

CONSTITUTIONAL GUARANTEES, CHARACTERISATION AND THE CONCEPT OF PROPORTIONALITY

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[The concept of proportionality has come to play a crucial role in Australian constitutional law in two contexts: as a test of the legitimate restriction of constitutional guarantees and as a means of characterisation in assessing whether Commonwealth laws are sufficiently connected to certain heads of federal power. Use of the doctrine in Australia has been marked by controversy and confusion. This article undertakes a comprehensive and comparative analysis of the nature and the effects of proportionality in Australian constitutional law. It concludes that the concept performs a justified and useful role in relation to constitutional guarantees. But the use of proportionality in the characterisation context is shown to raise a number of anomalies and objections.]

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INTRODUCTION

On its face, the concept of proportionality is simple and attractive. It is said to involve the idea that there should be a reasonable relationship or balance between an end and the means used to achieve that end. The aphorism often used to explain proportionality is that one 'should not use a sledgehammer to crack a nut'. However, close examination of the doctrine proves it to be considerably more complex than this easy phrase suggests. The complexity is reflected in the confusion and controversy now associated with the application of proportionality in Australia.

Proportionality was introduced to Australian constitutional law as a distinct concept by Deane J in *Commonwealth v Tasmania*,¹ having apparently been derived from the jurisprudence of the European Court of Justice ('ECJ') and the European Court of Human Rights ('Court of Human Rights').² Since 1983 'the proportionality doctrine has taken root and, indeed, extended its reach into the heartland of federal constitutional law'.³ The concept now plays an important role in two contexts. It has become the main test for determining when an apparent infringement of an express or implied constitutional guarantee is permissible. For certain heads of federal power it has also become a means of assessing whether a Commonwealth Act can be characterised as having a sufficient link to the power to be valid.

Despite the rapid acceptance of proportionality into constitutional law, the doctrine remains little analysed in Australia. At the academic level there has been relatively sparse examination of the concept.⁴ It has become the subject of significant judicial disagreement and uncertainty, particularly in relation to characterisation, and there is now evidence of a trend away from use of the concept. Given this background, a critical and comprehensive analysis of proportionality, as it is understood and applied in Australian constitutional law, is overdue. The aim of this article is to undertake such an analysis. In doing so,

¹ *Commonwealth v Tasmania* (1983) 158 CLR 1, 259-61 ('*Tasmanian Dams*').

² *Leask v Commonwealth* (1996) 140 ALR 1, 14 (Dawson J), 25-6 (Toohey J), 33 (Gummow J) ('*Leask*'); Sir Anthony Mason, 'Trends in Constitutional Interpretation' (1995) 18 *University of New South Wales Law Journal* 237, 246.

³ *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54, 65 (Gummow J) ('*Dover Fisheries*').

⁴ Only three Australian papers have taken constitutional proportionality as their main subject: Brian Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12 *University of Tasmania Law Review* 263; H P Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 126; B Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212.

some broader aspects of the nature of constitutional guarantees, and of the process of characterisation, will also be examined.

The task is approached in the following manner. Part I discusses and defines the concept of proportionality as it is understood outside Australian constitutional law. Part II analyses the use of proportionality as a test of legitimate restriction of constitutional guarantees in Australia. Part III addresses the employment of the concept in constitutional characterisation. Part IV examines the way in which the High Court has identified the interests that must be balanced: that is, the interests worthy of protection and the countervailing legitimate government purposes. Part V discusses the appropriate level of deference to legislative decisions in terms of the extent to which the concept encroaches upon political processes. Part VI addresses whether the use of proportionality is a useful or desirable development in Australian constitutional law. Throughout the paper comparisons will be made with the application of proportionality in other jurisdictions where to do so illuminates the concept. It should be noted that neither the possible use of proportionality as an administrative law ground of review of executive action,⁵ nor the issue of the validity of subordinate legislation under an authorising statute⁶ will be addressed here. However, the following analysis may certainly be relevant to these issues.

I THE CONCEPT OF PROPORTIONALITY

In the *Concise Oxford Dictionary*, the word 'proportion' is defined as 'a comparative part or share ... the correct or pleasing relation of things or parts of a thing'.⁷ Proportionality, therefore, involves ratios or relationships between matters. A common legal application of the idea has been in the context of responding to a need, grievance or provocation. Proportionality is a relevant factor in the criminal law defences of self-defence, provocation and duress.⁸ It has been invoked in relation to the international law of war, in regard to both when and how a state may respond aggressively to a grievance.⁹ It is relevant in determining acceptable responses to breaches of international treaty obligations.¹⁰ Proportionality also arises in relation to punishments and remedies. A criminal sentence must be proportionate to the crime.¹¹ For estoppel, the remedy granted must be proportionate to the detriment suffered.¹²

⁵ Cf *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 367 (Deane J).

⁶ Cf *South Australia v Tanner* (1989) 166 CLR 161 ('Tanner').

⁷ R E Allen (ed), *The Concise Oxford Dictionary of Current English* (8th ed, 1990) 958.

⁸ See generally Stanley Yeo, 'Proportionality in Criminal Defences' (1988) 12 *Criminal Law Journal* 211.

⁹ Judith Gardam, 'Proportionality and Force in International Law' (1993) 87 *American Journal of International Law* 391.

¹⁰ D Greig, 'Reciprocity, Proportionality, and the Law of Treaties' (1994) 34 *Virginia Journal of International Law* 295.

¹¹ See, eg, Richard Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.

¹² *Commonwealth v Verwayen* (1990) 170 CLR 394, 413 (Mason CJ), 441-2 (Deane J).

In each of these cases proportionality involves setting limits to the acceptable response. Proportionality does not provide its own justification. In each instance listed there is an interest or principle worthy of protection which mitigates against an excessive response. The concept of proportionality involves achieving a balance or a 'pleasing relation' between two objectives, principles or interests which are in tension or conflict. In the criminal defences, for example, there is a balance between the entitlement to respond to the provocation and the right of the provoking party not to be assaulted. In the punishment context, there must be a balance between the right or duty to punish (the extent of which will itself be based on some theory of punishment) and the rights of the defendant.

Proportionality has also been applied in public law around the world. A sophisticated model of the concept (originating in Germany) has emerged involving three aspects or levels.¹³ According to this doctrine, the government measure being reviewed must be suitable, necessary and not excessive in achieving its claimed end. Whilst there are numerous ways in which ideas of proportionality can be expressed¹⁴ (and judges do not always articulate or acknowledge the three levels), applications of the concept can nearly always be encompassed within this model. The ECJ employs proportionality as a 'general principle of Union law' to review measures of European Community institutions and national measures within the sphere of Union law.¹⁵ It operates as a test of legitimate regulation of a wide range of rights and interests. The Court of Human Rights has applied proportionality as a test of legitimate restriction of the rights guaranteed by the European Convention on Human Rights ('European Convention').¹⁶ The three-tiered approach has also been expressly adopted by the Supreme Court of Canada, which employs proportionality to test the restriction of constitutional guarantees contained within the Canadian Charter of Rights and Freedoms.¹⁷ The Canadian approach has in turn been accepted by the Hong Kong Court of Appeal in relation to its Bill of Rights,¹⁸ although the Privy Council has viewed it a little less warmly.¹⁹

Before examining the levels of proportionality, it should be noted that three preliminary steps must be taken before proportionality can be applied as a test of

¹³ Jürgen Schwarze, *European Administrative Law* (1992) 685–7; Nicholas Emiliou, *The Principle of Proportionality in European Law* (1996); Jeffrey Jowell and Anthony Lester, 'Proportionality: Neither Novel Nor Dangerous' in Jeffrey Jowell and Dawn Oliver (eds), *New Directions in Judicial Review* (1988) 52–4; Mahendra Singh, *German Administrative Law in Common Law Perspective* (1985) 88–92.

¹⁴ Paul Craig, *Administrative Law* (3rd ed, 1994) 414–5.

¹⁵ See, eg, *R v Minister for Agriculture, Fisheries and Food; Ex parte Fedesa* (C–331/88) [1990] ECR I–4023, 4062–4 ('*Fedesa*'); *SPUC v Grogan* (C–159/90) [1991] ECR I–4685, 4719–21 (Advocate General Van Gerven) ('*Grogan*'); *Fromançais v FORMA* (66/82) [1983] ECR 395, [8] ('*Fromançais*').

¹⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221; see, eg, *Handyside* (1976) 24 Eur Ct HR (ser A) [42]–[50]; *Sunday Times* (1979) 30 Eur Ct HR (ser A) [58]–[62]; *Silver* (1983) 61 Eur Ct HR (ser A) [97]–[98].

¹⁷ *R v Oakes* [1986] 1 SCR 103, 138–40 ('*Oakes*').

¹⁸ *R v Sin Yau Ming* [1992] 1 HKCLR 127, 145, 163, 166.

¹⁹ *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 970–5.

the validity of a government measure. Proportionality involves the balancing of competing interests. The competing interests in public law are the achievement of legitimate government ends and the protection of certain rights and interests from undue government regulation.²⁰ The first two steps, therefore, are to identify each of these interests.²¹ The third step is to decide the level of intensity with which the test will be applied.²² For each level of proportionality it is possible to assess the requirements rigorously or deferentially.

A Suitability

Synonyms variously employed for suitability include that the measure be an appropriate, effective, useful or rational means of achieving the legitimate end. To understand this level, it is first necessary to grasp the reason for applying it. The purpose and role of the suitability test is not altogether clear.²³ At least when applied in constitutional contexts,²⁴ the purpose of assessing suitability is *not* to check that the measure is well drafted or whether it represents the most practically desirable or effective way to achieve the end.²⁵ Even if proportionality is said to be an 'ethic' of 'good government',²⁶ there is no obvious justification for courts to apply a general quality control check on laws. Thus, in *Biovilac v EEC*,²⁷ the fact that the relevant measure had 'subsequently proved to be partially ineffective'²⁸ was disregarded by the ECJ. This view corresponds with the regular refrain in Australian constitutional law that it is for Parliament to choose the means to a legitimate end and that it is not for the court to assess the wisdom or effectiveness of that choice.²⁹ It should be noted that the Canadian Supreme Court has introduced a requirement of fairness as part of its first level of proportionality.³⁰ In so far as it is relevant to take account of issues of fairness, these are more effectively dealt with at the balancing stage.

The reason for assessing suitability in constitutional contexts is to test the purpose of the measure in question. The application of proportionality is

²⁰ See below Part III(A).

²¹ See below Part IV.

²² See below Part V.

²³ See, eg, Emiliou, above n 13, contrast 24 with 26–8; see also Peter Hogg, 'Section 1 Revisited' (1991) 1 *National Journal of Constitutional Law* 1, 16.

²⁴ Although proportionality has been applied in Europe to legislative, executive and judicial determinations, it is convenient here to focus on legislative measures as being the relevant matter for Australian constitutional law.

²⁵ In administrative law, contexts suitability *might* have the role of ensuring that the decision is not incompatible with the requirements of private law and that it is capable of being attained in law and fact: Emiliou, above n 13, 28.

²⁶ Fitzgerald, above n 4, 268.

²⁷ (59/83) [1984] ECR 4057, [17] ('*Biovilac*'); see also *Stölting v Hauptzolleamt Hamburg-Jonas* (138/78) [1979] ECR 713, [7] ('*Stölting*').

²⁸ *Biovilac* (59/83) [1984] ECR 4057, [17].

²⁹ See, eg, *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 344–5 ('*Jumbunna*'); *Marcus Clarke & Co Ltd v Commonwealth* (1952) 87 CLR 177, 256 ('*Marcus Clarke*'); *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306 ('*Uebergang*'); *Richardson v Forestry Commission* (1988) 164 CLR 261, 310 ('*Richardson*').

³⁰ *Oakes* [1986] 1 SCR 103, 139, 141–2.

premised on the legislative aim being a legitimate one. At the minimum, this requires some genuine independent reason that justifies the partial regulation (or restriction) of the protected interest, which must be a reason other than the desire merely to restrict the protected interest for its own sake.³¹ It is the actual or subjective purpose of the legislator which is at issue.³² Yet there are inherent difficulties in ascertaining the subjective purpose of an act of a collective body. Further, in assessing the purpose of a law, a court obviously cannot rely simply on the assertions of Parliament, the Executive or counsel. The answer, as in contract law, is to ascertain subjective intent from the objective evidence. This process is well illustrated by the Canadian Charter case of *R v Big M Drug Mart Ltd.*³³ There, the Supreme Court accepted that a secular justification might have supported Sunday trading legislation. However, the terms, nature and history of the legislation proved that it really involved an unconstitutional religious purpose.

Suitability serves as an objective test of purpose. If a measure is not an effective, appropriate or rational means of achieving the claimed end, then the measure cannot reasonably be characterised as having been made to achieve that end. Unless some other legitimate purpose emerges, the measure can be presumed to have been made predominantly for the impermissible purpose of restricting the relevant protected interest. The test sets a fairly low threshold and is rarely held to have been infringed.³⁴ A measure may be suitable to achieve one purpose whilst achieving a number of other aims or effects. Further, suitability does not test the *legitimacy* of a government's purpose. The issues are logically distinct, although closely related and often dealt with together. The preliminary question is whether or not the claimed government end is, of itself, a legitimate basis for restricting the particular protected interest at stake. Suitability assesses whether the measure can in fact be characterised as having been made for that claimed purpose.

To some extent, the other two levels of proportionality may also be said objectively to test purpose. That a law infringes a protected interest in a way which is unnecessary or excessive may indicate that the real purpose of the law is other than that which has been claimed.³⁵ There is not the same strong probative connection, however. A law can often reasonably be characterised as having been made with respect to a legitimate purpose even if there is a means available which is less restrictive of the protected interest, or even if the court views the level of restriction as excessive.³⁶

³¹ See below Part IV(B).

³² See, eg, *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 335 (Dickson CJ).

³³ *Ibid* 351–3.

³⁴ Emiliou, above n 13, 29; Hogg, above n 23, 16.

³⁵ *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 471–2 ('*Castlemaine*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 93–4 (Gaudron J) ('*Nationwide*'); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 352 (Dawson J) ('*Cunliffe*').

³⁶ See below Part III(A).

Suitability should be assessed in light of all the surrounding circumstances, as can be illustrated by certain ECJ cases on derogations from the guarantees of freedom of movement. National restrictions on the entry of people or goods, based on public policy justifications, have been held invalid unless the state has equivalent 'serious and effective measures'³⁷ to enforce such public policy in relation to conduct or trade internally. The inconsistency of the restrictions otherwise suggests that the real purpose behind the measures is illegitimate discrimination against incoming goods or people. Admittedly, such measures are suitable to achieve the claimed public policy end, in the simple sense of being effective to achieve that end to some extent. When seen in context, however, their partiality casts doubt on whether they would have been rationally adopted if they had really been made for the purpose claimed. Of course, a state should not be reproached for limiting the infringement of protected interests by only partially seeking to achieve a particular goal.³⁸ To do so would be contrary to the whole thrust of proportionality. The basis for objection in these cases relates to the inconsistency in application, not to the particular level of restrictiveness adopted.

B *Necessity*

The second level of proportionality involves assessing whether the measure is necessary in the sense that there are no alternative practicable means available to achieve the same end which are less restrictive of the protected interest. This meaning is the one adopted in Germany,³⁹ Canada⁴⁰ and by the ECJ.⁴¹ It does not require that the purpose or result of the legislation is itself necessary or desirable for the good of society. Necessity has a broader meaning under the European Convention. The guarantees in articles 8 to 11 may be restricted for certain purposes if the interference is 'necessary in a democratic society'. The court has derived the concept of proportionality from the word 'necessary'.⁴² The phrase focuses attention on whether the end of the disputed measure is itself necessary. Nevertheless, necessity in the narrower sense (the sense which will be employed here) does emerge as a reason for invalidity in the European Convention cases.⁴³

Applying the test of necessity does not directly require the allocation of weight to competing interests. According full respect to the protected interest demands

³⁷ *Conegate Ltd v HM Customs & Excise* (121/85) [1986] ECR 1007, 1022–3; *Adoui and Cornuaille v Belgium* (115,116/81) [1982] ECR 1665, 1707–8.

³⁸ *Grogan* (C–159/90) [1991] ECR I–4685, 4721 (Advocate General Van Gerven); *Handyside* (1976) 24 Eur Ct HR (ser A) [55].

³⁹ Schwarze, above n 13, 687; Singh, above n 13, 90; Emiliou, above n 13, 29–30.

⁴⁰ *Oakes* [1986] 1 SCR 103, 139.

⁴¹ *Commission v Germany* (178/84) [1987] ECR 1227, [28]; *Fedesa* (C–331/88) [1990] ECR I–4023, [13].

⁴² *Handyside* (1976) 24 Eur Ct HR (ser A) [49], [58]; *Young, James and Webster* (1981) 44 Eur Ct HR (ser A) [63].

⁴³ See, eg. *Soering* (1989) 161 Eur Ct HR (ser A) [111]; *The Observer and Guardian v United Kingdom* (1991) 216 Eur Ct HR (ser A) [69].

that the least restrictive practicable means be chosen. This principle applies even if, at the third level of proportionality, the restrictions imposed might otherwise be seen as justifiable. Of course, if the measure's restriction of the protected interest is only minor, or if the difference in restrictiveness between alternative measures is insignificant, then a court may not automatically invalidate the measure. The approach of the court here depends on the level of rigour or deference with which the test is applied, which may vary according to the weight assigned to the respective interests.⁴⁴ Further, the significance attached to the extent of the restriction will depend on the importance of the protected interest. Thus, in an indirect fashion, necessity may presuppose some weighting of interests.

C *Balancing*

Sometimes named proportionality in the narrow or strict sense, or proportionality properly so called, it is the third level which lies at the heart of the concept. It requires that the measure is either excessive or disproportionate in the sense that the restrictions or detriments caused outweigh the importance of the end or the beneficial result achieved. In simple terms it represents a cost-benefit analysis.

That which is weighed up must be understood. On the detriment side, the extent of the restriction of a protected interest is relevant. A slight or marginal infringement can easily be justified. Account must also be taken of the nature of the protected right or interest. Not all rights, interests or guarantees are of equal importance. For a very important interest, such as the right to life, any infraction would require a strong justification.⁴⁵ What is actually balanced is the *significance* of the detriment, which is a function of the level of restriction and the importance of the interest affected.⁴⁶ Thus, where a measure restricts two protected interests, it does not follow that because the measure is proportionate with respect to one interest the same applies for the other.⁴⁷

Similarly, on the other side of the equation, the importance of the end or value pursued by the measure has to be taken into account. So too does the benefit that the particular measure achieves in the context of that end. Thus, a measure may be valid even if it only goes a small way towards achieving an end which is of great importance, or vice versa. Questions of effectiveness resurface here.⁴⁸ If a law seeks to protect the environment, for example, but does not in practice afford much protection, then the net significance of the beneficial effects would be slight.

To some extent, therefore, the application of a balancing test *does* involve the court deciding on the desirability or necessity of a government end. That is what

⁴⁴ See below Part V.

⁴⁵ *McCann v United Kingdom* (1995) 324 Eur Ct HR (ser A) [147]–[150].

⁴⁶ *Oakes* [1986] 1 SCR 103, 139–40.

⁴⁷ Cf *Grogan* (C-159/90) [1991] ECR I-4685, 4723–4 (Advocate General Van Gerven).

⁴⁸ See, eg, *Open Door* (1992) 246 Eur Ct HR (ser A) [76].

is necessarily involved in assessing the importance of a regulatory aim or the benefit to be achieved by a measure. Proportionality may be about not ‘cracking nuts with sledgehammers’. But the test requires a determination that the problem at hand is, in fact, a nut and not something considerably harder. For this reason, the concept of proportionality applied by the Court of Human Rights is little different from that applied elsewhere, despite its special focus on ‘necessity’. Whether made apparent or not, the requirement that the court decide if the end or benefit is sufficiently important, necessary or desirable to justify restrictions of protected interests is a fundamental aspect of proportionality.

The difference between second and third level proportionality can be seen in the following terms. At the necessity level, the court need not review the government’s implicit weighting of interests. If it holds a measure invalid, it is because, even accepting that weighting, there is another means to achieve the end less restrictive of the protected interest. At the balancing level, if the court holds a measure invalid it is because in effect it sees the government as having overestimated the relative benefit or importance of its measure, or underestimated the detriments. The two levels do overlap. If there is clearly a less restrictive alternative means available, this may suggest that the government has not given due weight to the imperative to protect the relevant interest.⁴⁹ Nevertheless, a measure may be suitable to achieve a legitimate end, and be the least restrictive means available, but still fail the balancing test.⁵⁰ The classic example involves a boy seen escaping after stealing fruit from an orchard. The only means to catch him is to shoot him. The end of catching him is legitimate, and to shoot him is an effective and necessary means of achieving the end, but clearly it cannot be justified.

In summary, proportionality involves the reconciliation of principles or interests which conflict or are in tension. In public law these interests are the achievement of legitimate government ends and the protection of certain rights or interests. In this context, proportionality has been seen and applied as a tripartite concept, even if the components have sometimes not been acknowledged or properly understood. Whilst the three levels overlap somewhat, they remain logically distinct. This view of proportionality provides a useful model of analysis for the application of proportionality in Australian constitutional law.

II LEGITIMATE RESTRICTION OF CONSTITUTIONAL GUARANTEES

Constitutional guarantees are rarely seen as absolute in Australia or elsewhere. Rights and interests will often conflict. That certain rights or interests are granted constitutional protection does not require that such matters outweigh all other public interests.⁵¹ This approach might be labelled utilitarian, yet within any

⁴⁹ Fitzgerald, above n 4, 274.

⁵⁰ *Oakes* [1986] 1 SCR 103, 140; *Grogan* (C-159/90) [1991] ECR I-4685, 4720 (Advocate General Van Gerven).

