualify as a collective judgment of reason about what the commitment to rights of citizens translates into under the concrete circumstances addressed by the legislation'; elsewhere he refers to 'a right to contest decisions by public authorities (giving) expression to a commitment of liberty as non-domination not to be subject to laws that you might not reasonably have consented to': Kumm (n 150) 170.

[158] Locke (n 154) 353, 357, 372.

[159] Former Canadian Chief Justice Beverley McLachlin, 'Proportionality, Justification, Evidence and Deference: Perspectives from Canada' (Speech, Hong Kong Judicial Colloquium, 24 September 2015) 15-16.

[160] Barak (n 4) 460-463.

ECHR is implicated.[161] Further, proportionality has been and is applied overseas in non-rights contexts including German administrative law, free trade within the European Union, as well as more general aspects of the Treaty of Rome.[162]

There is no national bill of rights in Australia, though sub-national jurisdictions in Australia have enacted human rights instruments (which adopt proportionality).[163] The lack of a national bill of rights ought not preclude proportionality analysis beyond the existing parameters discussed above. Proportionality was developed in a context unconnected with provisions of an express human rights instrument.[164] It ought to apply beyond s 92, implied freedom of political communication and right to vote cases and reading down heads of power like inherent nationhood or defence powers, because the rationale for its use: justification of government incursion on an individual's liberties, is applicable beyond these limited contexts. The issue becomes, as Kirk observed, *the identification of interests which the law should deem to be worthy from government regulation*.[165]

How should these interests be identified in a defensible and rational manner? An obvious starting point is common law. The High Court acknowledges it as fundamental and foundational in preserving freedom.[166]

---

[161] *Bank Mellat* (n 1) (case involved a 'right to trade', not recognised by the *ECHR*); *Keyu* (n 98) (applicants sought review of refusal to hold a public inquiry into historical events – again no *Convention* right implicated).

[162] Adrienne Stone, 'Proportionality and its Alternatives' (2020) 48(1) *FLR* 123, 131. Stone develops an argument that would not tie proportionality to express rights provisions. This is the state-limiting, rather than express-rights enhancing, version of proportionality: at 134-136. '[Proportionality] enabled the (German) courts to protect individual freedoms by applying limits on state action despite the absence of an expressly justiciable set of constitutional rights': Chordia (n 18) 21.

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

[164] 'There is nothing about the way in which proportionality initially emerged in German constitutional law which suggests that the concept has an intrinsic connection with individual rights jurisprudence' and it developed earlier as part of German administrative law in a similar context: Chordia (n 18) 40.

[165] Kirk (n 72) 26.

[166] 'Under a legal system based on the common law, everybody is free to do anything, subject only to the provisions of the law': *Lange* (n 35) 564 (all members of the Court, quoting *Attorney-General v Guardian Newspapers* (No 2) [1990] 1 AC 109, 283 (Lord Goff)).

A common law bill of rights has been articulated for Australia.[167] There is precedent for applying common law rights to constrain government action. The principle of legality is important here. It is a well-accepted canon of statutory interpretation that, where a legislative provision is ambiguous and potentially impacts on fundamental human rights, it is presumed parliament did not intend to abrogate fundamental rights.[168] This is congruent with a position that, where such fundamental rights are at issue, it is more difficult for a legislature or executive action to 'pass' proportionality analysis.[169] The importance of the right at issue will be weighed in terms of whether the measure is 'adequate in its balance'.

This balancing occurred in Australia in the context of executive power in *Davis*[170] and in the UK in *Bank Mellat (No 2*).[171] It featured in *Brett Cattle Company*[172] and occurred in Australia in the context of legislative action in the *Australian Communist Party*[173] and others.[174] There are glimpses of it in various other cases. It is consistent with the rule of law in a liberal democracy.[175]

---

[167] James Spigelman, 'The Common Law Bill of Rights' (McPherson Lecture, 10 March 2008) 23-24, citing principles of non-retrospectivity, liberty, freedom of movement, freedom of speech, fair trial, right to access courts, right to appeal, legal professional privilege, privilege against self-incrimination, procedural fairness, right to property, just terms, right to religion, right to reputation and non-discrimination on irrelevant grounds; Meagher (n 78) 456.

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

[169] Michael Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] *NZLR* 423, 434; Meagher (n 78) 468-470.

[170] *Davis* (n 40) 100 (Mason CJ, Deane and Gaudron JJ) (reference to the law's impact on freedom of expression at a time when the High Court had *not yet* discerned that this freedom was constitutionally protected).

[171] *Bank Mellat* (n 1) (case involved a 'right to trade'); *Keyu* (n 97) (applicants sought review of refusal to hold a public inquiry into historical events – no ECHR right implicated); classically, *Dr Bonham's Case* (1610) 77 ER 646, 652 (Coke CJ).

