Revisiting Proportionality

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Constitutional guarantees and prohibitions are in general not understood to be absolute in nature. Pursuit of other legitimate interests may justify imposing some regulatory burden on the protected interest. Once that principle is accepted then it is necessary to identify some test or approach to delineate what burdens are acceptable, that is, to reconcile the imperative of giving effect to the constitutional protection on the one hand with the acceptance on the other that the interest sought to be advanced by the guarantee is not to be protected at all costs.

One type of test commonly applied around the world is labelled 'proportionality'. It originated in Germany, then was picked up by the European Court of Human Rights and the European Court of Justice, followed by courts such as the Canadian Supreme Court and the South African Constitutional Court. In essence that test involves asking three questions with respect to a legal measure said to infringe some guarantee: is it a suitable or rational means of achieving the claimed end ('suitability'); is it necessary in the sense of there being no other means available less restrictive of the protected interest ('necessity'); and is the burden imposed excessive or disproportionate in the sense that the burden imposed outweighs the benefit sought to be achieved in pursuing the claimed end ('balancing')?

A version of this approach has been adopted by a majority of the High Court as an appropriate test of justifiable infringement with respect to the implied constitutional protection of free communication on political and government matters (the 'implied freedom') and in relation to the guarantee in s 92 of the Constitution of freedom of interstate trade, commerce and intercourse. Since the decision in *McCloy v New South Wales*[2] in 2015 the label 'structured proportionality' has come to be applied to the notion. At the same time two members of the High Court – Gageler[3] and Gordon JJ – have expressed criticisms of the test and the manner in which it has been employed.

In 1997 I published a paper in which I explored the nature, antecedents and utility of the notion of proportionality for the purposes of Australian constitutional law.[4] Broadly speaking, I concluded that the test was a useful and appropriate means of testing infringement of constitutional guarantees but was critical of its use with respect to testing the link between a

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[1] Judge, New South Wales Court of Appeal. Thanks are due to James Stellios and the Hon John Griffiths for their comments on an earlier draft.

[2] [2015] HCA 34; (2015) 257 CLR 178 ('*McCloy*').

[3] His Honour was not yet Chief Justice in any of the cases being considered here, and it is simplest consistently to refer to him as Gageler J.

[4] Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1 ('Kirk 1997').

law and a federal head of power. In more recent times there has been a large volume of words addressed to the issue in the guarantee context. It is with some hesitance that I venture to add some more by revisiting the issue. I am prompted to do so by the recent division that has arisen in the High Court. I will seek to show that there is some merit in the criticisms that have been made of the way the concept has been articulated and applied in Australia in recent times. That does not mean the concept should be abandoned.

In what follows I trace the evolution of a proportionality test in Australia (Part 1), then summarise the criticisms made by Gageler and Gordon JJ (Part 2), before analysing the benefits of proportionality and its limits (Part 3), and finally summarising what I suggest is an appropriate middle path (Part 4).

Part 1: The evolution of the proportionality test in Australia

(a) Before Lange

Proportionality first entered the lexicon of Australian constitutional law as a distinct notion in the judgment of Deane J in the *Tasmanian Dam Case* in 1983, in the context of characterising laws as within or without purposive federal heads of power.[5] A phrase long employed to test whether a law can be characterised as achieving a purpose within power – derived from American constitutional law – involved asking whether the law was reasonably appropriate and adapted to achieving the relevant end.[6] Deane J stated that implicit in this notion was 'a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it'.[7] From that start, references to proportionality in the context of assessing whether Commonwealth laws were sufficiently connected to federal powers to be valid first waxed,[8] then substantially fell away – at least in the sense of protecting fundamental rights – after the High Court's decision in *Leask v Commonwealth*.[9] It is possible that some broad notion of proportionality still has some relevance in that context,[10] although that is a topic for another day. In 1989 the High Court also referred to notions of proportionality in assessing whether delegated legislation was validly made under a statutory power.[11]

The first distinct invocation of the notion in the High Court in the context of constitutional guarantees was in *Castlemaine Tooheys Ltd v South Australia* in 1990 in applying the s 92 freedom of interstate trade and commerce.[12] Two years before, in *Cole v Whitfield*, the Court had reset the approach to that guarantee by holding that it was directed to prohibiting discriminatory burdens of a protectionist kind on interstate trade and commerce.[13] In *Castlemaine Tooheys* the Court had to address when a law imposing a discriminatory burden might still be valid because made in justified pursuit of a legitimate purpose. Five members of the High Court stated that a measure which was 'appropriate and adapted to the resolution of

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[5] *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1, 278.
[6] Its first invocation was in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* [1908] HCA 95; (1908) 6 CLR 309, 345 (Barton J), 358 (O'Connor J).
[7] *Tasmanian Dam Case* (n 5) 260.
[8] See Kirk 1997 (n 4) 21-42.
[9] [1996] HCA 29; (1996) 187 CLR 579.
[10] Note *Spence v Queensland* [2019] HCA 15; (2019) 268 CLR 355, [60]-[63].
[11] *South Australia v Tanner* [1989] HCA 3; (1989) 166 CLR 161, 165 (Wilson, Dawson, Toohey and Gaudron JJ), 178 (Brennan J).
[12] [1990] HCA 1; (1990) 169 CLR 436 ('*Castlemaine Tooheys*').
[13] [1988] HCA 18; (1988) 165 CLR 360 ('*Cole*').