⁵¹ See, eg, *Australian Capital Television Pty Ltd v Commonwealth* [No 2] (1992) 177 CLR 106, 142 (Mason CJ) (*‘Political Advertising’*); *Belgian Linguistic* (1968) 6 Eur Ct HR (ser A) [5].

philosophical system, conflicting rights or interests may demand reconciliation. To allow some infringement of a guarantee in the public interest is one part of the broader process of giving content to the guarantee.⁵² Indeed, achieving the appropriate balance between the protected right or interest and competing interests is involved in the very definition of the scope of guarantees.⁵³ Some definitions themselves incorporate exception tests, such as that often given to discrimination.⁵⁴ It can always be argued that any particular guarantee is so important, or so narrow, that no restrictions should be permitted whatsoever. Few guarantees are likely to fall into this category, however.⁵⁵ The great majority of constitutional guarantees are of broad scope, affecting significant areas of human activity, and are thus seen as requiring latitude in drawing the appropriate balance on a case by case basis (ie the guarantees are seen as non-absolute). Although the extent of legitimate restriction is to a substantial extent 'inseparable from the scope of the rights'⁵⁶ in question, the very use of concepts such as proportionality illustrates that parallel issues arise for infringement of all non-absolute guarantees.

That a guarantee is not absolute does not mean that it may be restricted in pursuit of just any public interest. If the protected interest did not sometimes outweigh the competing public interest, then the guarantee would serve no protective role beyond, perhaps, that of a principle of interpretation.⁵⁷ There may, therefore, be express or implied pre-defined limits on what types of government interests are legitimate in the context of overriding a particular right.⁵⁸ Further, the protected interest should be accorded significant weight when balanced with competing interests. Thus the two European courts (the ECJ and the Court of Human Rights) have indicated that any restriction must not impair the 'very substance' or the 'very essence' of protected rights.⁵⁹ The Supreme Court of Canada has also stated that only 'pressing and substantial' government objectives can override a Charter right.⁶⁰

Restriction of guarantees may be permitted expressly.⁶¹ There is no express exception test for the guarantees contained in the Australian Constitution. This fact does not require that they be interpreted as absolute. The United States Bill

⁵² *Soering* (1989) 161 Eur Ct HR (ser A) [89].

⁵³ See, eg, Marc-André Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (1993) 125, 137–40.

⁵⁴ See Part II(A).

⁵⁵ Cf *Open Door* (1992) 246 Eur Ct HR (ser A) [67]–[70].

⁵⁶ Francis Jacobs, *The European Convention on Human Rights* (1975) 196.

⁵⁷ *Young, James and Webster* (1981) 44 Eur Ct HR (ser A) [63]; T Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993) 140.

⁵⁸ See below Part IV(B).

⁵⁹ *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* (5/88) [1989] ECR 2609, [18] ('*Wachauf*'); *Mathieu-Mohin and Clerfayt v Belgium* (1987) 113 Eur Ct HR (ser A) [52]; cf Eissen, above n 53, 144.

⁶⁰ *Oakes* [1986] 1 SCR 103, 138–9.

⁶¹ See, eg, European Convention arts 6(1) 8, 9, 10, 11; Treaty Establishing the European Economic Community as Amended by Subsequent Treaties, 25 March 1957, 298 UNTS 3, arts 36, 48, 56, 73d, 100a; Canadian Charter of Rights and Freedoms (1982) s 1.

of Rights has no derogation provision, yet some restrictions have long been permitted. The same is true of the new Hong Kong Bill of Rights.⁶² It could be argued, of course, that the presence of an express exception test might make a court more willing to uphold restrictions of the relevant interest. In any case, once it is accepted that a guarantee is not absolute, some test of what constitutes a legitimate type and level of restriction must be developed. Proportionality is such a test.

A *Miscellaneous Guarantees*

Section 116 of the Australian Constitution prevents the Commonwealth, *inter alia*, from 'prohibiting the free exercise of any religion'. The 1943 case of *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,⁶³ concerned wartime regulations which would have had the effect of dissolving the Adelaide Company of the Jehovah's Witnesses and confiscating its property, based on an executive declaration that the Company was prejudicial to the defence of the Commonwealth. The judges accepted that s 116 is not an absolute guarantee. They all held that the regulations did not breach the section. The judges' development of an exception test was limited and unsophisticated. Yet even there, notions of necessity, reasonableness and the balancing of competing interests were mentioned or implicit.

Section 117 of the Constitution provides that citizens shall not be subject to any disability or discrimination on the basis of non-residence in a State. The section was given a revitalised interpretation in 1989 in *Street v Queensland Bar Association*.⁶⁴ All judges accepted that the guarantee was not absolute. It was not necessary in that case, nor in a subsequent case,⁶⁵ to formulate a precise exception test. Two judges specified a related test to determine what constituted discrimination. Brennan J held that there would be no discrimination if legislation accorded differential treatment on permissible grounds, and there was 'a rational and proportionate connexion' between the differential treatment and the law's object.⁶⁶ Gaudron J's test was very similar,⁶⁷ and both tests mirror the approach of the two European courts in equivalent contexts.⁶⁸ Proportionality is employed as a means of assessing whether the measure is sufficiently and non-excessively connected to a legitimate purpose, which is essentially the same role it plays as an exception test for other guarantees.

Proportionality has also been applied to other constitutional guarantees. Two judges employed the concept as one aspect of the test for breach of the require-

⁶² *R v Sin Yau Ming* [1992] 1 HKCLR 127.

⁶³ (1943) 67 CLR 116, 131–2, 149–50, 155, 157, 160–1 ('*Jehovah's Witnesses*').

⁶⁴ (1989) 168 CLR 461 ('*Street*').

⁶⁵ *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463.

⁶⁶ *Street* (1989) 168 CLR 461, 510–2.

⁶⁷ *Ibid* 570–4; cf *Leeth v Commonwealth* (1992) 174 CLR 455, 488–92 (Deane and Toohey JJ) ('*Leeth*').

⁶⁸ *Belgian Linguistic* (1968) 6 Eur Ct HR (ser A) [10]; *Bilka* (170/84) [1986] ECR 1607, [36].

ment that the Commonwealth only acquire property on just terms.⁶⁹ These judges used the concept, in effect, as an indication of primary purpose. Toohey and Gaudron JJ, in dissent, employed the concept as a test of permissible deviation from strict equality for an implied guarantee of equality of voting power.⁷⁰ The most developed invocations of proportionality in the Australian context, however, relate to s 92 and to the implied freedom of political communication.

B Proportionality and Section 92

The constitutional guarantee in s 92 is, on the face of it, very simple: 'trade, commerce and intercourse among the States ... shall be absolutely free'. The problem of legitimate restriction of interstate trade has been said to be the 'major problem to which the section has given rise'.⁷¹ It was accepted almost from the beginning that the term 'absolutely free' did not mean that interstate trade could not validly be regulated.⁷² Various tests or formulas of permissible regulation were advocated.⁷³ Proportionality was first invoked in 1990 but related notions had clearly begun to emerge in the preceding two decades.

Barwick CJ has taken the most restrictive view of legitimate regulation in recent times. This view is manifested in his limited statement of legitimate government purposes which could restrict trade, and in the great weight he accorded to the guarantee in his balancing test. Yet it is notable that the actual test Barwick CJ applied was very similar to the modern approach. For legislation purporting to protect health in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*, he stated that measures could be valid only if they were 'reasonable and no more onerous in their impact on interstate trade than may be regarded as reasonably necessary to achieve that purpose'.⁷⁴

Reasonableness and necessity became key words during the 1970s in testing regulation. In *North Eastern Dairy*, for example, Gibbs J said the law went 'far beyond what is reasonably necessary for the purpose'; Mason J asked whether the law was 'reasonably necessary to protect the interests of the public'; Jacobs J spoke of what was 'necessary and reasonable' to achieve the purpose.⁷⁵ The word 'reasonable' implies some balancing of the importance of the end with the degree of the restriction. The word 'necessary' implies that there are no alternatives available with less onerous an effect on the guarantee.

⁶⁹ Australian Constitution s 51(xxxi); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 179–81 (Brennan J), 219–22 (McHugh J).

⁷⁰ *McGinty v Western Australia* (1996) 186 CLR 140–215 (Toohey J), 222 (Gaudron J) ('*McGinty*').

⁷¹ *Uebergang* (1980) 145 CLR 266, 281 (Barwick CJ).

⁷² See, eg, *Duncan v Queensland* (1916) 22 CLR 556, 573.

⁷³ See, eg, *Commonwealth v Bank of NSW* (1949) 79 CLR 497, 641; *Hughes & Vale Pty Ltd v NSW [No 2]* (1955) 93 CLR 127, 162–4.

⁷⁴ *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR, 559, 578–9 ('*North Eastern Dairy*').

⁷⁵ *Ibid* 601 (Gibbs J), 615 (Mason J), 634 (Jacobs J).

The approach was most refined in the judgment of Stephen and Mason JJ in *Uebergang* in 1980.⁷⁶ They rejected the view that different tests could be applied in different circumstances,⁷⁷ thus paving the way for a general test such as proportionality. Their statement of the applicable test was that the legislation be 'no more restrictive than is reasonable in all the circumstances, due regard being had to the public interest'.⁷⁸ They made it clear that the test involved balancing the adverse effect on interstate trade with the 'need which is felt for the regulation'.⁷⁹ They also indicated that the validity of the legislation could be affected if there were alternative practicable means of achieving the end with less effect on interstate trade. Thus, second and third level proportionality clearly emerge from this approach.

That all these judges were applying aspects of proportionality under another guise can be seen in the results of the cases. In *North Eastern Dairy*, a State law provided for expropriation of all milk produced, purportedly to ensure health precautions were observed. Five of the six judges held that the law was invalid, citing the availability of other means to protect health which were less restrictive of interstate trade. In *Clark King*, a High Court majority upheld the national wheat marketing scheme. Mason and Jacobs JJ decided that the 'calamitous conditions' which had previously affected wheat growers due to price fluctuations justified the level of intervention in interstate trade.⁸⁰ In other words, the infringement was justified given the importance of the end being addressed. A majority in *McGraw-Hinds (Aust) Pty Ltd v Smith*⁸¹ held that a consumer protection law, in effect, failed the necessity test. Some of the conduct to which it applied was quite innocent, hence the restriction on interstate trade could not be justified. In *Permewan Wright Consolidated Pty Ltd v Trewhitt*⁸² the majority upheld the validity of a law which required eggs sold in the State to be tested, graded and stamped. Gibbs J, for example, noted that the regulation was not 'unreasonable', implying that the balance achieved was acceptable.

In *Cole v Whitfield*,⁸³ a 1988 case, the High Court substantially revised its interpretation of the scope of the guarantee in relation to interstate trade. Since then the guarantee has only applied to laws which have the purpose or effect of imposing discriminatory burdens of a protectionist kind on interstate trade. One of the reasons given for the reinterpretation was that previous approaches had failed to deal adequately with 'the need for laws genuinely regulating intrastate and interstate trade'.⁸⁴ Although a narrower interpretation of any constitutional

⁷⁶ (1980) 145 CLR 266, 304–6.

⁷⁷ Cf *North Eastern Dairy* (1975) 134 CLR 559, 616 (Mason J); *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 188 (Mason and Jacobs JJ) ('*Clark King*').

⁷⁸ *Uebergang* (1980) 145 CLR 266, 306.

⁷⁹ *Ibid.*

⁸⁰ *Clark King* (1978) 140 CLR 120, 191–3.

⁸¹ (1979) 144 CLR 633, 647–8 (Gibbs J), 660 (Mason J), 670 (Murphy J), 671 (Aickin J).

⁸² (1979) 145 CLR 1, 18 ('*Permewan*').

⁸³ (1988) 165 CLR 360 ('*Cole*').

⁸⁴ *Ibid* 403.

guarantee will invalidate fewer laws, the new approach did not avoid the problem of legitimate restriction altogether.

The subsequent case of *Castlemaine Tooheys Ltd v State of South Australia*⁸⁵ concerned the validity of a State legislative scheme which established a cash deposit and bottle return regime for beer bottles. The scheme distinguished between refillable and non-refillable bottles by, for example, setting a higher deposit for the latter. The effect of the scheme was to discriminate against a particular interstate brewer, Bond, for whom it was not economic to use refillable bottles. The claimed purposes of the scheme were to reduce litter and to conserve energy resources by encouraging the return and reuse of bottles. The court accepted that, despite the protectionist effect, the law was not necessarily invalid; the guarantee of free trade was not absolute. The five-judge majority established the following as the test of legitimate restriction:

[L]egislative measures which are appropriate and adapted to the resolution of those [identified community] problems would be consistent with s 92 so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement.⁸⁶

Although not expressly stated, all three levels of proportionality seem to be included in this test. Suitability is implied by the use of the 'appropriate and adapted' phrase traditionally employed in such contexts in Australia. The concept was arguably employed on the facts. The court held that as there was no relevant difference between refillable and non-refillable bottles in terms of causing litter, there was no litter justification for the difference in treatment.⁸⁷ As for the ECJ cases discussed above,⁸⁸ the unjustified difference in treatment suggested the scheme was not really adopted for the purpose claimed. Alternatively, the decision can be characterised as involving necessity: the less severe provisions applying to refillable bottles would have also sufficed to reduce litter involving non-refillable bottles.

Necessity was the main basis of the court's decision on the energy conservation justification. The court asserted that the State could have achieved the same end by means which had less effect on interstate trade. For example, the Parliament could have prohibited the sale of beer in non-refillable bottles produced in the State. Suitability also seems to play a role here. The court noted that the use by Bond of refillable bottles produced outside the State would actually reduce energy consumption in *South Australia*. In practice, therefore, the law would actually increase State energy consumption by discouraging the sale of Bond beer.⁸⁹ The court did not need to consider third level proportionality. Nevertheless, although there is some uncertainty on point,⁹⁰ the formulation of the test

⁸⁵ (1990) 169 CLR 436 ('*Castlemaine*').

⁸⁶ *Ibid* 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

⁸⁷ *Ibid* 475-6, 480.

⁸⁸ See above Part I(A).

⁸⁹ *Castlemaine* (1990) 169 CLR 436, 476-7, 479-80.

⁹⁰ *Ibid* 472.

implicitly acknowledges that the burden of the restriction on interstate trade has to be balanced against the benefit of achieving the legitimate end. It is worth noting that the High Court's approach is very similar to that of the ECJ in equivalent contexts.⁹¹ Further, it seems that the same type of proportionality test will apply to the s 92 guarantee of freedom of intercourse.⁹²

The requirement that the burden on trade must only be 'incidental' is ambiguous and, strictly speaking, unnecessary. It is reminiscent of the European statements that the 'substance' or 'essence' of a right must not be impaired.⁹³ So viewed it means that the restriction must not be excessive, a requirement given effect by third level proportionality. Alternatively, it may mean that the burden on interstate trade must not be the very purpose of the law. Yet if that were the case, the law would have no legitimate end to balance against the effect of the restriction and would be invalid.⁹⁴

The majority assert that they are applying *one* test: characterising the law as 'relevantly discriminatory' or not.⁹⁵ Yet the proportionality inquiry only arose once the court had found that the law had the effect of discriminating against Bond in a protectionist way.⁹⁶ The key word is 'relevantly'. The majority effectively import the same sort of discrimination test as applied by the two judges in relation to s 117.⁹⁷ A law is discriminatory in a protectionist way, in the simple sense of imposing differential treatment, if it has the purpose or effect of protecting local industry.⁹⁸ Yet this protectionism will not be seen as discrimination in the relevant sense if the differential treatment can be justified as resulting from the proportionate pursuit of a legitimate aim. In substance, therefore, there is a two-stage inquiry: (1) whether the guarantee is *prima facie* breached by the imposition of a protectionist burden on interstate trade (ie whether there is actual discrimination); (2) whether the breach is justified as satisfying the proportionality test (whether the discrimination is relevant). These two stages are inherent in any test for the legitimate restriction of a constitutional guarantee.⁹⁹

The s 92 cases show that proportionality has deep roots in Australia. By 1980 a test for legitimate restriction of s 92 had evolved which incorporated both the second and third levels of the concept (which in turn presuppose the first level). In one sense, therefore, *Castlemaine* added little but the label. Indeed, in so far

⁹¹ See, eg. *Commission v Germany* (178/84) [1987] ECR 1227; *Commission v Denmark* (302/86) [1989] ECR 4607; Chris Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19 *Federal Law Review* 322.

⁹² *Nationwide* (1992) 177 CLR 1, 59 (Brennan J); see also *Cunliffe* (1994) 182 CLR 272, 307–8 (Mason CJ), 346–7 (Deane J), 366 (Dawson J), 392 (Gaudron J, agreeing with Deane J), 396 (McHugh J).

⁹³ See above n 59.

⁹⁴ See below Part IV(B).

⁹⁵ *Castlemaine* (1990) 169 CLR 436, 471–2.

⁹⁶ *Ibid* 472.

⁹⁷ See also *ibid* 478–80 (Gaudron and McHugh JJ).

⁹⁸ *Cole* (1988) 165 CLR 360, 407–8; cf David Souter, 'Intention or Effect? Commonwealth and State Legislation after *Cole v Whitfield*' (1995) 69 *Australian Law Journal* 332, 336–41.

⁹⁹ *Oakes* [1986] 1 SCR 103, 134.

as the court in that case did not clearly articulate the different aspects of proportionality, the *Castlemaine* test is arguably less clear than the approach of Stephen and Mason JJ in *Uebergang*. It should be noted, of course, that the fact that the restriction test is much the same as that previously applied does not necessarily mean that the results of its application will be similar. The effect of a restriction test will always depend substantially on the primary scope of the guarantee and the weight attached to it.

C Freedom of Political Communication

In 1992, in *Political Advertising*¹⁰⁰ and *Nationwide*,¹⁰¹ six judges of the High Court held that the Constitution impliedly restricted Commonwealth legislative power to protect freedom of communication on political or governmental matters. The ‘freedom’ (being what the limitation, which has the effect of an implied guarantee, tends to be called) has been considered subsequently by the court in *Cunliffe*,¹⁰² *Theophanous v Herald and Weekly Times Ltd*,¹⁰³ *Stephens v West Australian Newspapers Ltd*,¹⁰⁴ *Langer v Commonwealth*¹⁰⁵ and *Muldowney v South Australia*.¹⁰⁶ In the two founding cases the six majority judges accepted that the freedom was not absolute, developing a range of infringement tests. These tests can all be characterised as involving proportionality.

Brennan J originally invoked proportionality in a pure form, stating that a restriction of the freedom must ‘serve some other legitimate interest and it must be proportionate to the interest to be served’.¹⁰⁷ In *Theophanous* he expressed the fear that his use of the term proportionality was ‘not as clear as it should be’,¹⁰⁸ indicating that it means that the law must be appropriate and adapted to achieving a legitimate purpose, and that the restriction must only be incidental. With respect, Brennan J’s explanation adds nothing to the concept of proportionality when properly understood. It appears he feels some unease about the balancing of competing social values involved in the concept,¹⁰⁹ yet it is not clear how his later formulation avoids such balancing.

Mason CJ set up two tiers of review. The same basic test applied for both: whether the restriction of the freedom was ‘no more than reasonably necessary’, or was proportionate, to protect the competing public interest.¹¹⁰ Laws regulating the communication of ideas or information required a ‘compelling justification’, however; laws restricting the activity or mode of communication were ‘more

¹⁰⁰ (1992) 177 CLR 106.

¹⁰¹ (1992) 177 CLR 1.

¹⁰² (1994) 182 CLR 272.

¹⁰³ (1994) 182 CLR 104 (*‘Theophanous’*).

¹⁰⁴ (1994) 182 CLR 211 (*‘Stephens’*).

¹⁰⁵ (1996) 186 CLR 302 (*‘Langer’*).

¹⁰⁶ (1996) 186 CLR 352 (*‘Muldowney’*).

¹⁰⁷ *Political Advertising* (1992) 177 CLR 106, 150, 157.

¹⁰⁸ *Theophanous* (1994) 182 CLR 104, 152, see generally 150–2.

¹⁰⁹ *Ibid* 162–3.

¹¹⁰ *Political Advertising* (1992) 177 CLR 106, 143.

susceptible of justification'. Mason CJ openly acknowledged that such tests involved the balancing of competing public interests.¹¹¹ The second and third levels of proportionality are clearly implicit in his analysis.

McHugh J's approach was very similar to that of Mason CJ.¹¹² Deane and Toohey JJ also adopted a two-tier approach along much the same lines of division.¹¹³ For the stricter category they stated that the law must not go beyond what is 'reasonably necessary' to achieve certain limited ends.¹¹⁴ It is surprising that the progenitor of proportionality in Australia, Deane J, did not invoke the term here, yet that proportionality is what is involved became clear in *Cunliffe*.¹¹⁵ Gaudron J adopted a test of whether the law was 'reasonably and appropriately adapted' to achieving some end within power,¹¹⁶ a test she elsewhere treated as incorporating proportionality.¹¹⁷

The utility or accuracy of the suggested two-tier approach is limited. If a law on the means or mode (rather than the content) of communication restricted the freedom significantly then such a law would and should be required to have a weighty justification.¹¹⁸ A law rationing the number of television or radio licences is clearly the sort of law envisaged as falling into the more easily justified category. Yet it is doubtful that a law restricting the number of newspapers would be viewed with the same equanimity. The difference between these cases is not the nature of the law but the presence of a sufficient justifying purpose. The restrictive effect on the freedom and the weight of the justifying ends are what is important, not the form of the law. The proportionality test deals with these very matters in an appropriately flexible manner.

That these disparate tests of restriction are encompassed by proportionality is reflected in their application. In *Political Advertising*, a Commonwealth scheme prohibiting political advertisements during election periods and providing for a replacement regime of free advertisements was held to be invalid.¹¹⁹ The government's justifications were to reduce financial pressure on political parties (and thus the incentive for corruption), to promote equality of access to the media regardless of wealth, and to reduce the trivialisation of politics. The judges accepted that these ends were legitimate concerns which might justify some level of restriction. Mason CJ, Deane, Toohey, Gaudron and McHugh JJ held the scheme invalid essentially on the basis that these purposes did not justify the level of restriction of the freedom.¹²⁰ They thus applied third level proportionality. McHugh J also enumerated alternative means of reducing the

¹¹¹ *Ibid*; see also *Cunliffe* (1994) 182 CLR 272, 300.