[172] 'One important common law right, to which the principle of legality attaches, is the right to carry on business in one's own way within the law': *Brett Cattle* (n 131) [292] (Rares J).

[173] *Australian Communist Party* (n 18) 198, 200 (Dixon J), 209 (McTiernan J), 226-227 (Williams J), 242 (Webb J).

[174] *X7 v Australian Crime Commission* (2013) 248 CLR 92, 136-137 (Hayne and Bell JJ), 153 (Kiefel J); *Polyukhovich* (n 31) 592-593 (Brennan J); *Nationwide News* (n 24) 31 (Mason CJ); *Leask* (n 18) 636 (Kirby J).

[175] 'Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy based upon the principles and traditions of the common law … unless there is

Relatedly, since many rights recognised in international human rights instruments have a foundation in the common law, Australia is a signatory to the *International Covenant on Civil and Political Rights* and has legislated to recognise (to some extent) rights contained therein.[176] So while Australia lacks a national bill of rights, its commitment to protection of human rights is evident. Rights contained within covenants to which Australia is a signatory, together with the common law, could be used as a basis for conducting proportionality analysis.[177] A main purpose of our written constitution was to establish parameters around legislative power. Legislatures are constrained by requiring constitutional power to pass certain laws and the separation of powers principle. A federal structure also divides and diffuses legislative and executive power. In *Plaintiff S157/2002*, five members of the High Court noted the Court's power of judicial review 'exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction'.[178]

Taking into account both the common law and rights enshrined in international covenants in conducting proportionality analysis is rights-enhancing by limiting the extent to which a particular government can act to the detriment of an individual's human rights. Thus, constraints on legislative and executive power to protect human rights are considered consistent with Australian constitutional structure and culture, and liberal democracy.[179]

In sum, it is suggested firstly that in determining whether or not an exercise of executive power was valid or not, the court apply proportionality analysis – whether the decision was *suitable* for purposes for which it was made, *necessary*, considering whether the decision was minimally invasive of human rights (recognised at common law and international human rights

---

the clearest provision to the contrary, parliament must be presumed not to legislate contrary to the rule of law': *R v Secretary of State for the Home Department; Ex Parte Pierson* [1998] AC 539, 587 (Lord Steyn); similarly Lord Browne-Wilkinson: at 573. Mattias Kumm suggests interests protected as rights are not limited to what he calls 'classic' rights such as freedom of expression or association but includes 'all liberty interests': Kumm (n 149) 140.

[176] *Australian Human Rights Act 1986* (Cth), Sch 2; *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8, 9.

[177] Kirk (n 72) 46.

[178] *Plaintiff S157/2002* (n 132) 514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[179] 'The proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy': Kumm (n 149) 150.

instruments to which Australia is signatory), or whether there was an obvious and compelling alternative with less impact on relevant rights. The court would consider whether, having regard to the purpose/s of the decision, and its impact on rights, the exercise of executive power was *adequate in its balance*.[180] Disproportionality may sometimes indicate the decision maker was seeking to act for purpose/s beyond powers,[181] though it is broader than this. This ground would effectively supplant *Wednesbury* unreasonableness. It is acknowledged that there are a wide range of administrative powers and it is possible that structured proportionality may not suit all of them. The point being made here is that the court should, as a general rule, apply proportionality analysis to such questions. If it did so, it is possible that Australian law might then develop exceptions to this general rule, where proportionality (or structured proportionality) would not be appropriate. It is considered beyond the scope of the current work to state here what those exceptions might be. It is preferred that these be identified, in the common law tradition, through case law.

Other grounds of administrative review would remain available, though if proportionality were to become dominant, they may be used less frequently.[182] It is possible some may be subsumed under proportionality analysis. Possible mapping of this is beyond the scope of the current work.

It is suggested, secondly, that in determining whether a Commonwealth law is within power, proportionality should be considered.[183] There is no reason to restrict the approach to so-called purposive heads of power or laws under incidental powers. The court would consider whether the law was *suitable* to achieve a legitimate objective within the purpose/s of the

---

[180] It is conceded that, on occasion, this can be difficult to apply, because sometimes administrative decisions may not have a purpose distinct from the purposes of the legislation under which they are made. There has been some confusion in the Canadian authorities associated with the use of both structured and unstructured proportionality, and a lack of clear explanation as to when each should apply, and why: Janina Boughey, 'Rights, Review and Reasonableness: The Implications of Canada's New Approach to Administrative Decision-Making and Human Rights for Australia' (2013) 35 *Sydney Law Review* 283; Janina Boughey, 'A(nother) New Unreasonableness Framework for Canadian Administrative Law' (2020) 27 *Australian Journal of Administrative Law* 43.