¹¹² *Political Advertising* (1992) 177 CLR 106, 235.

¹¹³ *Nationwide* (1992) 177 CLR 1, 76–7; *ibid* 169–70.

¹¹⁴ See below Part IV(B).

¹¹⁵ *Cunliffe* (1994) 182 CLR 272, 339–40 (Deane J), 381, 383–4 (Toohey J).

¹¹⁶ *Political Advertising* (1992) 177 CLR 106, 217.

¹¹⁷ *Richardson* (1988) 164 CLR 261, 346.

¹¹⁸ As Deane J admits in *Cunliffe* (1994) 182 CLR 272, 339.

¹¹⁹ *Political Advertising* (1992) 177 CLR 106.

¹²⁰ *Ibid* 144–7 (Mason CJ), 174–5 (Deane and Toohey JJ), 218–21 (Gaudron J), 238–9 (McHugh J).

pressure for corruption. Brennan J, adopting a more deferential approach, upheld the scheme.¹²¹ Criticism of this case has included the view that the court drew the balance inappropriately.¹²² This argument is unsurprising in light of the lack of effective alternative measures¹²³ and the wealth of overseas precedents for the legislation, which were dismissed or ignored. However, any decision applying proportionality may be controversial, for where complex balancing of public interests is involved there will always be room for reasonable divergence of opinion.

In *Nationwide* a provision interpreted as preventing any criticism of the Industrial Relations Commission or its members, without the usual defences of justification or fair comment, was invalidated unanimously.¹²⁴ Of the four judges who applied the freedom, three held that the provision exceeded the legitimate purpose of proscribing unwarranted attacks.¹²⁵ This decision can be seen as reflecting a balancing test.¹²⁶ Arguably, however, the more accurate view is that these judges held that the apparent purpose of the law — to outlaw *all* criticism — directly conflicted with the freedom. To apply proportionality requires the balancing of a *legitimate* purpose.

In *Cunliffe* a legislative scheme requiring immigration advisers to be registered was upheld narrowly. Mason CJ, applying his exception test rigorously, employed third level proportionality to hold some aspects invalid.¹²⁷ Reflecting the potential for significant disagreements on these issues, Brennan J stated that any infringement of the freedom was 'manifestly incidental'.¹²⁸ Deane J would have invalidated some provisions because of the 'serious curtailment' of the freedom, and the availability in some respects of less restrictive measures.¹²⁹ Toohey J held that the scheme as a whole could be seen as proportionate.¹³⁰ Gaudron J's judgment involved first level proportionality: she found that some measures conflicted with the justification of the scheme, which was to protect immigration applicants.¹³¹

A majority in *Theophanous* (and also *Stephens*) devised a new constitutional defence in defamation law after holding that such law, under both common law and State statute, was subject to and inconsistent with the freedom. In relation to the common law, the majority clearly applied a balancing test, finding that the

¹²¹ Ibid 158–61, see also 187–91 (Dawson J).

¹²² Geoffrey Kennett, 'Individual Rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581, 613.

¹²³ *Political Advertising* (1992) 177 CLR 106, 155–6 (Brennan J).

¹²⁴ *Nationwide* (1992) 177 CLR 1.

¹²⁵ Ibid 53 (Brennan J), 78–9 (Deane and Toohey JJ).

¹²⁶ Fitzgerald, above n 4, 294–5.

¹²⁷ *Cunliffe* (1994) 182 CLR 272, 302–7.

¹²⁸ Ibid 329.

¹²⁹ Ibid 343–6.

¹³⁰ Ibid 381–4.

¹³¹ Ibid 390–2.

balance drawn was inappropriate.¹³² Brennan J, in contrast, took it as axiomatic that the common law had drawn an appropriate balance.¹³³

In *Langer* and *Muldowney* restrictions on the public encouragement of informal voting were challenged. In both cases McHugh and Gummow JJ held that there was no breach of the implied freedom,¹³⁴ and Brennan CJ, Toohey and Gaudron JJ held that any breach was justified.¹³⁵ Surprisingly, the latter three judges did not invoke the term ‘proportionality’, preferring the old ‘appropriate and adapted’ phrase. This omission may indicate caution about using the word in light of the controversy surrounding its application to characterisation, as well as some confusion about what the concept involves. Nevertheless, taken as a whole, the cases on the freedom of political communication confirm the role of proportionality as the basic test of legitimate restriction of constitutional guarantees, whether express or implied, in Australia.

D *The Role of Proportionality*

Proportionality is not the only possible test of legitimate restriction of constitutional guarantees. One approach, for example, is to assess whether the law can be characterised as genuinely made in the pursuit of some legitimate purpose.¹³⁶ This view fails to pay sufficient respect to the guarantee, for a law may be made for a legitimate purpose but still restrict the protected interest to an unacceptable degree. Another possibility is to ask with ‘good sense’ whether the restriction is ‘reasonably imposed’,¹³⁷ avoiding the complexities of the three-level proportionality test. Invocation of such vague terms only serves to hide the reasons supporting, and the values behind, the assessments involved. Arguably the same criticism applies to the ‘appropriate and adapted’ test. Clearly articulated justifying reasons are required when a court overrules a democratic legislature if the process is to be seen as being conducted openly and with legitimacy and integrity.¹³⁸ The Parliament is entitled to know the precise basis of objection, for it may still wish to pursue its aim in some other manner.

The formula used to test restriction of constitutional guarantees does matter.¹³⁹ It directs the form and substance of the inquiry, and thereby determines both the results achieved and the types of reasons provided. It is submitted that three-level proportionality is the most useful and desirable test of legitimate restriction, for four reasons. First, each of the three levels of the concept serves a justified

¹³² *Theophanous* (1994) 182 CLR 104, 131–3 (Mason CJ, Toohey and Gaudron JJ), 178–84 (Deane J).

¹³³ *Ibid* 153–5.

¹³⁴ *Langer* (1996) 186 CLR 302, 340, 350–1, cf 326–7 (Dawson J); *Muldowney* (1996) 186 CLR 325, 381, 385–8.

¹³⁵ *Langer* (1996) 186 CLR 302, 318, 333–5; *Muldowney* (1996) 186 CLR 352, 366–7, 374–5, 380–1.

¹³⁶ Cf *Attorney-General (Antigua) v Antigua Times Ltd* [1976] AC 16, 31–4.

¹³⁷ *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 969–75.

¹³⁸ Cf Jowell and Lester, above n 13, 67–8.

¹³⁹ *Contra Street* (1989) 168 CLR 461, 548 (Dawson J).

role in this context. The restriction of constitutional guarantees can only be supported if a measure is made in pursuance of a genuine competing legitimate purpose. The first level of proportionality tests whether a measure can be characterised as pursuing such a purpose. If it is accepted that a constitutionally protected interest can sometimes be overridden by competing public interests, but that not just any public interest or any set of circumstances can justify such restriction, then the need for a balancing test becomes plain. If the matter is put in terms of competing public interests, the public interest encapsulated in the decision to accord certain matters the protection of a constitutional guarantee will sometimes — but not always — outweigh the particular public interest represented by the legitimate government aim. This need to draw a balance is given effect by third level proportionality. The second level of proportionality reflects the view that, even if on balance the restriction is justified, to accord full and substantive respect to the guarantee demands that it be restricted as little as possible.¹⁴⁰ A measure will therefore be invalid if alternative practicable means of achieving the legitimate end are available.

Secondly, a proportionality test facilitates the provision of clear and detailed reasons for any decision as to a law's validity. Admittedly, there is some danger with proportionality that it will be invoked as a self-justifying conclusion.¹⁴¹ So employed, the criticisms made of a reasonableness test would apply. The difference from reasonableness is that the three-level model of proportionality provides a more specific and articulated framework by which to assess the validity of a law. The exact objection to a restriction is more likely to emerge from a reasoned application of proportionality. Of course, the ultimate question in this context is always the justifiability of a particular restriction. Thus, one should not become obsessive about the different components of the concept.¹⁴²

Thirdly, the test is sufficiently flexible to cope with any type of constitutional guarantee or any range of circumstances. Finally, that proportionality is the most appropriate test is supported by the fact that it has been adopted by the Court of Human Rights, the ECJ, the Supreme Court of Canada and the Hong Kong Court of Appeal in similar circumstances. Further, the s 92 cases in the 1970s illustrate the natural evolution of such a test in Australia itself.

It is unfortunate that, although the three elements have certainly been applied, no member of the High Court has yet clearly recognised the three level nature of proportionality. The structured approach of proportionality represents a beneficial addition to Australian constitutional law in this context. The possible trend away from invocation of the concept is therefore to be regretted.¹⁴³ There is

¹⁴⁰ Cf Michael Walzer, *Just and Unjust Wars* (2nd ed, 1992) 155–6.

¹⁴¹ Sophie Boyron, 'Proportionality in English Administrative Law: A Faulty Translation?' (1992) 12 *Oxford Journal of Legal Studies* 237, 254–5.

¹⁴² Cf Gerard La Forest, 'The Balancing of Interests under the *Charter*' (1992) 2 *National Journal of Constitutional Law* 133, 140–1.

¹⁴³ Note that use of the concept in relation to constitutional guarantees was affirmed in *Leask* (1996) 140 ALR 1, 9 (Brennan CJ), 18–19 (Dawson J), 25 (Toohey J), 26 (Gaudron J agreeing with Toohey J).

nothing in the cases to suggest, however, that the substance of the approach will be abandoned.

III TESTING THE LINK TO A POWER

Since being introduced in 1983, the relevance of proportionality to aspects of characterisation has been widely accepted. Yet there are now significant disagreements and misunderstandings as to whether and when the concept applies, what it involves and how it relates to previous approaches in the area. Before attempting to shed light on these issues, it is necessary to examine briefly the context in which proportionality applies.

In essence, characterisation is the process of testing the validity of any federal law by assessing whether it is made 'with respect to' one of the enumerated Commonwealth powers. The court has long taken the view that Commonwealth powers are to be interpreted broadly.¹⁴⁴ It is also traditional doctrine that powers are not to be read down because of the possibility that they might be employed in undesirable ways: this 'is a matter to be guarded against by the constituencies and not by the Courts'.¹⁴⁵ Generally, the dominant theme of the High Court's approach to characterisation has been literalistic positivism.¹⁴⁶

In a broad sense all articulated government powers are granted to achieve some object. Yet the great majority of Commonwealth powers are not seen as 'purposive'. In assessing the validity of a law made under these powers, the court does not, initially at least, assess the purpose of the law. Instead it examines whether the legal operation and effect of the law (the 'nature of the rights, duties, powers and privileges which it changes, regulates or abolishes')¹⁴⁷ is such as to fall within the relevant category. If a law has a legal operation sufficiently connected to one of the Commonwealth's powers then it is irrelevant that the law may manifestly be designed to achieve a purpose quite unrelated to the nature of the power itself.¹⁴⁸

Purpose is relevant to all federal powers in one manner, however. Implied in each power is the authority to legislate in relation to matters incidental to the power which are conducive or necessary 'for the reasonable fulfilment of the legislative power'.¹⁴⁹ There is also an express power to legislate with respect to matters incidental to the execution of the other powers (s 51(xxxix)). For the incidental powers it has long been understood that 'the end or purpose of the

¹⁴⁴ *Jumbunna* (1908) 6 CLR 309, 367–8; *R v Coldham; Ex Parte Australian Social Welfare Union* (1983) 153 CLR 297, 313–4; *New South Wales v Commonwealth* (1990) 169 CLR 482, 498 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ), 506 (Deane J).

¹⁴⁵ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151 ('Engineers' case').

¹⁴⁶ Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992) 13–15, 340–8; Gregory Craven, 'The Crisis of Constitutional Literalism in Australia' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 1–6.

¹⁴⁷ *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 7.

¹⁴⁸ *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329, 354.

¹⁴⁹ *Burton v Honan* (1952) 86 CLR 169, 177 ('Burton'); *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77.

provision, if discernable, will give the key'.¹⁵⁰ A majority of the High Court have recently sought to downplay the strictness of the division between the central and incidental aspects of any power, indicating that 'the power is an entirety'.¹⁵¹ Nevertheless, these judges still accept that purpose is relevant as one way of ascertaining validity, especially for laws at the 'periphery' of powers. Note that it is convenient to speak of the 'incidental power' to cover the incidental or peripheral aspect of the various powers.

For the non-purposive powers, therefore, the court has expanded the reach of Commonwealth power by treating purpose as an inclusionary, but not an exclusionary, factor. That a law achieves a purpose not directly related to the power does not invalidate the law so long as it has a legal operation and effect sufficiently connected to the power. Conversely, if the law on its face operates on matters insufficiently connected to the power, but achieves a purpose which is sufficiently connected, then the law will still be valid. The measure will only fail if both its legal operation and its purpose are insufficiently connected to the power.

A limited number of Commonwealth powers are regarded as being either inherently 'purposive' or having 'purposive' aspects. This categorisation applies to two of the express powers: defence (s 51(vi)),¹⁵² and external affairs (s 51(xxix)) when implementing treaties.¹⁵³ Two less defined powers also seem to have been classified in this way: the implied national power to legislate on matters relating to Australia's status as a nation (sometimes seen as incidental to the Executive power)¹⁵⁴ and the Commonwealth's power to legislate in relation to federal elections.¹⁵⁵ A law must be characterisable as made for the relevant purpose to be valid under these powers.

Two matters must be shown for purposive characterisation, regardless of whether the incidental power or powers with purposive aspects are involved.¹⁵⁶ First, the purpose of the law must be within the scope of, or sufficiently connected to, the power. This issue will depend on how widely each particular power is viewed. Secondly, the law must be characterisable as in fact adapted to achieve this purpose. The two steps of purposive characterisation can be carried out in reverse: the actual purpose of the law can be ascertained and then the

¹⁵⁰ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 354 (Dixon J).

¹⁵¹ *Cunliffe* (1994) 182 CLR 272, 318 (Brennan J); see also 351–6 (Dawson J), 375–6 (Toohey J); *Leask* (1996) 140 ALR 1, 7 (Brennan CJ), 16 (Dawson J), 33 (Gummow J), 40 (Kirby J).

¹⁵² *Stenhouse v Coleman* (1944) 69 CLR 457, 471 ('*Stenhouse*').

¹⁵³ *Victoria v Commonwealth* (1996) 138 ALR 129, 146–7 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). Purposive characterisation is not employed for laws relating to matters physically external to Australia: *De L v Director-General, New South Wales Department of Community Services* (1996) 139 ALR 417, 422 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

¹⁵⁴ *Davis v Commonwealth* (1988) 166 CLR 79 ('*Davis*').

¹⁵⁵ *Smith v Oldham* (1912) 15 CLR 355; *Fabre v Ley* (1972) 127 CLR 665, 669; *Langer* (1996) 134 ALR 400, 411 (Dawson J).

¹⁵⁶ *Sloan v Pollard* (1947) 75 CLR 445, 471–2 (Dixon J); *Cunliffe* (1994) 182 CLR 272, 296–7 (Mason CJ), 319–20 (Brennan J).

sufficiency of the connection assessed.¹⁵⁷ To give an example, it is now established that the legislative implementation of international treaties adopted by Australia is a purpose within the scope of the external affairs power. In any such case, therefore, the court has to assess whether the federal law can be characterised as having been made for the purpose of implementing the treaty. It should be noted in relation to the second step that it seems to be irrelevant that the law may be also characterisable as achieving some other purpose,¹⁵⁸ although the extent to which the legitimate purpose must be the dominating one has not been fully clarified.

The two processes of characterisation (assessing legal operation and effect, and assessing purpose) do overlap. A law is characterised as having a certain purpose by examining its terms, its effects and the ‘circumstances which called it forth’.¹⁵⁹ Neither the policies nor motives of legislators, nor the subjective purposes of particular members of Parliament, are said to be relevant.¹⁶⁰ As Deane J put it, the relevant purpose is ‘that which [the measure] can be seen to be designed to serve or achieve’.¹⁶¹ Thus, as discussed in relation to suitability,¹⁶² the approach involves the objective ascertainment of purpose. That the purpose of a measure is determined in part from its effects does not mean that purposive characterisation is merely a different label for examining the effects of a measure.¹⁶³ One key difference between the two processes lies in the reference to the background circumstances for purposive characterisation. The legal effect and operation of a law might relate entirely to domestic or to civilian matters, for instance. But if the circumstance which called the law forth is an international treaty or a war, the law can be seen as made for the purpose of legislating with respect to external affairs or defence (respectively).

The court has employed a number of expressions as tests to determine whether a law can be characterised as achieving a purpose within power (ie the second question in purposive characterisation). The phrase most commonly utilised is that the law is ‘appropriate and adapted’¹⁶⁴ — often qualified by such words as ‘reasonably’ — to achieve the legitimate purpose. Although the word ‘proportionate’¹⁶⁵ previously had been employed on occasion, proportionality was not

¹⁵⁷ See, eg, *Cunliffe* (1994) 182 CLR 272, 319 (Brennan J).

¹⁵⁸ *Victoria v Commonwealth* (1957) 99 CLR 575, 637 (Williams J), 646–7 (Webb J) (‘*Second Uniform Tax case*’); *R v Sweeney; Ex parte Northwest Exports Pty Ltd* (1981) 147 CLR 259, 265 (Gibbs CJ), 266–7 (Stephen J), 275 (Mason J); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 191–4 (Stephen J) (‘*Actors Equity*’); see also *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 279 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ); cf *Nationwide* (1992) 177 CLR 1, 93–4 (Gaudron J) and *Cunliffe* (1996) 182 CLR 272, 352 (Dawson J).

¹⁵⁹ *Stenhouse* (1944) 69 CLR 457, 471.

¹⁶⁰ *Ibid*; see also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 273 (‘*Communist Party*’); *Richardson* (1988) 164 CLR 261, 311.

¹⁶¹ *Richardson* (1988) 164 CLR 261, 311.

¹⁶² See above Part I(A).

¹⁶³ Cf *Leask* (1996) 140 ALR 1, 7 (Brennan CJ), 16 (Dawson J).

¹⁶⁴ Derived from the US, it was invoked in *Jumbunna* (1908) 6 CLR 309, 345, 358.

¹⁶⁵ *Marcus Clarke* (1952) 87 CLR 177, 226; *Fabre v Ley* (1972) 127 CLR 665, 669.

invoked as a distinct concept until 1983. Today it is seen as 'a condition of, if not a synonym for' the 'appropriate and adapted' test.¹⁶⁶ It should be noted that these terms are broad and have been used by different judges to mean different things. The ideas and effects, not the labels, are what is important here.

A *The Nature of Proportionality*

Although notions of proportionality and purpose are intimately connected, the links between them have been widely and significantly misunderstood. It has been stated or implied on a number of occasions that the primary, and perhaps only, role of proportionality is to assess whether a law can be characterised as achieving the claimed legitimate purpose.¹⁶⁷ As explained above,¹⁶⁸ applying a balancing test requires that the legislation be made pursuant to a legitimate government end. Thus, first level proportionality objectively tests the purpose of the law. Breach of the other levels of proportionality may also indicate an ulterior purpose. The key point is that an action may be characterisable as pursuing a legitimate purpose yet still not satisfy the second or third levels of the proportionality test. In relation to the second level, it is simply artificial to say that a measure cannot reasonably be characterised as one made in pursuit of a legitimate purpose merely because there is some alternative available means less restrictive of a particular interest. The legislator may not have considered the restrictive effect sufficiently significant to warrant adopting a different approach. It may still be that the only goal the legislator could be seen as pursuing was the legitimate one; there may be no other relevant and possible ulterior goal.

As for third level proportionality, the matter can be proved by the example of the boy in the orchard.¹⁶⁹ If the farmer had shot the boy, the clear purpose of the farmer (as objectively judged from all the circumstances) would have been to catch the thief. Thus, the purpose was legitimate, but the action excessive. Reasonable decision-makers will often disagree on the relative weight attached to competing social goals. That a court disagrees with the legislature's weightings does not establish that the legislature was not acting genuinely in pursuit of the claimed legitimate purpose.

The necessity and balancing levels *can* be used to test purpose but only if employed in a particularly narrow way. The court would have to ask whether the

¹⁶⁶ *Cunliffe* (1994) 182 CLR 272, 321 (Brennan J), see also 296–7 (Mason CJ), 351 (Dawson J); *Tasmanian Dams* (1983) 158 CLR 1, 260 (Deane J); *Richardson* (1988) 164 CLR 261, 303 (Wilson J), 346 (Gaudron J); *Victoria v Commonwealth* (1996) 138 ALR 129, 147 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Leask* (1996) 140 ALR 1, 8 (Brennan CJ), noting also 25 (Toohey J); cf *Cunliffe* (1994) 182 CLR 272, 377 (Toohey J).

¹⁶⁷ *Richardson* (1988) 164 CLR 261, 311–2 (Deane J); *Nationwide* (1992) 177 CLR 1, 88–9 (Dawson J); *Cunliffe* (1994) 182 CLR 272, 321–2, 324–5 (Brennan J), 355–6 (Dawson J), 387–8 (Gaudron J); *Victoria v Commonwealth* (1996) 138 ALR 129, 147 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Leask* (1996) 140 ALR 1, 8–9 (Brennan CJ), 14–19 (Dawson J), 26 (Gaudron J), 26–7 (McHugh J); *Taylor v Guttilla* (1992) 168 LSJS 133, 138–9; *Minister for Urban Affairs & Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 38, 45.

¹⁶⁸ See above Part I.

¹⁶⁹ See above Part I(C).

availability of less restrictive means, or the imbalance, was of such an overwhelming nature as to make it clear that the law could not reasonably be characterised as having been made with respect to the claimed legitimate purpose. As will be shown below,¹⁷⁰ members of the High Court have applied second and third level proportionality in characterisation. But this extraordinarily rigorous approach is not the one that they have adopted.

An example of the general point is *Richardson*.¹⁷¹ It concerned a Commonwealth law, based on an international treaty, which provided for an inquiry into the environmental value of native forests in Tasmania. The law accorded interim protection to an area constituting 4.5% of Tasmania. Deane and Gaudron JJ, in dissent, held the law partially invalid as being disproportionate.¹⁷² Given the significant restrictive effect of the legislation their finding was not unreasonable. Yet the only reasonable objective characterisation of the purpose of the law was that it was aimed at protecting the forest whilst assessing whether it was worthy of nomination for the World Heritage List — a legitimate purpose. The protection regime only operated for a very limited period and only applied to the area which was the subject of the inquiry. The law could not be seen as an attempt by the Commonwealth to extend its regulatory powers into general land management or the like.

Of the High Court, only Mason CJ has acknowledged clearly that proportionality does more than test purpose.¹⁷³ He thus held the provision in *Nationwide* was *ultra vires* even though he regarded the purpose of the law as valid. The judgment of the plurality in *Davis v Commonwealth*¹⁷⁴ arguably involved a similar finding. The next question, then, is what proportionality *does* in this context if not merely test purpose.

The ultimate issue in characterisation is always whether or not there is a sufficient connection between a law and the relevant head of power. It is possible to distinguish two types of characterisation analysis capable of being applied to the purposive powers: 'quantitative' and 'qualitative'. Quantitative analysis involves a one-dimensional assessment of the proximity of the law to a power. The purpose of the law might be seen as too remote from the purpose, operation or scope of the power. The provision, although covering some matters within power, may cover too many matters insufficiently connected to the power to be characterised as made for the legitimate purpose. Value judgments may, of course, affect the determinations of degree involved in these questions. Nevertheless, there is no normative element to the process in the sense of assessing the effect of the law on particular protected interests. It will be shown below that quantitative characterisation was the established orthodoxy in Australia.

¹⁷⁰ See below Part B(3).

¹⁷¹ *Richardson* (1988) 164 CLR 261.

¹⁷² *Ibid* 313–7 (Deane J), 346–8 (Gaudron J).

¹⁷³ *Nationwide* (1992) 177 CLR 1, 30–1; see also *Oakes* [1986] 1 SCR 103, 140.

¹⁷⁴ (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ).

Qualitative analysis takes account of an extra normative dimension by assessing the particular nature of the matters being regulated and whether those matters may appropriately be regulated in that way. Thus, for example, a law might prohibit military officers from criticising the government. The law might be sufficiently related to defence to satisfy a quantitative analysis in that it regulates the conduct of the defence forces. On a qualitative analysis, concerns would arise about free expression.

Applying the first level of proportionality in characterisation requires no qualitative analysis. If the law is not a suitable or rational means of achieving the claimed legitimate purpose then clearly the law cannot be said to be sufficiently connected to the relevant power. The fact that the law may be completely benign in its qualitative effect does not alter this failure. Conversely, that a law has some malign characteristic does not necessarily mean that it is not a rational means of achieving the legitimate end.

Second level proportionality involves asking whether the law represents the least restrictive means to achieve the end. This test begs the question of *what* should be least restricted. The 'what' must be some identified interest(s). It is not sufficient to say that general freedom should not unnecessarily be restricted. In any given situation there usually will be a number of possible means to achieve an end and these will affect different interests in different ways. There is no criterion for determining which of these means are acceptable unless some particular interest (or limited set of interests) is said to be worthy of protection, such that it should be impaired to a minimal extent. Thus, to apply second level proportionality requires an extra dimension: the identification of some interest(s) deemed worthy of protection from undue government regulation.

The same is true of the third level of proportionality. When applying proportionality in the characterisation context, judges have tended to ask if the *means* is proportionate to the end.¹⁷⁵ Yet in the guarantee context they have asked if the *restriction of the guarantee* is proportionate to the end.¹⁷⁶ A balancing process involves the allocation of weight to either side. A means cannot be said to have some self-evident 'cost'. There must be some criterion or criteria by which to judge the means. The 'cost' or the objection must be the adverse effects of the law.¹⁷⁷ Again, these effects must relate to particular identified interests, as otherwise there is no way of quantifying the negative weight to be allocated to the means. Third level proportionality, strictly, is not between means and ends.

¹⁷⁵ *Tasmanian Dams* (1983) 158 CLR 1, 260 (Deane J); *Richardson* (1988) 164 CLR 261, 311–2 (Deane J); *Nationwide* (1992) 177 CLR 1, 29 (Mason CJ); *Cunliffe* (1994) 182 CLR 272, 297 (Mason CJ), 321–2 (Brennan J). See also *Belgian Linguistic* (1968) 6 Eur Ct HR (ser A) [10]; *Fromançais* (66/82) [1983] ECR 395, [8].

¹⁷⁶ *Castlemaine* (1990) 169 CLR 436, 473; *Political Advertising* (1992) 177 CLR 106, 143 (Mason CJ), 157 (Brennan J), 235 (McHugh J); *Cunliffe* (1994) 182 CLR 272, 300 (Mason CJ). See also *Handyside* (1976) 24 Eur Ct HR (ser A) [49]; *Sunday Times* (1979) 30 Eur Ct HR (ser A) [62]; *Wachauf* (5/88) [1989] ECR 2609, [18].

¹⁷⁷ See *Nationwide* (1992) 177 CLR 1, 30–1 (Mason CJ); *Re DPP; Ex parte Lawler* (1994) 179 CLR 270, 294 (McHugh J); *New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307, 324 (Kirby P). See also *Fedesa* (C–331/88) [1990] ECR I–4023, [13]; *Grogan* (C–159/90) [1991] ECR I–4685, 4720 (Advocate General Van Gerven).

Rather, the means is what is judged by weighing the adverse effects of the law on particular interests against the benefit of the government achieving its end.

It can be seen, therefore, that to apply second and third level proportionality necessarily involves qualitative or normative analysis. To apply these levels presupposes the identification of particular interests deemed worthy of protection from undue government regulation (even if sometimes, in fact, these interests are not clearly articulated). As seen above,¹⁷⁸ the very idea of proportionality involves the reconciliation of principles or interests which are in conflict or in tension.¹⁷⁹ In this context the interests being balanced are the achievement of a legitimate government purpose (which must itself be sufficiently connected to the relevant power) and the adverse effects on particular identified interests.

Proportionality, therefore, operates in essentially the same way for characterisation as it does for constitutional guarantees.¹⁸⁰ In the guarantee context, the interest requiring protection is clear, of course, being the interest protected by the guarantee itself. In the characterisation context, the interests worthy of protection are not clearly specified. Proportionality can potentially apply to protect a range of interests: human rights or fundamental freedoms; commercial rights, such as the freedom to carry on a trade or business;¹⁸¹ economic interests,¹⁸² in which case proportionality might represent a classical cost-benefit analysis; environmental interests;¹⁸³ federalism matters, such as the interests of States in maintaining their areas of jurisdiction, or the 'right' of citizens to be governed by the appropriate level of government.¹⁸⁴ In practice the concept has been applied generally to protect rights and freedoms in characterisation in Australia.

B *The Change in the Nature of Characterisation*

The qualitative aspect inherent in proportionality signals a subtle yet fundamental shift in the court's approach to characterisation. To illustrate this change it is useful briefly to examine the orthodox method for testing sufficiency of connection.

1 *The Orthodox Approach*

The method of purposive characterisation, described at the beginning of this Part, has been applied with varying degrees of judicial deference. At the most deferential end of the spectrum is the famous case of *Herald & Weekly Times Ltd*

¹⁷⁸ See above Part I.

¹⁷⁹ Cf *Cunliffe* (1994) 182 CLR 272, 297 (Mason CJ).

¹⁸⁰ Cf *ibid* 377 (Toohey J); *Leask* (1996) 140 ALR 1, 25.

¹⁸¹ *Hauer v Land Rheinland-Pfalz* (44/70) [1979] ECR 3727, 3750 ('Hauer').

¹⁸² *Fedesa* (C-331/88) [1990] ECR I-4023, [12].

¹⁸³ Cf the French doctrine of '*le bilan*': Lionel Brown and John Bell, *French Administrative Law* (4th ed, 1993) 247-9; note *Rosemount Estates Pty Ltd v Minister for Urban Affairs and Planning* (1996) 90 LGERA 1, 18-21.

¹⁸⁴ Fitzgerald, above n 4, 278-80. In the European Community proportionality has been linked with the doctrine of subsidiarity: see, eg, Emiliou, above n 13, 139-42.

v Commonwealth.¹⁸⁵ It concerned legislation made under the incidental aspect of the Commonwealth's broadcasting power (s 51(v)). The relevant provisions related to concentration of media ownership, preventing persons associated with television broadcasting licensees from holding certain interests or positions connected with other licensees. Kitto J, with whom the other judges agreed, accepted that for some of the proscribed matters there was only a 'possibility' that the person would be able to exert any influence in relation to the other licensee.¹⁸⁶ Yet he held that the legislation was valid because it was 'a means' for effectuating an end within power, stating:

How far they should go was a question of degree for the Parliament to decide, and the fact that the Parliament has chosen to go to great lengths — even the fact, if it be so, that for many persons difficulties are created which are *out of all proportion to the advantage gained* — affords no ground of constitutional attack.¹⁸⁷

The decision is best understood as being based on the view that a measure will be valid if it is sufficiently explicable in terms of a legitimate purpose, even if its actual operation is only remotely connected to the power.¹⁸⁸ The method correlates with the suitability criterion of proportionality.¹⁸⁹ But it is the antithesis of second and third level proportionality, as Kitto J himself implies, involving no concern for the qualitative effect of the law. The case serves to prove again that testing for proportionality and testing for purpose are different exercises.

In external affairs cases this broad approach is reflected in the readiness of some judges to characterise a law as having been made to implement a treaty. For example, Starke J, dissenting in *R v Burgess; Ex Parte Henry*,¹⁹⁰ held that any provision appropriate for giving effect to, and not *positively inconsistent* with, the treaty was valid. In *Second Airlines of NSW Pty Ltd v New South Wales [No 2]* Menzies and Owen JJ upheld provisions because they were 'a means' of implementing the treaty.¹⁹¹ Another manifestation, concerning the defence power, occurred in the *Jehovah's Witnesses* case.¹⁹² Latham CJ and McTier-nan J, in dissent, upheld wartime regulations dissolving a chapter of the religion because the provisions related sufficiently to the legitimate purpose of preventing subversion.¹⁹³ Their decision illustrates powerfully the absence of any qualitative concerns about effects on rights in this approach.

¹⁸⁵ (1966) 115 CLR 418 ('*Herald & Weekly Times*').

¹⁸⁶ *Ibid* 436.

¹⁸⁷ *Ibid* 437 (emphasis added).

¹⁸⁸ Cf Lee, above n 4, 138; but note *Nationwide* (1992) 177 CLR 1, 28 (Mason CJ).

¹⁸⁹ See above Part I(A).

¹⁹⁰ (1936) 55 CLR 608, 659–60 ('*Burgess*'); see also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634, 647–8.

¹⁹¹ *Second Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 136, 139, 167 ('*Second Airlines case*').

¹⁹² (1943) 67 CLR 116.

¹⁹³ *Ibid* 136–47, 157.

In general, judges have been somewhat less deferential than in these instances, emphasising that the level of connection is a matter of degree.¹⁹⁴ Both the connection between the purpose of the law and the power, and whether or not the law is adapted to achieve the purpose claimed, have been subject to greater scrutiny. The connection cannot be merely 'tenuous, vague, fanciful or remote',¹⁹⁵ it has to be 'reasonable'.¹⁹⁶ In this context 'reasonable' means that the level of connection must be sufficiently real or perceptible, not that the law itself must be reasonable, necessary or desirable.¹⁹⁷ Even this stricter approach can still be seen as correlating with level one proportionality. It does not involve the other two levels of the concept.

2 *The Approaches Compared*

Leslie Zines has argued that the notion of proportionality has 'always been inherent' in the 'appropriate and adapted' formula.¹⁹⁸ Arguably, a law purportedly implementing a treaty obligation to prevent the spread of an obscure sheep disease by requiring the slaughter of all sheep, to take Deane J's 'extravagant example',¹⁹⁹ might well fail on the orthodox approach. Of course, with that method the example could not be invalidated for simple unreasonableness. As noted above, and as the court has accepted, that a measure is clearly unnecessary or excessive may indicate that the real purpose of the measure is other than claimed.²⁰⁰ Yet an ambiguity in the court's approach surfaces here. If dual character is permissible in purposive characterisation, as it appears to be,²⁰¹ then evidence of pursuit of some other purpose is not of itself a sufficient ground for invalidity. Nevertheless, gross excessiveness might prevent characterisation of the law as having been made to pursue the legitimate purpose. The nature of the effects of the law might be seen as too remote from the legitimate purpose; the measure might be seen as reaching too far.

On the orthodox approach, however, that 'less drastic measures might have sufficed'²⁰² has not generally been seen as a matter for the court. Also, as shown above, the orthodox approach manifests no particular concerns about the qualitative effects of laws. Another illustration of this fact was a unanimous joint judgment on the incidental power, as late as 1987, in *Alexandra Private Geriat-*

¹⁹⁴ See, eg, *Burton* (1952) 86 CLR 169, 178–9; *Nationwide* (1992) 177 CLR 1, 28–9 (Mason CJ), 104 (McHugh J); *Leask* (1996) 140 ALR 1, 15 (Dawson J), 41, 43 (Kirby J). See generally Zines, above n 146, 34–45.

¹⁹⁵ *R v Sharkey* (1949) 79 CLR 121, 151.

¹⁹⁶ *Burton* (1952) 86 CLR 169, 179.

¹⁹⁷ *Ibid.* See also *Nationwide* (1992) 177 CLR 1, 85 (Dawson J); Sir John Latham, 'Interpretation of the Constitution' in Justice Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 1, 20–1.

¹⁹⁸ Leslie Zines, 'Constitutionally Protected Individual Rights' in Paul Finn (ed), *Essays on Law and Government — Volume 2: The Citizen and the State in the Courts* (1996) 136, 156.

¹⁹⁹ *Tasmanian Dams* (1983) 158 CLR 1, 260.

²⁰⁰ See, eg, above n 35.

²⁰¹ See, eg, above n 158.

²⁰² *Sloan v Pollard* (1947) 75 CLR 445, 472 (Dixon J).

ric Hospital Pty Ltd v Commonwealth.²⁰³ The court stated that the possible serious effect of a law on freedom to run businesses, the fact that the controls might be more stringent than necessary, and even the possible threat to the economic viability of some businesses, were not matters relevant to the sufficiency of connection.²⁰⁴

Of course, any restriction of government legislative power, by definition, results in some interests being protected from possible regulation. The key difference between proportionality and the orthodox approach is that proportionality delimits permissible boundaries *because* of a desire to protect certain interests and does so *by reference* to those interests. That the *effect* of a decision is to protect some interests does not mean that either of these factors apply. Dixon CJ recognised that there was a fine but real distinction here in his famous statement of the orthodox approach to characterisation:

[T]here are points at which matters of degree seem sometimes to bring forth arguments in relation to justice, fairness, morality and propriety, but those are not matters for the judiciary to decide upon.²⁰⁵

Admittedly, judges purporting to determine only quantitative sufficiency of connection may well be influenced 'even imperceptibly' by qualitative considerations.²⁰⁶ For example, a law might be on the borderline of validity because it covers some matters not clearly (or only remotely) connected to the legitimate purpose. In assessing the significance of these matters, a judge *may* be influenced by the particular qualitative nature of the matters in question. In practice these distinctions are fine. Nevertheless, there is a fundamental logical distinction between cause and effect here. In general, any protection of particular interests is merely an effect, not a determinant, of orthodox characterisation.

There are two notable pre-proportionality cases in which qualitative factors do appear to have influenced the process of characterisation itself.²⁰⁷ These cases are exceptional, involving extreme legislation, but they illustrate how it is possible to slip from quantitative to qualitative characterisation. In the *Jehovah's Witnesses* case,²⁰⁸ although none of the judges held that the s 116 guarantee was infringed, the majority judges did take account of the rights and interests of the parties involved in holding that the provisions were beyond the defence power.²⁰⁹ Starke J, for example, called the regulations 'arbitrary, capricious and oppressive'.²¹⁰ It seems implicit that the judges took the view that there were less 'drastic and permanent' means available to achieve the end,²¹¹ and that the measure was disproportionate to any legitimate end. In the *Communist Party*

²⁰³ (1987) 162 CLR 271.

²⁰⁴ *Ibid* 283 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ).

²⁰⁵ *Burton* (1952) 86 CLR 169, 179.

²⁰⁶ *DPP v Toro-Martinez* (1993) 33 NSWLR 82, 94 (Kirby P).

²⁰⁷ See also *Sillery v R* (1981) 180 CLR 353, 362 (Murphy J).

²⁰⁸ See above Part II(A).

²⁰⁹ (1943) 67 CLR 116, 150 (Rich J), 153-4 (Starke J), 164-7 (Williams J).

²¹⁰ *Ibid* 154.

²¹¹ *Ibid* 166.

case in 1951, one underlying concern for some judges was the effect on rights of free association and property.²¹² Williams and Webb JJ, more explicitly, seemingly read down the defence power by reference to its effect on 'rights and liberties'.²¹³ Dixon J appeared to read down the implied national power by reference to the underlying constitutional assumption of the 'rule of law'.²¹⁴ Yet, given the context, it is apparent that Dixon J's real concern for protecting the rule of law related not to some broad idea of protecting individual freedoms, but to the traditional Diceyan notion of government being subject to law — including, relevantly, to the Constitution itself.

3 *The Application of Proportionality*

The qualitative aspect of proportionality is revealed by an analysis of its use in characterisation. The concept of proportionality was first applied in this context as the test of the validity of laws implementing international treaties under s 51(xxix), a role for which it has been generally accepted.²¹⁵ The *Tasmanian Dams* case concerned Commonwealth legislation, based on the World Heritage Convention, purporting to protect areas listed on the World Heritage List from a range of development activities. Brennan and Deane JJ held most of the key relevant provisions invalid. Brennan J's judgment has been seen as involving proportionality.²¹⁶ Yet his finding merely related to the unnecessary width of the provisions to achieve the purpose of implementing the treaty, which is simply a matter of assessing conformity with the Convention (at most a matter of first level proportionality).²¹⁷ Deane J's judgment, introducing proportionality, is different. His reasons for invalidation related to the effect on property rights imposed by the far-reaching restrictions.²¹⁸ He was concerned about the 'substantial control' taken of the affected properties (the cost) as against the likelihood or not of preventing any relevant environmental damage (the benefit). Thus, he took account of the qualitative effect of the law on a particular interest. He only upheld narrower aspects of the provisions which enabled tailoring of the restrictions to the particular circumstances of any case. His decision thus involved second and/or third level proportionality: a means less restrictive of property rights was available to achieve the legitimate end of implementing the conservation treaty; the more restrictive means were not justified by the end. From the very beginning, therefore, qualitative analysis was implicit.

In *Richardson*, a closely related case from 1988, Deane and Gaudron JJ dissented in holding most of the key provisions invalid.²¹⁹ The use of proportionality to protect particular identified interests is even clearer in this case. Deane J

²¹² *Communist Party* (1951) 83 CLR 1, 194–5, 197–8, 200 (Dixon J), 206–7, 209 (McTiernan J).

²¹³ *Ibid* 226–7, 242.

²¹⁴ *Ibid* 193.

²¹⁵ See, eg, *Castlemaine* (1990) 169 CLR 436, 473.

²¹⁶ See the discussion in *Richardson* (1988) 164 CLR 261, 291 (Mason CJ and Brennan J).

²¹⁷ *Tasmanian Dams* (1983) 158 CLR 1, 236–7.

²¹⁸ *Ibid* 266–7.

²¹⁹ *Richardson* (1988) 164 CLR 261.

expressly sought to protect the ‘ordinary rights of citizens and the ordinary jurisdiction of the State’.²²⁰ Given the effective freeze imposed on development (ie on property rights) over a significant portion of Tasmania, and the absence of evidence of any imminent threat to most of this area, he held that the law was disproportionate to the legitimate end of identifying and protecting potential world heritage areas.²²¹ Again, Deane J can be said to have applied either second or third level proportionality. Gaudron J’s judgment is similar.²²² Wilson J also engaged in a balancing exercise to protect the interest of non-interference in State affairs, although he upheld the provisions.²²³

In relation to the defence power, Brennan J employed proportionality to invalidate an amended provision of the War Crimes Act 1945 (Cth) in *Polyukhovich v Commonwealth*.²²⁴ Brennan’s analysis, with which Toohey J agreed, involved third level balancing: peacetime defence interest could not justify such an infringement of the common law ‘freedom from a retrospective criminal law’.²²⁵

It is the application of proportionality to the incidental power which has catalysed significant disagreement. *Davis v Commonwealth*²²⁶ concerned the Commonwealth’s national implied power and/or the incidental legislative aspect of its executive power. The Commonwealth had prohibited the unauthorised use of a range of expressions and symbols in connection with the celebration of the Bicentenary. Part of the relevant provisions was unanimously held invalid. The main judgment was that of Mason CJ, Deane and Gaudron JJ. In *Nationwide*, Mason CJ claimed that *Davis* established that validity under the incidental power depended on there being reasonable proportionality, and that in determining this, it was material to ascertain the adverse effects on ‘fundamental values traditionally protected by the common law’.²²⁷ The ‘extraordinary intrusion into freedom of expression’ and the ‘grossly disproportionate’ nature of the scheme certainly were noted in *Davis*, though no mention was made of ‘fundamental values’.²²⁸ The excessive and unjustified restriction of free expression does appear to have been determinative of the plurality’s decision (third level proportionality). Brennan J took a similar approach to that of the plurality.²²⁹ Yet the case can also be read as holding merely that the measure reached was beyond what was sufficiently connected to the legitimate purpose of protecting the celebration of the Bicentenary. Perhaps because of this ambiguity or concurrence, Wilson,

²²⁰ Ibid 317.

²²¹ Ibid.

²²² Ibid 346–8.

²²³ Ibid 303–4.

²²⁴ (1991) 172 CLR 501 (*‘Polyukhovich’*).