[181] That an administrative decision maker is acting for proper purposes is, of course, already considered in determining validity of administrative action: *R v Toohey; Ex Parte Northern Land Council* (1981) 151 CLR 170.

[182] For example, some of the considerations relevant in determining whether there has been an improper exercise of power pursuant to s 5(1)(e) of the *ADJR Act 1977* (Cth).

[183] Chordia (n 18) ch 6.

relevant head of power. It would consider whether it was *necessary* to achieve it, given its impact on common law rights and those recognised in international human rights instruments to which Australia is party, or whether an obvious and compelling alternative existed less invasive of those rights. It would consider whether it was *adequate in its balance* in terms of purpose/s and impact/s on freedoms. Disproportionality may sometimes indicate that parliament was seeking to achieve purposes outside its powers.[184] In this way, a structurally similar approach would be taken to determine the validity of the exercise of executive and legislative power. Judicial power would operate as intended as a check on excesses of power of the other two arms of government. The judiciary would not usurp the other arms of government – it would not second guess the original decision maker or set aside decisions due to mere philosophical disagreement.

It is suggested, thirdly, that proportionality continue to be applied to determine validity of delegated legislation. The court would consider whether it was suitable to achieve a legitimate objective within the purpose/s of the primary legislation. It would consider whether it was necessary to achieve such a purpose, given its impact on common law rights and those recognised in international human rights instruments to which Australia is party, or whether an obvious and compelling alternative existed less invasive of those rights. It would consider whether it was adequate in its balance in terms of its purpose/s and impact/s on freedoms. This is similar to the position previously taken by the High Court in considering validity of delegated legislation. That delegated legislation is wider than necessary to achieve the purposes of the primary legislation has been a factor suggesting invalidity.[185] The Court has previously regarded the impact of delegated legislation on fundamental common law rights in determining validity.[186] Again, the court does not second guess the delegated legislation merely because members of the court believe that it might have been drafted better, pursued different policy objectives, or made different choices between competing interests.

---

[184] *Davis* (n 40) 100 (Mason CJ, Deane and Gaudron JJ); *Cunliffe* (n 41) 352 (Dawson J).

[185] *Tanner* (n 139) 165 (Wilson, Dawson, Toohey and Gaudron JJ); *Melbourne Corporation v Barry* (1922) 31 CLR 174, 189 (Isaacs J) ('*Barry*'); *Williams* (n 139) 155 (Dixon J); similarly, Starke CJ (147), 157 (Evatt J), 159 (McTiernan J).

[186] *Barry* (n 185) 196-197 (Isaacs J), 206 (Higgins J).

This approach would unify and consolidate tests currently utilised to determine the validity of government action and would simplify the law. It would re-assert the culture of justification, that government incursion on rights of individuals must be carefully calibrated and closely tailored to purpose. It would reduce the likelihood that legislation and delegated legislation would be drafted, or ministerial power exercised, in an overbroad way, unnecessarily impacting individuals' human rights. It would cause government to consider the impact of its proposed laws on the rights of individuals, a result consistent with parliamentary intent, reflected in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

IV CONCLUSION

This article has documented use of proportionality in Australian public law. While it has been and continues to be utilised in Australian constitutional law, at least to some extent, its use in Australian administrative law has been more hesitant. This article has argued the hesitancy is misplaced. There is value in a consistent approach across Australian public law, where the common concern is placing parameters around the use of government power, with a view to protecting and preserving liberty. Elsewhere, proportionality is and has been applied in the administrative law space. There is nothing logically that would confine it merely to constitutional, not administrative law, proportionality can play an important role in all areas of public law. The article has documented increasing utilisation of proportionality in UK administrative law, partially influenced by Europe, complementing/supplanting the much-criticised *Wednesbury* approach.

Proportionality analysis is compatible with a liberal democracy that values and protects fundamental freedoms. One way it does so is by insisting on the justification and rationalisation of government incursions on liberty. Proportionality assists this. Through use of structured proportionality, the courts can consider the extent to which government action, legislative or executive, is suitable, necessary and adequate in its balance. In making these assessments, the court can legitimately consider fundamental human rights that Australia recognises as such or rights in international human rights instruments to which Australia is a signatory. It upholds the social contract with governments of limited powers, with a view to maximising freedom. The article favours greater use of proportionality principles in

the administrative law space, expanded use in the constitutional law space, and continued use in the context of delegated power situations. In this way, there is a consistent public law approach to exercises of government power, encouraging governments to carefully consider the way in which its proposed actions impact on rights, and to carefully justify use of its vast powers.