²²⁵ Ibid 593 (Brennan J), 684 (Toohey J); see also *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 484 (Brennan and Toohey JJ).

²²⁶ (1988) 166 CLR 79 (*‘Davis’*).

²²⁷ *Nationwide* (1992) 177 CLR 1, 30–1.

²²⁸ *Davis* (1988) 166 CLR 79, 100.

²²⁹ Ibid 115–7.

Dawson and Toohey JJ were prepared to agree with the plurality's 'conclusion'.²³⁰

In *Nationwide News*, Mason CJ, Dawson and McHugh JJ did not apply the implied freedom of political communication but simply held that the measure was beyond the incidental aspect of the industrial relations power. Mason CJ accepted that the Industrial Relations Commission might conceivably require greater protection from criticism than the courts. Nonetheless, this legitimate aim was 'outweighed by the strength of the public interest in public scrutiny and freedom to criticise'.²³¹ As in *Davis*, proportionality was applied to protect the qualitative interest of free expression. Mason CJ's objection was not that there were less restrictive means available but that the legitimate end was of insufficient weight to justify such a restriction on free speech (third level proportionality). McHugh J's judgment was along similar lines. Dawson J's judgment is discussed below.²³²

Interestingly, Gaudron J in *Nationwide*, although applying the implied guarantee, was content to rely on Mason CJ's and McHugh J's reasons as to why the measure was disproportionate.²³³ This reliance illustrates that proportionality operates in much the same manner in the characterisation and guarantee contexts. The contexts are especially close when implied guarantees are at issue, as in neither case is there an express constitutionally protected interest. The difference is that the freedom of political communication *prima facie* applies to all powers, including in their central area. Further, the freedom's foundation lies in the Constitution itself and not in the common law or other such external sources which found those interests protected in the characterisation context.²³⁴

Proportionality has been applied by the South Australian Court of Criminal Appeal in relation to the incidental aspect of the taxation power (s 51(ii)). The subject law was held to intrude neither upon privacy nor upon any other common law value or freedom.²³⁵

It can be seen from these characterisation cases that a qualitative protection of particular interests is inherent in the application of proportionality. The judges have applied both the necessity and balancing levels of the concept. In these respects proportionality represents an important change in the nature of characterisation. Fitzgerald argues that the application of proportionality to characterisation has only involved, and should only involve, the use of the first and second levels.²³⁶ If the objection is to the court deciding what other interests are worthy of protection, then this objection applies to the second level as much as to the third. Moreover, Fitzgerald's claim is not supported by the cases. It is often difficult to ascertain whether necessity or balancing is relied upon. This ambigu-

²³⁰ *Ibid* 101, 117; cf *Nationwide* (1992) 177 CLR 1, 88 (Dawson J).

²³¹ *Nationwide* (1992) 177 CLR 1, 34.

²³² See below Part III(D).

²³³ *Nationwide* (1992) 177 CLR 1, 95.

²³⁴ See below Part IV(A).

²³⁵ *Rogers v R* (1995) 64 SASR 280, 291-3 (Doyle CJ).

²³⁶ Fitzgerald, above n 4, 271-5.

ity is both because the two levels overlap²³⁷ and because regrettably, as in the guarantee context, the judges have neither recognised nor articulated the three levels of proportionality. Nevertheless, the plurality in *Davis*, Brennan J in *Polyukhovich* and Mason CJ in *Nationwide* all applied the balancing test. It is arguable that so too did Deane J in *Tasmanian Dams*, and Wilson, Deane and Gaudron JJ in *Richardson*.

It should be noted that in *Victoria v Commonwealth* the five judge majority stated that the notion of proportionality, although relevant to external affairs questions, 'will not always be particularly helpful'.²³⁸ They did not apply the concept either to the treaty questions or to issues of the incidental aspect of the industrial relations power arising in the case. The point should be made that even if one accepts the qualitative approach it may not always be useful to speak of proportionality. The suitability level of proportionality does overlap with the orthodox 'appropriate and adapted' test. But if the question is *just* whether or not a law reasonably conforms with the provisions of a treaty, for example, and there are no rights or interests worthy of constitutional protection that are affected, then the most useful test is simply whether or not the law is appropriate and adapted to implement those provisions. It adds nothing to ask whether or not the law is suitable to achieve its legitimate goal. In the absence of affected relevant interests the second and third levels of proportionality do not arise. Some judgments which have been seen as involving the concept are, therefore, better seen as merely an application of the established 'appropriate and adapted' test.²³⁹

C Critique

The High Court has generally taken the view that the established 'appropriate and adapted' test implies, or is a synonym for, proportionality.²⁴⁰ This view may be based on the idea that proportionality merely tests purpose, which was shown to be incorrect.²⁴¹ The analysis above indicated that the second and third levels of proportionality necessarily introduce an extra qualitative dimension to characterisation involving the protection of particular interests from undue government regulation. As illustrated above,²⁴² this qualitative element was largely new; the orthodox approach eschewed the consideration of such factors. Proportionality has been employed by the High Court to protect property rights, States' rights, the principle of non-retrospectivity and freedom of expression.

²³⁷ See above Part I(C).

²³⁸ *Victoria v Commonwealth* (1996) 138 ALR 129, 147 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

²³⁹ Namely *Tasmanian Dams* (1983) 158 CLR 1, 236-7 (Brennan J); *Richardson* (1988) 164 CLR 261, 291-2 (Mason CJ and Brennan J).

²⁴⁰ See, eg, above n 166.

²⁴¹ See above Part III(A).

²⁴² See above Part III(B).

Mason CJ and Brennan J have also talked of protecting common law values or freedoms.²⁴³

It is submitted that to suggest that the 'appropriate and adapted' test and proportionality are essentially the same is to ignore the fundamental, if subtle, change that the concept has wrought from the positivist orthodoxy. By engaging in qualitative analysis the court does assess, to some extent, the necessity, desirability, justice or fairness of the measure in question; it does thereby read down Commonwealth powers by reference to perceived undesirable consequences of the measure. Such assessments are necessarily involved in deciding whether or not an alternative means less restrictive of some particular interest should have been adopted, or whether that interest has been affected adversely to an unjustified extent.²⁴⁴ Proportionality thus involves the court in a process of balancing competing social interests parallel to that engaged in by the legislature.²⁴⁵

The orthodox approach is not the only logical or reasonable test that could be used to assess the link between federal laws and constitutional powers. Proportionality represents one valid means of assessment. The protection of rights and interests involved in the concept is not a necessary part of testing the link, but nor is it inconsistent with doing so. Such a significant shift should have been carefully considered and justified, however. The application of proportionality in this context has been marked by some confusion and marred by the waxing and waning of judicial enthusiasm for the concept.²⁴⁶ Further, what has been notably absent from the cases involving proportionality in characterisation is a justification for this fundamental change. The closest judges have come is the flawed suggestion that the notion is inherent in, or implied by, the 'appropriate and adapted' test. In a speech in 1992 Toohey J noted the established principle that legislation will not be taken to infringe basic liberties unless the intention is clear and suggested that the same approach could be taken with constitutional powers.²⁴⁷ This view, which would represent a foundational shift in constitutional interpretation, might have been used to justify proportionality. It has not been so used.

It is commonplace that in the last decade the High Court has exhibited great concern to accord constitutional protection to individual rights and freedoms. The introduction of proportionality to characterisation is part of this movement. Thus, although the concept can be used to protect a wide range of interests, three of the four interests protected to date fall into the individual rights category (property rights, free expression, non-retrospectivity). The court has shown no inclination to engage in economic cost-benefit analyses, for example.

²⁴³ *Nationwide* (1992) 177 CLR 1, 31 (Mason CJ); see also *Cunliffe* (1994) 182 CLR 272, 297 (Mason CJ); *Polyukhovich* (1991) 172 CLR 501, 592-3 (Brennan J).

²⁴⁴ See above Part I(C) and below Part IV(B).

²⁴⁵ See below Part V.

²⁴⁶ See below Part D.

²⁴⁷ Justice John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 170.

Zines has depicted how judges concerned about rights, in a system without a Bill of Rights, may seek to hang limits on legislative power on such ‘pegs’ as they can find in a Constitution.²⁴⁸ The limited use of testing for purpose in characterisation has been employed as a peg on which to hang proportionality. The problem with such an approach is that it leads to patchy results. That the limit applies just to Commonwealth powers, and not to the States, ‘produces a lop-sided freedom’.²⁴⁹ More significantly, it is anomalous that the limit of proportionality applies to just two of the Commonwealth’s main powers, and to the incidental area of all powers, but not to the central area of most powers. Constitutional pegs aside, the incidental/central divide provides no relevant rational distinction for seeking to protect particular rights in some cases involving a power and not in others.

Another criticism can be made of some instances of the doctrine’s use. The role that notions of federalism play in characterisation has long been controversial. It has been accepted since the *Engineers’ case* that there are no state ‘reserve powers’.²⁵⁰ To determine the reach of Commonwealth powers by reference to preconceived ideas about the appropriate extent of state powers turns ‘logic on its head’,²⁵¹ as Deane J eloquently put it, for exclusive state powers are only what is left over after determination of federal powers. Yet Deane J himself, along with Wilson J, employed proportionality in *Richardson* to protect ‘the ordinary jurisdiction of the State of Tasmania’.²⁵² In effect, the ‘adverse’ result of the intrusion into established state jurisdiction was balanced against the benefit of achieving the central government aim.²⁵³ Yet the result can only be seen as adverse on the basis of preconceived notions of what the powers of the State should be. The objection here is not to proportionality *per se*, but to applying it in such a way as to *set out to protect* predetermined notions of appropriate state powers. To do so falls into the ‘reserve powers’ trap.²⁵⁴

It can be seen that proportionality introduces a significant change to the nature of characterisation. Such a change has been insufficiently justified, is arguably inappropriate, leads to uneven results and may protect state powers in a manner contrary to basic orthodoxy. But the most telling objection to this use of proportionality is that it has the effect of constitutionalising certain common law interests, a matter which will be examined below.²⁵⁵ For this reason, above all others, it is submitted that use of the concept in characterisation is neither a justified nor desirable development.

²⁴⁸ Leslie Zines, *Constitutional Change in the Commonwealth* (1991) 33–73.

²⁴⁹ Zines, ‘Constitutionally Protected Individual Rights’, above n 198, 139.

²⁵⁰ *Engineers’ case* (1920) 28 CLR 129.

²⁵¹ *Richardson* (1988) 164 CLR 261, 307; cf, eg, *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227, 240 (Gibbs CJ).

²⁵² *Richardson* (1988) 164 CLR 261, 317, 303–4 (Wilson J).

²⁵³ See Fitzgerald, above n 4, 278–9.

²⁵⁴ Michael Detmold, ‘Australian Law: Federal Movement’ (1991) 13 *Sydney Law Review* 31, 58.

²⁵⁵ See below Part IV(A).

It should be noted that one possible response to the charge of unevenness would be to *extend* the application of the doctrine. There is at least one federal power to which proportionality could be applied with little difficulty. The power generally used to regulate Aboriginal affairs covers laws with respect to '[t]he people of any race for whom it is deemed necessary to make special laws' (s 51(xxvi)). The requirement of necessity has been seen by the European courts and the Supreme Court of Canada to import proportionality. The same could be done here, although to date the High Court has revealed no desire to do so.²⁵⁶ Gaudron J has applied the 'appropriate and adapted' test, and thus perhaps proportionality, to the related aliens power (s 51(xix)).²⁵⁷

Various commentators have asserted that a proportionality-type test should be applied to all powers.²⁵⁸ One way in which the concept could be applied more broadly with relative ease would be to view a greater number of constitutional questions as being in the incidental area of the relevant power. The central-incidental dividing line is rarely clear. Ironically, the recent further blurring of the boundary could actually facilitate this endeavour.

More generally, it would be possible to apply proportionality to all Commonwealth powers. Whilst the application of the concept depends upon the *identification* of a legitimate government purpose, it does *not* require that the power under which the measure is made be defined in terms of purpose. The concept could apply to the central area of non-purposive powers in exactly the same way it applies for the incidental aspects: by assessing whether or not the purpose of the law is sufficiently connected to the power, and then examining whether the law is proportionate to achieving that purpose. The question need not be whether the law is proportionate to the purpose of the power itself.²⁵⁹ Because proportionality does more than just assess purpose, the concept represents an extra test which can be applied alongside either purposive or legal effect characterisation. On the latter approach, central area laws such as that seen in *Murphyores Incorporated Pty Ltd v Commonwealth*²⁶⁰ would be valid so long as: (1) they met the low suitability threshold for achieving the claimed valid purpose; and (2) they did not unduly infringe particular protected interests. Alternatively, purposive characterisation could be adopted as the sole test of validity, in which case the court might assess whether the law could be characterised as having been made for the valid purpose rather more vigorously. The difference between the two approaches is minor and implicitly raises the question, mentioned above, of the extent to which the legitimate purpose must be the dominant one in purposive characterisation.

²⁵⁶ See, eg, *Western Australia v Commonwealth* (1995) 183 CLR 373, 460.

²⁵⁷ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 57–8.

²⁵⁸ Latham, above n 197, 21; Fitzgerald, above n 4, 297–301; Toohey, above n 247, 170; see also John Doyle, 'Common Law Rights and Democratic Rights' in Paul Finn (ed), *Essays on Law and Government — Volume 1. Principles and Values* (1995) 144, 164–5.

²⁵⁹ *Contra Cunliffe* (1994) 182 CLR 272, 354 (Dawson J).

²⁶⁰ (1976) 136 CLR 1 ('*Murphyores*').

One possible 'peg' upon which such a broad application of proportionality could be hung is the requirement in the Constitution, and in State constitutions, that laws be made for the 'peace, order, and good government' of the polity. This basis might enable application of the concept to State laws. The current comprehensive response to this argument, of course, is that the court has held that the phrase is not relevantly one of limitation.²⁶¹

To apply proportionality to characterisation generally would represent a revolutionary shift in the court's approach to interpreting the Commonwealth's powers, albeit a movement in the same direction as that already seen. Such a change appears highly unlikely in the foreseeable future. The two leading advocates of the concept of proportionality, Mason CJ and Deane J, have retired. Indeed, it is now clear that enthusiasm for use of the concept in characterisation has cooled considerably.

D *The Retreat from Qualitative Characterisation*

The first and leading critic of proportionality in characterisation was Dawson J. His judgments in *Nationwide*, *Cunliffe* and *Leask* forcefully reject use of the concept in questions regarding incidental power.²⁶² In *Nationwide* he stated that the 'question is essentially one of connection, not appropriateness or proportionality, and where a sufficient connection is established it is not for the Court to judge whether the law is inappropriate or disproportionate'.²⁶³ In his view, proportionality is useful and permissible in characterisation only for powers, such as the defence power, which are themselves defined in terms of purpose. His essential objection to the concept is that 'it invites the Court to act upon its view of the desirability of the impugned legislation'.²⁶⁴ In other words, he rejects the introduction of a qualitative element to characterisation, and accepts the orthodox approach.

Contrary to some views,²⁶⁵ Dawson J is correct to state that the difference between his approach and proportionality 'is more than merely verbal',²⁶⁶ as shown above. In *Nationwide* he, like the other judges, held the provision invalid. He indicated that it had not been shown that the need to protect the Industrial Relations Commission from 'any criticism ... in any circumstances' was sufficiently connected to the industrial relations power.²⁶⁷ In making this finding, he did not apply proportionality (leaving aside suitability) because he did not consider the qualitative effect of the measure on any particular protected

²⁶¹ *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

²⁶² *Nationwide* (1992) 177 CLR 1, 85-9; *Cunliffe* (1994) 182 CLR 272, 354-5; *Leask* (1996) 140 ALR 1, 13-19.

²⁶³ *Nationwide* (1992) 177 CLR 1, 88.

²⁶⁴ *Ibid* 89; see also *Cunliffe* (1994) 182 CLR 272, 357; *Leask* (1996) 140 ALR 1, 18.

²⁶⁵ See, eg, Lee, above n 4, 139; A Blackshield, 'The Implied Freedom of Communication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 232, 256-7.

²⁶⁶ *Nationwide* (1992) 177 CLR 1, 88.

²⁶⁷ *Ibid* 91.

interests. One might argue that the effect on free speech had some influence on his decision. But his judgment did not and need not rely on this factor.

There are difficulties with the judge's views, however. First, he accepts that purpose can be relevant to ascertaining validity for incidental power matters, even if it is not the main question.²⁶⁸ Given that he sees proportionality as essentially a test of purpose, it is not apparent why proportionality should not be useful as *one way* of ascertaining validity.²⁶⁹ Secondly, and in any case, Dawson J is misguided in suggesting that proportionality is fundamentally about testing purpose. Thirdly, if the main danger of proportionality is that it invites judges to decide on the desirability of legislation, and this is unacceptable, then surely it should not be applied in characterisation at all. Yet he has accepted its application to the defence power.

Toohey J, in *Cunliffe*, was the next judge to question the use of proportionality in characterisation. Unlike the other judges, he distinguished proportionality from the 'appropriate and adapted' test.²⁷⁰ Having apparently changed his mind since *Polyukhovich*, he stated that proportionality is 'better confined to situations where there is tension between operative principles', by which he appears to mean legitimate restriction of constitutional guarantees.²⁷¹ Yet he expressly accepted a role for 'qualitative assessment' in characterisation. Indeed, he appears to suggest that the 'reasonably appropriate and adapted' test should apply to *all* characterisation questions, including non-incidental issues.²⁷² Given that the fundamental difference between proportionality and previous approaches is its qualitative nature, it is strange that he should be so careful to distinguish it. He is incorrect if he meant to suggest that proportionality cannot logically be applied to characterisation because of its tension-resolving nature.²⁷³ In *Leask*, Toohey J reiterated this view. He appeared to shift position again, however, in warning against the court being drawn 'into areas of policy and of value judgments',²⁷⁴ thereby apparently rejecting qualitative analysis.

The *Leask* case can be seen both as another example of the confusion which has surrounded proportionality, and as the point where a majority of the court moved away from qualitative analysis in characterisation. The turning of the tide was foreshadowed in *Victoria v Commonwealth*, when the majority questioned the usefulness of proportionality in relation to the external affairs power.²⁷⁵ It is arguable that the recent efforts to downplay the central/incidental distinction,²⁷⁶ and thereby to reduce the role of purpose in characterisation, also reflects concerns about the role of proportionality. *Leask* itself involved a criminal

²⁶⁸ Ibid 87. See also *Cunliffe* (1994) 182 CLR 272, 355; *Leask* (1996) 140 ALR 1, 15–16.

²⁶⁹ Cf *Cunliffe* (1994) 182 CLR 272, 323 (Brennan J).

²⁷⁰ Ibid 377 (Toohey J).

²⁷¹ Ibid.

²⁷² Ibid 378.

²⁷³ See above Part III(A).

²⁷⁴ *Leask* (1996) 140 ALR 1, 26.

²⁷⁵ (1996) 138 ALR 129, 147 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

²⁷⁶ See, eg, above n 151.

provision which possibly created a strict liability offence. Although most of the judges appeared to uphold the law within the central area of either or both the currency and taxation powers (s 51(xii) and (ii)),²⁷⁷ the nature and role of proportionality was addressed.

Brennan CJ distinguished two senses of proportionality. In its first incarnation proportionality is merely an indicator of purpose, and may be employed as such in purposive characterisation. In its 'second sense', as it is employed in relation to constitutional limitations and by the ECJ, it has no role in characterisation.²⁷⁸ Although not entirely clear, it seems that the difference between these senses is taking account of qualitative concerns. In characterisation, proportionality may not be used to assess the necessity or desirability of a measure. Brennan CJ has therefore shifted position from his unquestionably qualitative approach in *Polyukhovich* and his arguably similar judgment in *Davis*.

McHugh J suggested that proportionality may 'sometimes prove helpful' in purposive characterisation. Yet, his rejection of a qualitative approach is indicated in three ways: (1) his emphasis on the test being nothing more than a guide to sufficiency of connection; (2) his approval of Dawson J's statement that it is not for the court to assess appropriateness or proportionality; and (3) the fact that he generally agreed with Dawson J's reasons in the case, the majority of which relate to a rejection of qualitative analysis.²⁷⁹ McHugh J's rejection represents a change from his qualitative protection of free expression in *Nation-wide*. Gaudron J, on the other hand, adhered to her past support for proportionality.²⁸⁰

Of the two new judges, Gummow J essentially accepted the view of Dawson J.²⁸¹ In contrast, Kirby J, who had previously appeared to sympathise with Dawson J on point,²⁸² indicated that proportionality 'may sometimes be helpful in the context of constitutional characterisation'.²⁸³ Interestingly, he did not expressly limit the concept to purposive characterisation. There is a slight possibility, therefore, that he envisaged some broader role for the concept. In relation to qualitative assessment he indicated that it was not for the court to concern itself with the merits, wisdom or desirability of a measure.²⁸⁴ Yet he suggested that the merits of a law may cast light upon the sufficiency of its connection to a power. Kirby J's view can be seen as a halfway position, generally rejecting qualitative assessment but accepting that such considerations may creep into orthodox quantitative analysis.

²⁷⁷ *Leask* (1996) 140 ALR 1, 10 (Brennan CJ), 21-2 (Toohey J), 26 (Gaudron J agreeing with Toohey J), 32-3 (Gummow J); cf 19 (Dawson J), 27 (McHugh J agreeing with Dawson J), 43-4 (Kirby J).

²⁷⁸ *Ibid* 8-9.

²⁷⁹ *Ibid* 26-7.

²⁸⁰ *Ibid* 26.

²⁸¹ *Ibid* 33.

²⁸² *DPP v Toro-Martinez* (1993) 33 NSWLR 82, 94-5; *Della Patrona v DPP (Cth) [No 2]* (1995) 38 NSWLR 257, 268-70.

²⁸³ *Leask* (1996) 140 ALR 1, 42, see generally 39-44.

²⁸⁴ *Ibid* 39, 41-2.

Following this case, the position of the High Court appears to be as follows. Probably six judges accept that proportionality has a role to play in relation to truly purposive powers (all except Toohey J; Gummow J appears implicitly to accept such a role). Four judges accept that use of the concept is relevant and permissible in relation to the incidental power (Brennan CJ, Gaudron, McHugh and Kirby JJ), whilst three deny this (Dawson, Toohey and Gummow JJ). It seems that five judges now reject any role for qualitative analysis in characterisation (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). As shown above, the application of proportionality is inherently qualitative. There is, therefore, a contradiction in the position of four of these latter five judges in accepting *any* role for proportionality in the characterisation context (ie Brennan CJ, Dawson, McHugh and Gummow JJ). The court has not reconciled its newly reaffirmed positivism with its view that proportionality is useful as a test of purpose.

E A Way Forward

The simplest resolution of the conflict, of course, would be to state that the concept of proportionality has no part to play in characterisation. The test of proportionality is really an additional test of validity, sitting on top of quantitative assessment. A rejection of the concept would leave the orthodox approach intact.

There is an alternative, however, which can largely encompass the concerns of the judges. Proportionality could be employed as indicative of purpose in the particular narrow manner described above.²⁸⁵ The court would ask whether the imbalance, or the availability of alternative means, was of such a *clear, gross or overwhelming nature* as to prevent the measure reasonably being characterised as having been made with respect to the claimed legitimate purpose. In such cases the disproportionality can be said to be ‘of such significance that the law cannot fairly be described as one with respect to’ the legitimate purpose.²⁸⁶ The test would be useful in such clearly excessive cases as the sheep disease example given by Deane J in *Tasmanian Dams*,²⁸⁷ but would not be used rigorously to protect particular interests from unjustified (yet not altogether unreasonable) infringement. In essence, such an approach is simply a very deferential application of proportionality. Interestingly, this approach might therefore draw on Mason CJ’s argument that greater deference is due in applying the concept to characterisation than in relation to constitutional guarantees.²⁸⁸ The suggested method may represent what the court now envisages as the appropriate use of the concept. The requirement for an overwhelming breach has not been made clear, however. The term ‘grossly disproportionate’ was actually invoked by the

²⁸⁵ See above Part III(A).

²⁸⁶ *Actors Equity* (1982) 150 CLR 169, 192 (Stephen J).

²⁸⁷ (1983) 158 CLR 1, 260.

²⁸⁸ *Cunliffe* (1994) 182 CLR 272, 297–8, 300; see also below Part V(B).

plurality in *Davis* and by McHugh J in *Nationwide*.²⁸⁹ It is questionable whether that label reflects the substantive deference shown in those judgments; arguably the disproportionality involved was not overwhelming.

Such an application of proportionality *does* still involve qualitative assessment. Even Deane J's 'extravagant' example is disproportionate (as opposed to being too remotely connected in its effects) *because* of the adverse effect on either or both of two particular interests: property interests in sheep and a moral interest in preventing undue slaughter of animals. It is submitted that a law requiring the slaughter of all feral goats to prevent the spread of a foreign disease would not be seen as so *clearly* unreasonable. The difference between the examples is the absence of property interests. The intensity of qualitative assessment involved in the suggested approach is significantly lower, however, than that involved in the applications of proportionality in characterisation to date. In practice, there would be little difference from the orthodox approach. Orthodox cases where the court has upheld measures with disproportionate effects under purposive or incidental powers are relatively rare. As noted above, judges have emphasised that there are questions of degree involved. In practice this emphasis has allowed judges to be influenced 'even imperceptibly'²⁹⁰ by qualitative considerations, such that 'a point may eventually be reached where the drastic turns into the invalid'.²⁹¹

The suggested approach would be useful *whenever* purpose was at issue in the characterisation context, thus avoiding the inconsistencies of Dawson J's approach. It does not set up two different definitions or models of proportionality, with all the confusion that that entails, as Brennan CJ seems to suggest. Rather, there would be one model applied to both constitutional guarantees and to characterisation, but with significantly different levels of deference involved. The new approach would significantly reduce the degree of qualitative analysis undertaken by the court, thus largely meeting the positivist requirements of the present majority, whilst also encompassing the views of Kirby J. But that *some* qualitative assessment would be involved should not be denied.

IV THE IDENTIFICATION OF INTERESTS

To apply proportionality as a test of constitutional validity requires the identification of both a legitimate government purpose and a right or interest worthy of constitutional protection from undue regulation. In the characterisation context, what is a legitimate government purpose will depend on the scope of each power in question. Yet what rights and interests should be protected from unwarranted intrusion, in the absence of a Bill of Rights, is far from apparent. In relation to constitutional guarantees the protected right or interest is clear: that interest is encapsulated within the guarantee itself. But not just any government

²⁸⁹ *Nationwide* (1992) 177 CLR 1, 101; *Davis* (1988) 166 CLR 79, 100.

²⁹⁰ *DPP v Toro-Martinez* (1993) 33 NSWLR 82, 94 (Kirby P).

²⁹¹ *Leask* (1996) 140 ALR 1, 42 (Kirby J).

objective will necessarily be capable of overriding the guarantee. These issues arise regardless of the level of deference with which proportionality is applied. They are worthy of examination.

A Identifying Interests Worthy of Protection

The High Court has used proportionality in the characterisation context to protect the interests of freedom of expression, property rights, States' rights and non-retrospectivity of criminal legislation. An argument could be made that all of these interests have some constitutional basis. The case of *Davis* preceded the finding of the implied limitation protecting freedom of political communication, but the facts arguably did concern political communication.²⁹² In *Nationwide*, Mason CJ and McHugh J did not apply the new constitutional freedom itself when they held the provision invalid, yet one could seek to explain their decisions as actually related to the freedom. The s 51(xxxi) guarantee of acquisition of property on just terms could be seen as some sort of basis for protecting property rights. In *Polyukhovich*, a minority held that the constitutional separation of powers generally prohibits retrospective criminal laws,²⁹³ though Brennan J (who used proportionality to protect non-retrospectivity) did not decide the point.

The argument that proportionality only protects values derived from the Constitution represents one way in which use of the concept in characterisation could be limited or, indeed, desiccated. Such an approach would be very close to using proportionality simply as a test of legitimate restriction of constitutional guarantees. That is all it would be with respect to freedom of political communication. In relation to the other interests, protecting States' rights is of questionable legitimacy anyway. The Commonwealth's power to make retrospective laws currently is unresolved. Proportionality might be seen as an unnecessary extra protection for property rights given s 51(xxxi).

The argument is artificial, however. Apart perhaps from States' rights, the protected interests were not in fact derived by the judges from the Constitution. Rather, they seem to have been derived from the common law. Only twice has the source of the protected interest expressly been identified. In *Polyukhovich*, Brennan J derived the 'freedom from a retrospective criminal law' from 'the freedoms which the law assures to the Australian people', by which he appears to mean the common law.²⁹⁴ Similarly, Mason CJ has indicated that proportionality will protect 'fundamental values traditionally protected by the common law, such as freedom of expression',²⁹⁵ a view which Kirby J has perhaps implicitly approved.²⁹⁶ It is difficult to see any basis for the concern to protect free

²⁹² Note *Davis* (1988) 166 CLR 79, 116. Surprisingly, the case has been listed as an example of infringement of a constitutional immunity: *Leask* (1996) 140 ALR 1, 9 (Brennan CJ).

²⁹³ *Polyukhovich* (1991) 172 CLR 501, 629–32 (Deane J), 686–90 (Toohey J), 704–8 (Gaudron J).

²⁹⁴ *Ibid* 592–3.

²⁹⁵ *Nationwide* (1992) 177 CLR 1, 31; see also *Cunliffe* (1994) 182 CLR 272, 297.

²⁹⁶ *Leask* (1996) 140 ALR 1, 44; cf *DPP v Toro-Martinez* (1993) 33 NSWLR 82, 95 (Kirby P).

expression in *Davis* other than the common law. The protection of property rights in *Tasmanian Dams* and *Richardson* can also be seen as originating in the common law. Given this basis, Doyle CJ suggests that the concept will be extended to protect all fundamental common law rights and freedoms.²⁹⁷ It was the common law to which Doyle CJ turned when proportionality arose before him in *South Australia*.²⁹⁸

1 *Articulating Common Law Rights*

The concept of 'fundamental' common law principles, rights or freedoms, as recently invoked by the High Court,²⁹⁹ appears to cover a broad range of matters.³⁰⁰ There are rights given effect by tort, such as the protection given to property interests by the tort of trespass. There are legal rules which protect such rights as legal professional privilege. Certain rights or interests — including non-retrospectivity — are protected by strictly construing statutes which affect them.³⁰¹ Other rights or interests, although not enforceable of themselves, are given weight in relation to other matters. Thus the desire to protect free speech is taken into account in the law of defamation and contempt.

The word 'fundamental' here appears to mean that the interests are considered to be very important.³⁰² Certainly three interests traditionally have been treated by the common law as cardinal: personal liberty, property and freedom of speech.³⁰³ Identifying what other matters fall into this category leaves substantial room for subjectivity. Some interests may emerge more clearly than others. Yet in the hundreds of thousands of cases decided in the common law world there is a myriad of sources to support almost any right that a judge might wish to advocate as fundamental. Common law rights can be thread from little silk.³⁰⁴ Indeed, in some circumstances, to label some new judicial creation as a 'common law right' may lend 'an air of antiquity and authority'³⁰⁵ which is quite misleading. Moreover, there is much in the common law, both past and present, which is objectionable by modern standards. For example, the common law has a notoriously poor track record on according women equality.³⁰⁶ It has been largely hostile to employee and trade union interests, still not recognising the

²⁹⁷ Doyle, above n 258, 161.

²⁹⁸ *Rogers v R* (1995) 64 SASR 280, 292.

²⁹⁹ *Bropho v Western Australia* (1990) 171 CLR 1, 17–18; *Coco v R* (1994) 179 CLR 427, 435–8.

³⁰⁰ *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 252; Doyle, above n 258, 147–8; David Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) 50–6, 70–1.

³⁰¹ D Pearce and R Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) 104–6.

³⁰² Cf Feldman, above n 300, 50–1.

³⁰³ Mason, 'Trends in Constitutional Interpretation', above n 2, 247; Allan, above n 57, 136, 143.

³⁰⁴ See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 304 (Gaudron J) ('*Teoh*').

³⁰⁵ Doyle, above n 258, 156.

³⁰⁶ Cf *Leeth* (1992) 174 CLR 455, 486.

internationally mandated right to strike.³⁰⁷ The application of the *terra nullius* doctrine by the common law was ‘founded on unjust discrimination’,³⁰⁸ yet was only altered in 1992.

That the common law can and does change is not necessarily a source of reassurance. Traditionally, it can be said, that the common law has displayed a ‘liberal and individualistic bias’.³⁰⁹ The common law tends to protect negative civil liberties, along with economic and property interests.³¹⁰ Arguably, it is inappropriate for courts to protect positive rights which require action or expenditure by governments.³¹¹ But the issues are not neatly distinguishable: protection of one type of interest may come at a cost to another. In *Political Advertising*, for example, the High Court’s invalidation of the legislation protected negative freedom of speech at the cost of positive enhancement of free and equal access to the media. Thus, use of the common law (whether past or present) as a source of fundamental rights or interests for proportionality brings with it a number of objections: the choice is open and subjective; the common law may not conform to contemporary values; and the priorities which it embodies may be one-dimensional.

2 *International Guides for the Common Law*

For nearly thirty years the ECJ has been prepared to review European Community (EC) and related national legislation for breach of ‘fundamental rights’.³¹² The EC has no Bill of Rights and has not itself ratified the European Convention. The ECJ has thus faced a similar need as that of the High Court to find a source of fundamental rights.³¹³ It has drawn first on the constitutions of member states. Secondly, it has looked for guidance to international treaties to which all member states are signatories. There has thus been significant reliance on the European Convention,³¹⁴ which appears to be becoming the primary source of fundamental rights for the ECJ.³¹⁵

It is well-established that Commonwealth constitutional powers are not to be read down by reference to international law.³¹⁶ Nevertheless, insofar as international law is an influence on the *common law*, international conventions may be relevant to identifying fundamental rights for the purposes of proportionality.

³⁰⁷ *Victoria v Commonwealth* (1996) 138 ALR 129, 194–5 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); K Ewing, ‘The Right to Strike in Australia’ (1989) 2 *Australian Journal of Labour Law* 18, 18–23, 30–8.

³⁰⁸ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (‘*Mabo*’).

³⁰⁹ T Allan, ‘Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism’ (1985) 44 *Cambridge Law Journal* 111, 119, see generally 117–22.

³¹⁰ Geoffrey Lindell, ‘Recent Developments in the Judicial Interpretation of the Australian Constitution’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 1, 23.

³¹¹ Cf Cass Sunstein, *The Partial Constitution* (1993) 69–71.

³¹² Starting with *Stauder v City of Ulm* (29/69) [1969] ECR 419.

³¹³ *Nold v Commission* (4/73) [1974] ECR 491, 507.

³¹⁴ T Hartley, *The Foundations of European Community Law* (3rd ed, 1994) 146.

³¹⁵ *Grogan* (C–159/90) [1991] ECR I–4685, 4741.

³¹⁶ *Poltes v Commonwealth* (1945) 70 CLR 60; *Horta v Commonwealth* (1994) 181 CLR 183, 195.

Australia is a signatory to the International Covenant on Civil and Political Rights ('ICCPR'), amongst other human rights conventions. In Australia, unlegislated treaties have 'no legal effect upon the rights and duties'³¹⁷ of citizens or the government. A recent line of cases has accepted that international treaties ratified by Australia constitute a 'legitimate influence'³¹⁸ on the development of the common law, seemingly where there is no pre-existing certainty.³¹⁹ Particular emphasis has been placed on the role of conventions which declare 'universal fundamental rights', such as the ICCPR.³²⁰ Although the doctrine is not to be seen 'as a backdoor means'³²¹ of incorporating treaties into the common law, there is a strong basis for referring to such treaties in order to assist in the articulation of fundamental common law rights and values.

There is another, indirect route to the same result. Treaties can codify, crystallise or influence customary international law.³²² Although it is a complex question, there is a range of judicial and academic support for the view that much of the ICCPR and the Universal Declaration of Human Rights now represent principles of customary law.³²³ Irrespective of the incorporation/transformation debate,³²⁴ there is no doubt that the common law can draw on customary international law as a source for its development.

The benefits of employing international law in these ways are that the human rights covenants present a clear list of fundamental rights which are consistent with contemporary values. The criticisms of subjectivity and obsolescence made of the common law are thus largely avoided. Sovereignty is not compromised when such covenants are referred to in judicial discretion as merely as one influence on the development of the common law.³²⁵ The key difficulty with such use is that the relevant covenants were formulated well after 1900. This fact raises the issue of whether the relevant common law for the purposes of proportionality is the law of 1900, when the Constitution was accepted by the people of Australia, or the law of today. The only judicial indication comes from Ma-

³¹⁷ *Chow Hung Ching v R* (1948) 77 CLR 449, 478 (Dixon J).

³¹⁸ See *Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J) and cases cited therein; *Western Australia v Commonwealth* (1995) 183 CLR 373, 486.

³¹⁹ *Teoh* (1995) 183 CLR 273, 288; *Mabo* (1992) 175 CLR 1, 42. Cf *Jago v District Court of NSW* (1988) 12 NSWLR 558, 569 (Kirby P) ('*Jago*'); *Dietrich v R* (1992) 177 CLR 292, 360 (Toohey J).

³²⁰ *Teoh* (1995) 183 CLR 273, 288; *Mabo* (1992) 175 CLR 1, 42; *Jago* (1988) 12 NSWLR 558, 569.

³²¹ *Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J), 304 (Gaudron J agreeing).

³²² See, eg, *Military & Paramilitary Activities (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 836.

³²³ Andrew Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution' (1994) 43 *International and Comparative Law Quarterly* 537, 540-7 and the cases cited therein; see also Rosalyn Higgins, 'The Relationship Between International and Regional Human Rights Norms and Domestic Law' (1992) 18 *Commonwealth Law Bulletin* 1268, 1272-3; Ian Brownlie, *Principles of Public International Law* (4th ed, 1990) 570-1.

³²⁴ An open issue in Australia: Gillian Triggs, 'Customary International Law and Australian Law', in M P Ellinghaus, A Bradbrook & A Duggan (eds), *The Emergence of Australian Law* (1989) 383-4.

³²⁵ *Contra* P Lane, 'The Changing Role of the High Court' (1996) 70 *Australian Law Journal* 246, 250.

son CJ, who appears to have relied on the modern common law in *Nationwide*.³²⁶

3 *Which Common Law?*

In constitutional construction words in the Constitution generally are seen as having the essential meaning that they had in 1900.³²⁷ However, some judges have favoured what has been called a 'progressive' view of the Constitution, which sees the Constitution as a living instrument to be read in the light of modern needs and values.³²⁸ Where proportionality quite fits into this picture is unclear. Proportionality is not a *word* employed in the Constitution. As noted, little justification has been offered for its use in characterisation. If the justification is that it was not intended that the grant of Commonwealth powers extend to laws which unduly restricted fundamental common law values,³²⁹ then presumably the common law of 1900 would apply. Yet it would be equally possible to ascribe some intent that the developing values of the common law not be infringed. In a parallel issue, Deane and Toohey JJ have held that Commonwealth powers may be subject to implied constitutional limitations derived from 'fundamental rights and principles recognised by the common law at the time the Constitution was adopted'.³³⁰ These judges, in this context, were content to rely on the common law of 1900.

There is arguably a significant difference in degree between paying some heed to modern values and needs in constitutional interpretation, as advocated by the 'progressive' view of interpretation, and the explicit reading down of Commonwealth powers by reference to modern judicial notions of fundamental rights. On the other hand, the common law of 1900 might not protect interests considered fundamental today or might be antithetical to contemporary values. The main difficulty surrounding the use of proportionality relates to whether the concept should be employed to protect *any* common law rights or interests. If it is to be so used, the better course is that this be done in line with modern views of fundamental rights.

4 *Issues of Legitimacy*

In *Theophanous*, Mason CJ, Toohey and Gaudron JJ stated that if 'the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former'.³³¹ How this statement can be reconciled with the application of proportionality in characterisation is unclear. As shown above, proportionality operates in essentially the same way in characterisation as

³²⁶ (1992) 177 CLR 1, 31; cf *Theophanous* (1994) 182 CLR 104, 142 (Brennan J).

³²⁷ See, eg, *Cheatle v R* (1993) 177 CLR 541.

³²⁸ Greg Craven, 'After Literalism, What?' (1992) 18 *Melbourne University Law Review* 874, 874-82; Mason, 'Trends in Constitutional Interpretation', above n 2, 238-40; Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 5, 23.

³²⁹ Cf Toohey, above n 247, 170.

³³⁰ *Nationwide* (1992) 177 CLR 1, 69; *Leeth* (1992) 174 CLR 455, 485-7.

³³¹ *Theophanous* (1994) 182 CLR 104, 126.

for constitutional guarantees. The key difference is that in characterisation the court has to supply the protected interests. To derive these interests from the common law is effectively to imply constitutional limitations in much the same way as Deane and Toohey JJ did in *Leeth*,³³² albeit that the restriction of proportionality applies only to a limited range of powers.

The *Leeth* minority view has been subject to considerable criticism. The objections to implied constitutional guarantees of rights have been well rehearsed and will not be repeated here.³³³ Three brief points are worth making in this context. First, to read down Commonwealth powers by reference to the common law is contrary to principles of parliamentary supremacy and to basic constitutional orthodoxy in Australia. It has been stated that 'it is a Constitution we are interpreting', not a mere statute.³³⁴ To read constitutional provisions down to protect fundamental common law rights or doctrines is effectively to apply a canon of *statutory* construction³³⁵ in a manner previously and authoritatively rejected.³³⁶

Secondly, to justify such use of proportionality by reference to some intention in 1900 to protect common law values is unconvincing. In so far as this intention is ascribed to the people of Australia in 1900, it is an artificial and arbitrary imputation. In so far as the intent is assigned to the framers of the Constitution, it is ill-based.³³⁷

Thirdly, there is general acceptance today that judges must make value judgments in deciding difficult questions of constitutional interpretation. These choices may be especially controversial when constitutional guarantees are involved. Yet for the court to not only enforce existing guarantees but actually decide what rights and interests should be accorded constitutional protection is to enter a whole new order of value judgment. As Campbell argues, '[s]carcely any aspect of political power is more important than the determination of what is to count as those priority interests'³³⁸ which override other interests. When proportionality is used in characterisation, regardless of whether past or present common law values are relied on, judges take this power unto themselves. In summary, then, significant legitimacy problems arise for the use of proportion-

³³² (1992) 174 CLR 455.

³³³ On *Leeth* (1992) 174 CLR 455 see, eg, Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 150, 174–8; Lindell, above n 310, 37–9; Leslie Zines, 'Courts Unmaking the Laws' in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (1995) 125, 136–7; cf Michael Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228. See generally Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 65–75.

³³⁴ *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J); see also *Jumbunna* (1908) 6 CLR 309, 367–8.

³³⁵ Namely, that a statute is presumed not to have been intended to override fundamental rights.

³³⁶ *Polites v Commonwealth* (1945) 70 CLR 60, especially 78 (Dixon J); see also *R v Burah* (1878) 3 App Cas 889, 904–5; *Hodge v R* (1883) 9 App Cas 117, 132.

³³⁷ See, eg, *Official Record of the Debates of the Australasian Federal Convention* (vol IV, Third Session, 1898) 664–91; J La Nauze, *The Making of the Australian Constitution* (1972) 227–32.

³³⁸ Tom Campbell, 'Democracy, Human Rights and Positive Law' (1994) 16 *Sydney Law Review* 195, 205.

ality in characterisation because of the need to identify those interests worthy of protection from undue regulation. However, if the process is to be undertaken, then it is best done with reference to the modern common law as informed by international human rights instruments.

B *Identifying Legitimate Government Interests*

In the characterisation sphere, the legitimate government purpose provides the whole context of the application of proportionality. The matter is not nearly so clear for constitutional guarantees. If a constitutional guarantee is to have some protective force, there must be some limit on what public interests may justify its restriction. There are a number of ways in which such limitations may be imposed or articulated in relation to any particular guarantee.

First, at the very minimum, a government aim simply to restrict the protected interest for its own sake can never be legitimate (this might be described as the impermissible purpose). There must be some *other* independent purpose justifying restriction if the guarantee is to have any protective effect. If the purpose of a law was simply to protect local industry, for example, it could not be justified as a legitimate restriction of a guarantee of free trade. Thus, in *Nationwide*, Brennan, Deane and Toohey JJ effectively held that the purpose of protecting the Industrial Relations Commission from all criticism was simply not legitimate, being in direct conflict with the freedom of political communication.³³⁹ The width of the impermissible purpose will depend on how the nature, purpose and effect of the particular guarantee is viewed.³⁴⁰

Second, the legitimate aims may be stated as part of an express restriction test. Articles 8 to 11 of the European Convention, for example, state that limitations may be imposed in pursuit of such matters as 'public health, order or morals'. The guarantees in Australia do not have express restriction tests of this kind.

Third, some set of limitations may be sought to be derived from the nature of the guarantee itself. Such attempts can be seen in *Street* concerning the s 117 guarantee of equality of treatment for residents of different States.³⁴¹ Further examples appear below in relation to political communication and s 92.

A fourth method of identifying the scope of legitimate overriding purposes is by reference to some guiding philosophy derived from the constitutional context of the guarantee. For instance, the general derogation test for the Canadian Charter in s 1 allows 'reasonable limits ... demonstrably justified in a free and democratic society'. In giving meaning to this phrase the Supreme Court has enunciated a range of relevant values and principles, such as a 'commitment to

³³⁹ (1992) 177 CLR 1, 53, 78–9.

³⁴⁰ *Street* (1989) 168 CLR 461, 548 (Dawson J).

³⁴¹ *Ibid* 491–3, 510–4, 528–9, 548, 559–60, 570–4, 582–5.

social justice and equality'.³⁴² Any express Bill of Rights is likely to reflect some particular philosophical vision.³⁴³

Deane and Toohey JJ have prescribed a detailed test of legitimate restrictions of the implied freedom of political communication. A restriction of the freedom will be valid only if it is conducive to availability of the means of communication (an aspect which might be said to have been derived from the nature of the guarantee itself), or that it does not:

go beyond what is 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.³⁴⁴

This statement is reminiscent of the Canadian derogation test. The latter aspect of the statement in particular might be said to embody an individualistic, liberal approach. Yet there is no obvious feature of the constitutional context which might be said to imply such a philosophy. Representative democracy, from which the implied freedom is derived, neither requires nor is necessarily based on a liberal philosophy.³⁴⁵ Proportionality itself might be viewed as reflecting such a philosophy, and it is perhaps seen in this way in Germany.³⁴⁶ Yet given that the concept is capable of balancing a wide range of factors and interests, there is no inherent aspect of the doctrine which can be said to require an emphasis on individualistic liberal values. Deane and Toohey JJ's limitation thus reflects their own preferred philosophy.

Fifth, rather than attempting to predefine what types of purposes may override a guarantee, it is possible to deal with the matter simply on a case by case basis through the allocation of weight to the respective interests. The greater the weight allocated to a guarantee, the fewer government interests will be able to justify its restriction. In *Political Advertising*, for example, Mason CJ and McHugh J held that only a 'compelling justification'³⁴⁷ could support content-based restrictions on political communication. This type of approach is the one most commonly adopted (in conjunction with the minimal first approach). It is inherently difficult to predefine permissible overriding interests where there is no express restriction test. The ECJ initially showed some willingness to limit the scope of legitimate overriding ends in a context equivalent to Australia's s 92,³⁴⁸ for example, but has progressively widened the range.³⁴⁹ The Court of Human Rights itself has paid 'scant independent attention' to whether any measure in issue can be characterised as falling into the express categories of

³⁴² *Oakes* [1986] 1 SCR 103, 136.

³⁴³ Allan Hutchinson and Andrew Petter, 'Private Rights/Public Wrongs: The Liberal Lie of the Charter' (1988) 38 *University of Toronto Law Journal* 278, 279.

³⁴⁴ *Political Advertising* (1992) 177 CLR 106, 169; *Nationwide* (1992) 177 CLR 1, 77.

³⁴⁵ Kirk, above n 333, 45–9.

³⁴⁶ Emiliou, above n 13, 40–3.

³⁴⁷ (1992) 177 CLR 106, 143, 235.

³⁴⁸ *Rewe v Bundesmonopolverwaltung für Brantwein* (120/78) [1979] ECR 649, [8].

³⁴⁹ *Procureur de la République* (240/83) [1985] ECR 531, [12]–[13]; *Torfaen Borough Council* (C–145/88) [1989] ECR 3851, [13]–[14], also 3882 (Advocate General Van Gerven).

legitimate ends.³⁵⁰ Such reticence is understandable. Any purpose may be characterised with varying degrees of generality. The prohibition on gay sexual activity considered in *Dudgeon*, for instance, might be characterised as relating to regulation of public morality or to restriction of consensual private sexual acts.³⁵¹ As this example shows, the characterisation may also beg the question ultimately at issue: the justifiability of the restriction.

1 *The Section 92 Search*

The difficulties of these issues are well-illustrated by the cases on s 92 of the Constitution. One of the controversies over the scope of the guarantee related to which government interests could legitimately be pursued in the regulation of interstate trade. The narrowest approach in recent times is that of Barwick CJ. He sought to derive the scope of overriding government interests from the nature of the section, particularly from the concept of freedom itself. Freedom to trade necessitated 'laws of the kind which accommodate one man's activities to those of another so that each is free to trade'.³⁵² The scope of legitimate regulation extended only to the mutual accommodation of the private interests of interstate traders. The range of legitimate overriding interests was thus limited to public health, honesty and fairness in commercial dealings, restrictive trade practices and anti-competitive conduct.³⁵³ Barwick CJ's justification was simple: the guarantee was unqualified; there could be no 'gloss upon it'.³⁵⁴ Furthermore:

[t]he decision whether or not a community or some part of it benefits from legislation involves social and political theory and must inevitably involve passage down a slippery path, better suited to the feet of legislators than to those of judges.³⁵⁵

His view reflects a desire to avoid making what he regarded as political judgments about the appropriate type and level of regulation in the public interest.

There are two fundamental problems with Barwick CJ's approach. First, it is simply too narrow, as Barwick CJ himself effectively acknowledged. Restrictions relating to public health, for example, are not concerned with the mutual accommodation of traders' interests.³⁵⁶ A trade in unsafe food does not infringe other traders' freedom. On a strict *laissez-faire* view there is no need for laws regulating health standards so long as consumers can make informed choices. The real purpose of laws regulating such matters is to protect a community

³⁵⁰ P van Dijk and G van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed, 1990) 584.

³⁵¹ *Dudgeon* (1981) 45 Eur Ct HR (ser A) contrast [45]–[46] with [60]–[61].

³⁵² *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 15 ('*Samuels*'); see also *North Eastern Dairy* (1975) 134 CLR 559, 581; *Clark King* (1978) 140 CLR 120, 152–3; *Uebergang* (1980) 145 CLR 266, 280–4.

³⁵³ *Samuels* (1969) 120 CLR 1, 19–20; *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617, 630; *North Eastern Dairy* (1975) 134 CLR 559, 581; *Clark King* (1978) 140 CLR 120, 152; *Uebergang* (1980) 145 CLR 266, 283.

³⁵⁴ *Samuels* (1969) 120 CLR 1, 15.

³⁵⁵ *Clark King* (1978) 140 CLR 120, 153–4.

³⁵⁶ *Permewan* (1979) 145 CLR 1, 24 (Stephen J).

interest. Secondly, this approach hides, but does not avoid, the subjective assessments involved. To say that it is all a question of defining 'freedom' is artificial. Freedom cannot be defined without making political or value judgments. For instance, there are many complex arguments about the economic and social desirability of competition law. For Barwick CJ to decide that such regulation is compatible with freedom reflects his own conclusions on this debate.

At the other end of the spectrum Mason J emphasised that s 92 was a guarantee based on protecting the public interest. Given this 'predominant public character',³⁵⁷ the freedom logically could be subject to restriction to satisfy other aspects of the public interest. He did not articulate the full scope of what ends might justify restricting free interstate trade, but indicated that 'many other fields' apart from public health might be included.³⁵⁸

The views of Mason J seem to have been the main influence for the present approach of the court, articulated in *Castlemaine*. The majority there stated:

[I]t would place the Court in an invidious position if the Court were to hold that only such regulation of interstate trade as is in fact necessary for the protection of the community is consistent with the freedom ordained by s 92. The question whether a particular legislative enactment is a necessary or even a desirable solution to a particular problem is in large measure a political question best left for resolution to the political process.³⁵⁹

The court abandoned the task of attempting to limit the range of government ends which potentially can override the freedom. Thus the majority said that they 'must' accept that the State Parliament had 'rational and legitimate grounds' for wishing to address the claimed litter and energy conservation problems.³⁶⁰ The only illegitimate aim, seemingly, is the impermissible purpose of seeking to burden interstate trade itself. The deferential motivation here is similar to that of Barwick CJ; the result is quite the opposite. In so far as the court's approach reflects the last method described above (ie, assessing legitimacy on a case by case basis) it is unobjectionable. Yet the passage quoted seems to eschew *any* judicial determination of the necessity or desirability of government ends.³⁶¹ This view is flawed for three reasons.

First, in order to apply a proportionality balancing test, it is necessary to allocate weight both to the interest being protected and to the end or purpose sought to be achieved. To decide on the weight or importance of a government purpose is to decide on its necessity or desirability, as shown above.³⁶² To allocate weight to a protected interest has the same effect: the greater the importance attached to the guarantee, the narrower the range of government interests which

³⁵⁷ *Pilkington v Frank Hammond Pty Ltd* (1974) 131 CLR 124, 185-6; *North Eastern Dairy* (1975) 134 CLR 559, 614-6; *Permewan* (1979) 145 CLR 1, 34-8, see also 26-7 (Stephen J).

³⁵⁸ *North Eastern Dairy* (1975) 134 CLR 559, 615.

³⁵⁹ *Castlemaine* (1990) 169 CLR 436, 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

³⁶⁰ *Ibid.*

³⁶¹ See also *Theophanous* (1994) 182 CLR 104, 163 (Brennan J).

³⁶² See above Part I(C).

will have sufficient importance to justify its restriction. The court in *Castlemaine* only managed to avoid dealing with this realisation because it decided the case using just the first and second levels of proportionality.³⁶³

Second, it may be that the government purpose depends on a claimed fact. Whether it is necessary or desirable to reduce litter or conserve resources is relatively subjective. Yet the object of a law might be, for example, to protect the public from health risks associated with a particular product. If facts could be produced which showed that there were no such risks of any significance then the claimed government purpose would disappear.³⁶⁴ In *Uebergang*, under the old approach, the court held that appropriate facts could be adduced in relation to such matters.³⁶⁵ Proportionality does not avoid this issue.³⁶⁶ It may be that *if* the problem does exist as claimed then the measure is suitable, necessary and proportionate to achieving that end. The court has to decide if the end itself is valid.

Third, the court's apparent view is inconsistent with the judgment itself. One basis on which the court decided that the scheme was invalid was that the interstate supplier, by using bottles made interstate, was saving on *South Australia's* energy resources.³⁶⁷ This objection relies on the premise that it was not legitimate for the State to do what it could to seek to conserve *Australian* or *world* energy resources.³⁶⁸ Such a premise *is* a substantive limitation on legitimate government ends, and a questionable one at that.³⁶⁹

It may be that, despite its avowal, the court did leave itself some room for imposing limitations on legitimate ends. The majority talked of laws protecting the community 'from a real danger or threat to its welfare',³⁷⁰ which might allow the court to judge whether there was a *real* problem to be addressed. The court also did speak of judgments on necessity and desirability as being '*in large measure* a political question'.³⁷¹ In any case, what does clearly emerge from the divergent approaches detailed here is the general aversion of Australian judges to being seen to intrude on the political or legislative domain. This tendency raises the issue of what level of deference should be shown to legislative determinations.

V POLITICS, PROPORIONALITY AND DEFERENCE

There can be no doubt that significant elements of the proportionality test overlap with matters and processes normally associated with the political arena. In these circumstances, questions of legitimacy, judicial capability and deference

³⁶³ Cf *Tanner* (1989) 166 CLR 161, 165.

³⁶⁴ See, eg, *Commission v Germany* (178/84) [1987] ECR 1227, [44].

³⁶⁵ *Uebergang* (1980) 145 CLR 266.

³⁶⁶ See, eg, *Tanner* (1989) 166 CLR 161, 168; *Cunliffe* (1994) 182 CLR 272, 303–4 (Mason CJ).

³⁶⁷ *Castlemaine* (1990) 169 CLR 436, 476–7.

³⁶⁸ Cf *Castlemaine* (1990) 169 CLR 436, 479 (Gaudron and McHugh JJ).

³⁶⁹ Detmold, above n 254, 51–3.

³⁷⁰ *Castlemaine* (1990) 169 CLR 436, 472.

³⁷¹ *Ibid* 473.

all arise. These are complex issues which can only be addressed briefly here. Nevertheless, analysis of European and Australian case law reveals a number of principles relevant to determining the level of intensity with which the test should be applied.

As with any ground of review, proportionality can be applied with varying degrees of intensity.³⁷² Thus, for suitability, a court can take a more or less rigorous view of how effective a measure must be in achieving its claimed legitimate end. For necessity, there are degrees to which a court can assess how practicable claimed alternative means must be, how closely they must achieve the original objective, how restrictive they must be to justify invalidation of the government's measure, and how thoroughly the possibility of alternatives is to be investigated.³⁷³

The most indeterminate decisions arise at the balancing level. Intensity arises here in relation to how excessive a measure can be before it will be invalid. This determination is tied to the allocation of weight: allowing a range of discretion effectively accords significant weight to the government interest. The decision as to what legitimate ends may override any protected interest is also closely related to these tasks, being linked to the allocation of weight to the protected interest. All of these tasks are part of the process of giving content to protected rights or interests. When s 92 of the Constitution was seen as having wide scope, for example, those judges who wanted to limit its application applied a broad and deferential test of legitimate restriction.³⁷⁴ Following the narrow reinterpretation of the section, the court has applied the proportionality test more rigorously: in *Castlemaine* the putative alternative means were arguably more draconian than the State's law but their availability was sufficient to invalidate the measure.³⁷⁵

These aspects of applying a balancing test all ultimately involve some judicial decision as to what is necessary or desirable for the governance of the community. Any legislative measure is likely to have restrictive effects on some interests. In passing any measure, therefore, the Parliament must have made some determination of the appropriate balance between competing social interests. Thus when the court applies a balancing test, it asks essentially the same question as that addressed by the legislature.³⁷⁶ Proportionality does not necessarily involve the substitution of the court's view, however. If any level of deference is accorded to the view of Parliament then the question becomes whether the decision is within an acceptable range.

³⁷² Craig, above n 14, 415.

³⁷³ *R v Chaulk* [1990] 3 SCR 1303, 1341-3; see also Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105, 113; cf *Illinois State Board of Elections v Socialist Workers Party*, 440 US 173, 188-9 (1979) (Blackmun J).

³⁷⁴ See, eg, *Permevan* (1979) 145 CLR 1, 30 (Stephen J), 37-8 (Mason J).

³⁷⁵ See, eg, *Castlemaine* (1990) 169 CLR 436, 477.

³⁷⁶ Sir Gerard Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994) 177, 181; Zines, 'Courts Unmaking the Laws', above n 333, 132; Craig, above n 14, 416-7.

That the court engages in the same balancing process as the legislature when applying proportionality is not, by itself, a ground for criticism. In developing the common law courts perform the same task.³⁷⁷ Of course, to do so in a way which overrides Parliament is a fundamentally different matter. Yet the approach cannot be condemned by dogmatic assertions of parliamentary supremacy. Such supremacy is generally accepted as being qualified in systems with an entrenched constitution. The courts are accepted as having some justifiable role in overriding laws which breach constitutional requirements. In Australia such supremacy is qualified by the constitutionalism inherent in an entrenched constitution.

There are, it is submitted, two key determinants of the appropriateness of judicial review in this area. First, briefly, there is the basic question of the legitimacy of courts engaging in such review. In a representative democracy the people govern themselves through their elected representatives. Judges are unelected and largely unaccountable to the people. Any judicial decision overriding the determinations of the Parliament can thus be said, in at least a simple sense, to be undemocratic.³⁷⁸ Assessing the advantages and detriments of legislation is not a mathematical process; it depends on subjective evaluations.³⁷⁹ And arguably questions about constitutional rights, by their very nature, tend to involve value judgments to a greater extent than other areas of law.³⁸⁰ When such important decisions are taken by reference to the personal values of the few, forceful legitimacy objections arise. Admittedly, democracies often choose to limit themselves by adopting constitutional guarantees. These provisions inherently require the balancing of competing social interests, both in their definition (being usually expressed in very general terms) and in their application. The people must be taken to accept some balancing role for the courts in relation to constitutional guarantees. Nevertheless, issues of legitimacy do not simply disappear: questions of degree still arise. The separation of powers, if nothing else, limits the extent to which judges may encroach on the role of legislators as the primary law-makers and 'interest-balancers' of the nation.³⁸¹

The second key determinant is the ability of the court to deal adequately with the issues raised. Constitutional rights questions are often complex and polycentric, having ramifications for a range of interests.³⁸² They cannot be addressed simply by traditional legal analysis but require political, social and ethical

³⁷⁷ Justice Michael McHugh, 'The Law-making Function of the Judicial Process Part II' (1988) 62 *Australian Law Journal* 116, 119–21.

³⁷⁸ Kirk, above n 333, 44–5, 49, 72–3.

³⁷⁹ Cf Walzer, above n 140, xv–xvi.

³⁸⁰ Brennan, above n 376, 182; see also Sir Anthony Mason, 'A Bill of Rights for Australia?' (1989) 5 *Australian Bar Review* 79, 81–2; see also Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990) Ch 1.

³⁸¹ *Richardson* (1988) 164 CLR 261, 310–2 (Deane J); *Cunliffe* (1994) 182 CLR 272, 338 (Deane J).

³⁸² Cf Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 394–404.

argument.³⁸³ Yet the judicial procedure is severely restricted in relation to the parties who may seek to be heard, the types of arguments which may be put and the evidence which may be presented. It has also been said that judges are not fitted by training or experience to determine such matters.³⁸⁴ The High Court itself manifested such concerns in seeking to avoid judging the desirability of government ends in *Castlemaine*.³⁸⁵ On the other hand, constitutional courts around the world have been able to fill such roles competently, preventing a simple condemnation of judicial involvement. The appropriate response is caution.³⁸⁶ Together, these two determinants indicate that if proportionality is to be applied at all, there are strong reasons for approaching the task with some restraint. The question then is how to determine the appropriate level of deference.

A *The Margin of Appreciation*

A foundational aspect of the jurisprudence of the Court of Human Rights is the 'margin of appreciation'. In essence this term is a label for the level of deference shown by the court in determining issues of proportionality. The margin of appreciation varies with the circumstances. If it is very wide, only loose review is applied. If it is very narrow, the review is much stricter and the balancing of competing interests must be correct in the eyes of the court. The ECJ similarly accords variable deference in applying proportionality, although it does not use the label.

The margin of appreciation has been criticised as involving an abdication of the court's role in enforcing the European Convention.³⁸⁷ It has also been argued that the concept has no relevance for national courts.³⁸⁸ This view is based on the original justification offered for the margin: that national authorities are better placed than international judges to determine the content of such matters as public morality and necessity.³⁸⁹ For the reasons given above, however, some level of deference by national courts to the determinations of legislatures is clearly justified. Indeed, valuable guidance for Australia can be drawn from the approach of the two European courts. It is submitted that two of the underlying determinants of the level of deference shown by these courts are the same two

³⁸³ Brennan, above n 376, 181–2; La Forest, above n 142, 143.

³⁸⁴ *R v Home Secretary, Ex parte Brind* [1991] 1 AC 696, 767 (Lord Lowry); McHugh, above n 377, 125.

³⁸⁵ (1990) 169 CLR 436.

³⁸⁶ McHugh, above n 377, 125.

³⁸⁷ Van Dijk and van Hoof, above n 350, 585–6, 601–2.

³⁸⁸ Yash Ghai, 'Derogations and Limitations in the Hong Kong Bill of Rights' in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Perspective* (1993) 161, 181–2.

³⁸⁹ *Handyside* (1976) 24 Eur Ct HR (ser A) [48].

issues that are relevant in Australia: the democratic legitimacy, and the capability or practicality, of the courts taking a rigorous approach to a matter.³⁹⁰

The margin of appreciation varies with the nature of both the subject matter and the protected interest. The most important factors relating to the subject matter are how subjective, controversial or complex it is perceived to be. Thus, the Court of Human Rights has taken a very deferential approach to 'political, economic and social issues on which opinions within a democratic society may reasonably differ widely'.³⁹¹ The ECJ tends to be very deferential when complex economic and technical issues arise in connection with the Common Agricultural Policy³⁹² or anti-dumping matters³⁹³ because these are in the area of 'political responsibilities' of the Union institutions. Where the justifying aim of legislation is the regulation of public morals, the courts take a low intensity approach, recognising that conceptions of morals may vary significantly.³⁹⁴ The existence of common standards amongst the Member states tends to reduce the margin of appreciation.³⁹⁵ Such standards make judicial intervention less open to the criticism that the judges are imposing their own subjective preferences. The legitimacy determinant is the main underlying basis of the courts' deference on subjective or controversial issues. In relation to complex social or economic matters, the capability determinant is also important.³⁹⁶

Where the matter is regarded as being more capable of 'objective' evaluation, a narrower margin will be accorded.³⁹⁷ Thus, for public health derogations from free movement, the ECJ is now rigorous on matters capable of scientific proof³⁹⁸ but deferential where the justification relates to more subjective issues such as discouraging alcohol consumption.³⁹⁹ On the other hand, that a measure is very technical may be a reason for avoiding strict scrutiny,⁴⁰⁰ reflecting the capability determinant. Both European courts tend to accord a wide margin for matters of national security,⁴⁰¹ reflecting both determinants.⁴⁰² The Supreme Court of

³⁹⁰ Note R Macdonald, 'The Margin of Appreciation' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (1993) 82, 122; see also de Búrca, above n 373, 111.

³⁹¹ *James* (1986) 98 Eur Ct HR (ser A) [46]; *Lithgow* (1986) 102 Eur Ct HR (ser A) [51].

³⁹² *Stöltzing* (138/78) [1979] ECR 713, [7]; *Biovilac* (59/83) [1984] ECR 4057, [17]; *Fedesa* (C-331/88) [1990] ECR I-4023, [14].

³⁹³ Alexander Egger, 'The Principle of Proportionality in Community Anti-dumping Law' (1993) 18 *European Law Review* 367, 384, 386.

³⁹⁴ *Handyside* (1976) 24 Eur Ct HR (ser A) [48]; *Open Door* (1992) 246 Eur Ct HR (ser A), [68]; *Van Duyn* (41/74) [1974] ECR 1337, [18]; *R v Bouchereau* (30/77) [1977] ECR 1999, [34].

³⁹⁵ *Rees* (1987) 106 Eur Ct HR (ser A) [37]; van Dijk and van Hoof, above n 350, 602-3, above n 350; *Sandoz* (174/82) [1983] ECR 2445, [19]; de Búrca, above n 373, 147.

³⁹⁶ See generally de Búrca, above n 373, 116.

³⁹⁷ *Sunday Times* (1979) 30 Eur Ct HR (ser A) [59].

³⁹⁸ *Commission v Germany* (178/84) [1987] ECR 1227, [44]; cf *Sandoz* (174/82) [1983] ECR 2445, 2463-4.

³⁹⁹ *Aragonesa de Publicidad Exterior and Publivia v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* (C-1/90 C-176/90) [1991] ECR I-4151, 4184.

⁴⁰⁰ *Powell and Rayner* (1990) 172 Eur Ct HR (ser A) [44]; *Quebec v Irwin Toy (Attorney-General)* [1989] 1 SCR 927, 993 ('*Irwin Toy*').

⁴⁰¹ *Leander* (1987) 116 Eur Ct HR (ser A) [59]; *Campus Oil Ltd v Minister for Industry and Energy* (72/83) [1984] ECR 2727, 2751-6.

Canada has suggested that greater deference is due for matters involving the striking of a balance between competing groups, than for where (in criminal law for example) the matter is simply one between the state and the individual.⁴⁰³ Whether there is a true distinction here is questionable. However, in so far as the concern for greater deference is based on the difficulties of courts assessing polycentric matters, or on the greater relative expertise of the courts in such legal matters as criminal law, then the suggestion has merit.

The importance of the government end has been suggested to affect the margin of appreciation.⁴⁰⁴ Yet, strictly speaking, such use presupposes the very matter to which the margin applies: assessing the existence and extent or weight of the justifying necessity, and the choice of means to meet it.⁴⁰⁵ In contrast, it is submitted that the issue of deference does *not* strictly arise in relation to either defining the protected interests or allocating them weight, at least when those interests are constitutional guarantees. These are legal interpretative tasks appropriately undertaken by judges. In any event, of course, the government is accorded some leeway, so the difference is largely theoretical. But put simply, the margin applies to the government interest side of the equation and not to the protected interest. Conversely, the weight attached to the protected interest does affect the width of the margin accorded to the government in seeking to achieve its end, whilst the weight of the government interest does not.

Different protected rights or interests have differing levels of importance. The Court of Human Rights has attributed significant weight to freedom of expression, for instance.⁴⁰⁶ The ECJ views freedom of movement as a 'fundamental principle' and thus the legitimate derogations must be 'interpreted strictly'.⁴⁰⁷ The particular protected conduct in question is also relevant. The Court of Human Rights is more rigorous in reviewing regulation of political expression than for other types of speech,⁴⁰⁸ and matters of great intimacy are protected highly under the guarantee of privacy.⁴⁰⁹ A relatively narrow margin of appreciation may thus apply even for controversial matters.⁴¹⁰ This approach reflects the fact that if the substance of the right or interest is meaningfully to be protected then, in some core cases at least, a low level of deference will be demanded.

⁴⁰² See, eg, de Búrca, above n 373, 132.

⁴⁰³ *Irwin Toy* [1989] 1 SCR 927, 993-4; *McKinney v University of Guelph* [1990] 3 SCR 229, 285-9, 445-6, 447 ('*McKinney*').

⁴⁰⁴ See, eg, de Búrca, above n 373, 147.

⁴⁰⁵ *Sunday Times* (1979) 30 Eur Ct HR (ser A) [7] (joint dissenting opinion); *Lingens* (1986) 103 Eur Ct HR (ser A) [39]; *Barfod* (1989) 149 Eur Ct HR (ser A) [28].

⁴⁰⁶ *Handyside* (1976) 24 Eur Ct HR (ser A) [48]-[49]; *Sunday Times* (1979) 30 Eur Ct HR (ser A) [62], [65].

⁴⁰⁷ *Van Duyn* (41/74) [1974] ECR 1337, [18]; *Rutili* (36/75) [1975] ECR 1219, [27].

⁴⁰⁸ D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995) 397-406.

⁴⁰⁹ *Dudgeon* (1981) 45 Eur Ct HR (ser A) [52].

⁴¹⁰ *Ibid*; see also *Open Door* (1992) 246 Eur Ct HR (ser A) [72].

Deference to the decision-maker can be shown in a number of ways. The court might simply assume that the government interest is of great importance, or at least allow some leeway on the point. The court might concentrate on whether the measure is suitable to achieve the claimed legitimate end, and either not apply the other levels of proportionality,⁴¹¹ or modify them by phrases such as 'not manifestly inappropriate'⁴¹² or talk of 'reasonable basis'.⁴¹³ There may be an implicit shift in the onus of proof for matters such as the availability of less restrictive means.⁴¹⁴ For all such possibilities the net effect is that the court requires stronger and clearer arguments to persuade it that proportionality is breached at any of the three levels.

B *Deference in Australia*

Differing levels of deference have been shown in a number of ways in Australia. Deference is reflected in the wording of the test employed. Thus the 'appropriate and adapted' test has been progressively qualified.⁴¹⁵ The formulation favoured now is that the measure be 'reasonably capable of being considered appropriate and adapted'.⁴¹⁶ Proportionality itself is often qualified by the word 'reasonable', indicating a degree of deference.⁴¹⁷ The form may not reflect the reality, however. Deane J asserted in *Richardson*⁴¹⁸ that his modified test reflected greater deference than the simple 'appropriate and adapted' test employed by Barwick CJ in *Second Airlines*.⁴¹⁹ Yet Barwick CJ was deferential and upheld much of the measure to which he applied his test,⁴²⁰ whilst Deane J applied his test strictly and invalidated most of the relevant provisions.

Some aspects of the European factors can be seen in Australia, although relatively little consistent principle has emerged. The strong general desire to avoid judging the necessity or desirability of government ends is seen in the judicial aversion to stating predefined legitimate ends which may override constitutional guarantees.⁴²¹ The reluctance to scrutinise national security, economic and technical considerations, is reflected in the greater deference shown by the court towards the use of the defence power during wartime.⁴²² It is interesting, however, that the court took a strict approach to derogation from the economic

⁴¹¹ *Störling* (138/78) [1979] ECR 713, [7]; *Biovilac* (59/83) [1984] ECR 4057, [17].

⁴¹² *Fedesa* (C-331/88) [1990] ECR I-4023, 4063-4; *James* (1986) 98 Eur Ct HR (ser A) [46]; *Lithgow* (1986) 102 Eur Ct HR (ser A) [122].

⁴¹³ *McKinney* [1990] 3 SCR 229, 285-9.

⁴¹⁴ *Van Dijk and van Hoof*, above n 350, 591; see also de Búrca, above n 373, 143.

⁴¹⁵ See, eg, *Second Airlines case* (1965) 113 CLR 54, 86 (Barwick CJ); *Tasmanian Dams* (1983) 158 CLR 1, 130 (Mason J), 172 (Murphy J), 232 (Brennan J), 259 (Deane J).

⁴¹⁶ *Richardson* (1988) 164 CLR 261, 289, 303, 311-2, 327, 336, 345; *Victoria v Commonwealth* (1996) 138 ALR 129, 146.

⁴¹⁷ See, eg, *Tanner* (1989) 166 CLR 161, 165-8; cf *Castlemaine* (1990) 169 CLR 436, 473-7, where 'reasonable' was not used and proportionality was applied rigorously.

⁴¹⁸ (1988) 164 CLR 261, 312.

⁴¹⁹ (1965) 113 CLR 54.

⁴²⁰ *Ibid* 86-8.

⁴²¹ See above Part IV(B).

⁴²² Latham, above n 197, 18; Geoffrey Sawyer, *Australian Federalism in the Courts* (1967) 103.

guarantee of s 92 in *Castlemaine*.⁴²³ Of course, the government interests justifying restriction of an economic guarantee are not necessarily themselves economic, as *Castlemaine* illustrates. On the other hand, economic considerations are central when considering the detriment in such cases. It could be argued that greater deference was due, although the weight attached to the guarantee since its narrow reinterpretation might be seen as counterbalancing this factor.

In relation to the nature of the protected interest there is certainly evidence of both different allocations of weight to the interests and varying resultant levels of deference to government interests. One of the key past battles over s 92 was whether or not it should be seen as of a 'predominant public character', and thus readily restricted in pursuit of other public interests,⁴²⁴ or whether it protected a fundamental individual right to free trade.⁴²⁵ Given that even on the latter view some regulation was accepted, the real dispute concerned the weight allocated to the guarantee as against other interests.⁴²⁶ There were parallel disagreements about the deference due to Parliament's balancing.⁴²⁷ In relation to the implied freedom of political communication, the majority in *Political Advertising* accorded great weight to the freedom and were accordingly strict in their review.⁴²⁸ Brennan J adopted a deferential approach, emphasising the primary role of Parliament in choosing the means to achieve a legitimate end and leading to his partial dissent.⁴²⁹ He is the only member of the High Court to have invoked the 'margin of appreciation' label.⁴³⁰

Whether or not the 'margin of appreciation' label is adopted is ultimately unimportant. The danger of the term, as for 'proportionality' itself, is that it can become an easy phrase which hides the reasons for the decision as to the appropriate level of deference.⁴³¹ The application of proportionality should be reasoned and articulated; the same applies for the determination of the level of deference due in any case. In general the determination of deference has been more transparent in Europe than in Australia. It may seem overly legalistic to consider the appropriate level of deference as a separate question. As the differences in *Political Advertising* demonstrate, however, the level of deference will often be the key determinant of the result.⁴³²

In Australia factors beyond those seen in Europe also arise. In *Cunliffe*, Mason CJ indicated that greater deference was due in the characterisation context

⁴²³ (1990) 169 CLR 436.

⁴²⁴ *Pilkington v Frank Hammond Pty Ltd* (1974) 131 CLR 124, 185–6 (Mason J); *North Eastern Dairy* (1975) 134 CLR 559, 614–6; *Permewan* (1979) 145 CLR 1, 34–8.

⁴²⁵ *North Eastern Dairy* (1975) 134 CLR 559, 582 (Barwick CJ); *Clark King* (1978) 140 CLR 120, 153–4; *Uebergang* (1980) 145 CLR 266, 288–92.

⁴²⁶ Cf *Gillow* (1986) 109 Eur Ct HR (ser A) [55].

⁴²⁷ Contrast *Permewan* (1979) 145 CLR 1, 30, 37–8 with *Uebergang* (1980) 145 CLR 266, 300–1.

⁴²⁸ *Political Advertising* (1992) 177 CLR 106, 144–5, 174–5, 235.

⁴²⁹ *Ibid* 158–9, 161–2.

⁴³⁰ *Ibid*; see also *Cunliffe* (1994) 182 CLR 272, 325; *Leask* (1996) 140 ALR 1, 10.

⁴³¹ Macdonald, above n 390, 123–4.

⁴³² See also *Sunday Times* (1979) 30 Eur Ct HR (ser A) [4] (joint dissenting opinion).

than where a guarantee was being restricted.⁴³³ This view seems to be based on an acceptance that the legitimacy of the court protecting rights differs for the two contexts. The very point of constitutional guarantees is to impose some limit on the legislative process. A fear of intruding into the political domain therefore has only limited relevance, and proportionality may justifiably be applied with some vigour. For the purpose of characterisation, there is no necessity to apply proportionality to protect rights in testing a law's link to a power. Thus, the court is more open to criticism for encroaching on Parliament's legitimate domain. The fact that in this context it is the court itself which chooses what interests to protect raises further legitimacy problems.⁴³⁴ Thus, Mason CJ's distinction is properly made, though not adopted by the other members of the court.⁴³⁵

Indeed, this approach can be extended. Implied guarantees or freedoms sit in between express guarantees and characterisation. They exist as judicially articulated restrictions and *prima facie* apply to all Commonwealth powers, unlike the *ad hoc* interests protected in characterisation. Yet it is submitted that more deference (less protection) is due for these than for express guarantees. First, their implied basis itself raises arguments of democratic legitimacy, as the controversy over such rights has amply demonstrated. The more closely an implied right is tied to the text or structure of the Constitution, the less this would be a reason for deference. Secondly, the contents and requirements of such guarantees are likely to be even less clear than for express guarantees. It was suggested above that deference does not apply to interpretation of the protected interest itself. This view arguably does not apply when the guarantee is not express, for then there has been no necessary and clear democratic acceptance of the role of the court in defining and enforcing the guarantee.

Proportionality, by its very nature, cannot be applied in a value-neutral manner.⁴³⁶ Nevertheless, even aside from applying the test less intensively, judges can restrict the extent to which they can be accused of imposing personal philosophical predilections. One way in which this task is attempted is through the invocation of 'community values'.⁴³⁷ Although it is doubtful that these can be identified without reliance on personal values,⁴³⁸ the approach constitutes a valid attempt to base value judgments on some basis more solid than personal belief. In contrast, the individualistic philosophy implicit in Deane and Toohey JJ's test of legitimate restriction of the freedom of political communication is, on the face of it, supported by little but personal choice.⁴³⁹

⁴³³ *Cunliffe* (1994) 182 CLR 272, 300.

⁴³⁴ See above Part IV(A).

⁴³⁵ Gaudron J appeared to accept it in *Cunliffe* (1994) 182 CLR 272, 387-8, and arguably applied it in *Nationwide* (1992) 177 CLR 1, cf 94 (re incidental power) with 95 (re the implied freedom). However, she applied the lower test to the implied freedom in *Langer* (1996) 186 CLR 302, 334-5 (with Toohey J) and *Muldowney* (1996) 186 CLR 352, 375-6, 380-1.

⁴³⁶ See, eg, Craig, above n 14, 444.

⁴³⁷ See, eg, *Mabo* (1991) 175 CLR 1, 42.

⁴³⁸ John Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 63-9.

⁴³⁹ See above Part IV(B).

In deciding whether a balance struck by the Parliament is within the acceptable range, judges need not rely merely on their own assessment. Guidance can be obtained from parallel decisions of other constitutional courts. The court can also look to legislative practice overseas,⁴⁴⁰ and Anglo-Australian history,⁴⁴¹ just as in Europe the existence of common national standards has been referred to in assessing the validity of the balance drawn.⁴⁴² Such legislative practice can be evidence of the existence and nature of societal needs or values, of the importance attached to them, of the means considered reasonable to deal with them and of the availability of alternative means. In Australia, reference has also been made to analogous balances drawn by the common law, notably in *Nation-wide*.⁴⁴³

There are dangers in employing such sources, however. First, they may reflect an anachronistic or inappropriate weighting of values. A powerful illustration of this point is the decision in *Theophanous*, where the majority held that the common law itself breached the implied freedom of political communication.⁴⁴⁴ Secondly, these sources may not encompass new, or newly important, problems. In *Political Advertising*, Gaudron J held the Act invalid because the restriction on free speech was not of a kind 'traditionally ... permitted by the general law'.⁴⁴⁵ Yet the detriments associated with electronic political advertising are necessarily of recent origin. Further, it is doubtful that the common law would ever be able to deal adequately with the need or desire to address such problems.

There is one other simple way in which the court can limit controversy arising from the application of proportionality: by applying the levels of proportionality sequentially. Suitability is the level most easily satisfied. The assessment of necessity does not require the stark allocation of weights to competing interests seen at the third level. Since it is this weighting process which is at the heart of the legitimacy and capability debate, the court should only undertake it when unavoidable.

Thus, in summary, there are two fundamental determinants of the intensity with which the High Court should apply the test of proportionality: the democratic legitimacy of taking a strict approach on any particular issue, and its ability to deal adequately with the assessments involved. European and Australian cases illustrate a number of factors which reflect these concerns and which serve as markers of the appropriate level of deference: the subjectivity, controversial nature or complexity of the issues involved; whether the issues are technical, economic or related to national security; the importance of the protected interest; and the extent to which the activity in question goes to the

⁴⁴⁰ See, eg, *Political Advertising* (1992) 177 CLR 106, 154–5, 161 (Brennan J); cf 131 (Mason CJ), 240–1 (McHugh J).

⁴⁴¹ See, eg, *Burton* (1952) 86 CLR 169, 178–9.

⁴⁴² *Marckx v Belgium* (1979) 31 Eur Ct HR (ser A) [41]; *Dudgeon* (1981) 45 Eur Ct HR (ser A) [60]; *Hauer* (44/79) [1979] ECR 3727, 3746–7.

⁴⁴³ (1992) 177 CLR 1, 31–4, 52, 78–9, 95, 103–4.

⁴⁴⁴ *Theophanous* (1994) 182 CLR 104, 128–33, 178–84; cf 154 (Brennan J).

⁴⁴⁵ *Political Advertising* (1992) 177 CLR 106, 218–21.

core of the protected area. The court generally should be more deferential in the characterisation context than for constitutional guarantees, although an intermediate category of deference may be justified for implied guarantees. Finally, judges may be able to limit the potential for protest by referring to a range of other sources in assessing balances where appropriate and useful, and by applying the levels of proportionality sequentially.

VI PROPORTIONALITY IN AUSTRALIAN CONSTITUTIONAL LAW

Kahn-Freund famously warned that ‘we cannot take for granted that rules or institutions are transplantable’⁴⁴⁶ from one legal system to another. The importation of proportionality into Australian constitutional law lends some support to this view. Application of the concept has been marked by confusion and a failure to recognise or articulate its nature and implications. Thus, no member of the High Court has to date expressly recognised the three levels implicit in proportionality, although all three levels are in operation. Some judges have either not understood or not accepted that proportionality ultimately involves a judgment with respect to the necessity or desirability of government ends. The requirement sometimes expressed that a burden on a constitutional guarantee be ‘incidental’ is ambiguous and strictly unnecessary. The two-tier review suggested by some judges for the freedom of political communication is of limited utility and accuracy. The common view that proportionality is essentially a test of purpose is incorrect. The suggestion that proportionality in characterisation is synonymous with the ‘appropriate and adapted’ test, as previously applied, fails to recognise the fundamental change in characterisation wrought by the concept. Only two High Court judges have ever identified the source of interests being protected when proportionality is applied in characterisation. Assuming that the common law is the main source, then the important issue of whether the common law of 1900 or of today is relevant has not been addressed.

Despite these problems, the use of proportionality as a test of legitimate restriction of constitutional guarantees is a beneficial development in Australia. The three levels of proportionality ensure that significant respect is paid to guarantees, unlike some other possible tests of legitimate restriction. Yet proportionality is sufficiently flexible to cope with a wide variety of guarantees and with competing public interests. It can be applied with varying degrees of deference, as appropriate. A key virtue of the concept is that, when understood as incorporating three levels, it provides an efficient framework for judging restrictions and specifying objections. Paradoxically, the danger of the concept is the temptation to employ it as a self-justifying label which covers the real reasons for, and values behind, a decision. Any test can be applied badly or well, however.

⁴⁴⁶ Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 *Modern Law Review* 1, 27.

The use of proportionality in the characterisation context represents a fundamental shift in approach. Where previously the High Court had tended to take a positivist quantitative approach to characterisation, proportionality necessarily involves the qualitative protection of certain rights or interests from undue government regulation. This manner of characterisation is not, of itself, illogical or unreasonable. It reflects a judicial decision to protect individual rights and freedoms. Yet insufficient explanation or justification has been given for the break from the previous orthodoxy. The confusion and disagreement that surround the use of proportionality in characterisation suggest that the implications of employing the concept were not fully understood. The occasional use of the concept to protect state powers also sits uneasily with prevailing wisdom. Further, the fact that proportionality is only employed in characterisation of federal laws, and only when purposive issues are involved, is anomalous and produces uneven results.

Employing proportionality in characterisation has the same effect as protecting a set of implied constitutional limitations, albeit a flexible and expanding set. It acts to protect those interests deemed to be important by judges. The common law has been referred to as a source of such interests, but that law does not provide a clear, modern set of fundamental rights and interests. The common law can be developed in line with such human rights instruments as the ICCPR. Yet even if rights were indirectly sourced from such covenants, it would still be judges choosing which interests to protect. This fact makes such use of proportionality questionable in a constitutional democracy such as Australia. The choice of what interests are accorded overriding status goes to the heart of the governance of the community. If legislative power is to be limited so as to protect certain rights and interests, then arguably it should be the people, not unelected judges, who decide what these are.

Proportionality is a complex but useful concept. To Australian constitutional law it has proved a mixed blessing. Employed as a test of legitimate restriction of constitutional guarantees, it can be said to serve a justified role well. When applied as a characterisation test, however, it raises too many anomalies and objections to warrant bestowing upon it the same approbation. If the test is to continue to be employed in this latter context, then the narrow approach suggested above, involving a very deferential application of the concept, may offer a way ahead which partially addresses the concerns raised about the doctrine.