[legitimate purposes] would be consistent with s 92 so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement'.[14] They said:[15]

> the existence of reasonable non-discriminatory alternative means of securing that legitimate object suggests that the purpose of the law is not to achieve that legitimate object but rather to effect a form of prohibited discrimination. There is also some room for a comparison, if not a balancing, of means and objects in the context of s 92.

Their Honours thus accepted the relevance of considering issues of necessity and seemingly some degree of balance. In fact, as I sought to show in 1997, necessity and balancing had already been part of the Court's pre-*Cole* s 92 case law.[16] Their Honours held the law invalid. In considering one of the justifications offered for the law, relating to energy conservation, they postulated a more draconian alternative means in the form of prohibiting the use of non-refillable beer bottles. In so doing they seem to have been applying a reasonably rigorous degree of scrutiny.

The five judges asserted that, unlike in related American case law, for the purposes of s 92 the issues 'are combined as one inquiry into the characterization of the law as protectionist or otherwise', which was also called assessing whether it is 'relevantly discriminatory'.[17] In substance, however, there are still two stages of analysis: assessing whether the law imposes a discriminatory burden on trade or commerce (and, in light of the subsequent decision in *Palmer v Western Australia*,[18] on intercourse), then assessing whether that burden can be justified.[19] So much was recognised by four members of the High Court in *Palmer*.[20] As I develop below, that is not to suggest that the two stages are not linked.

The implied freedom was first recognised in 1992 in *Australian Capital Television Pty Ltd v Commonwealth* and *Nationwide News Pty Ltd v Wills*.[21] The need to identify some justification test was recognised from the beginning. The term 'proportionality' was employed in *ACTV* in that regard by Mason CJ, Brennan J and McHugh J.[22]

The approach of Mason CJ has been referred to regularly since. His Honour drew a distinction 'between restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted'.[23] For the former category, 'only a compelling justification will warrant the imposition of a burden on free communication … and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest'.[24] Restrictions in the latter category 'are more susceptible of justification', the question being whether 'the restriction imposes a

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[14] *Castlemaine Tooheys* (n 12) 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[15] Ibid 472.
[16] Kirk 1997 (n 4) 12-16; the point was reiterated in *Palmer v Western Australia* [2021] HCA 5; (2021) 272 CLR 505, [57] (Kiefel CJ and Keane J), note also [264] (Edelman J).
[17] (1990) 169 CLR 436, 471 and 472 respectively.
[18] *Palmer v Western Australia* [2021] HCA 5; (2021) 272 CLR 505 ('*Palmer*').
[19] See J K Kirk, 'Section 92 in its Second Century' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020, Federation Press) ('Kirk 2020'), 256-257.
[20] [49] (Kiefel CJ and Keane J), [190]-[193] (Gordon J) and [261]-[264] (Edelman J).
[21] Respectively [1992] HCA 45; (1992) 177 CLR 106 ('*ACTV*') and [1992] HCA 46; (1992) 177 CLR 1 ('*Nationwide News*').
[22] *ACTV* (n 21) 143-144 (Mason CJ), 150-151 and 157-162 (Brennan J), 235 (McHugh J).
[23] Ibid 143.
[24] Ibid.

burden on free communication that is disproportionate to the attainment of the competing public interest'.[25] He said that '[i]n weighing the respective interests involved and in assessing the necessity for the restriction imposed, the Court will give weight to the legislative judgment on these issues', but ultimately 'it is for the Court to determine whether the constitutional guarantee has been infringed in a given case'.[26] Mason CJ's reference to 'weighing' and 'necessity' would appear to involve notions of necessity and balancing as understood in the proportionality context. If that is so for the category more susceptible of justification, then it is difficult to see why it would not also be relevant for the category of restrictive laws requiring more compelling justification. The very point of a 'compelling' requirement is to indicate that such a law will be invalid unless there is a very strong justification which outweighs the significance of such a burden on the freedom.

(b) Justification vis-a-vis the implied freedom after Lange

After some controversy about the nature and effect of the implied freedom, the High Court unanimously restated the relevant principles in 1997 in *Lange v Australian Broadcasting Corporation*.[27] As regards justification the Court reiterated that the freedom is not absolute, and said that restrictions could be valid if the object of the law is compatible with the freedom and its basis and 'the law is reasonably appropriate and adapted to achieving that legitimate object or end'.[28] It was said that '[d]ifferent formulae have been used by members of this Court in other cases to express the test … including proportionality', and that in the case at hand there was 'no need to distinguish these concepts'.[29]

Various terms continued to be employed by different members of the Court in the implied freedom context. From 2013 there was a move to focus on proportionality as the appropriate test in the sense involving suitability, necessity and balancing. In *Monis v The Queen*, in that year, Hayne J said that 'judgment may be assisted by adopting the distinctive tripartite analysis that has found favour in other legal systems'.[30] Crennan, Kiefel and Bell JJ adopted such an approach in *Tajjour v New South Wales* in 2014.[31] The issue was addressed at more length by French CJ, Kiefel, Bell and Keane JJ in *McCloy*, adopting the tripartite proportionality test and giving reasons for doing so.[32] Gageler J and Gordon J each expressed some criticisms of the approach. It was Gageler J who was first in the Court to append the label 'structured proportionality' to the approach,[33] followed by Gordon J.[34] That label has come to be adopted by its proponents within the Court.

The debate has continued in subsequent cases, notably including *Murphy v Electoral Commissioner* in 2016, *Brown v Tasmania* in 2017,[35] *Clubb v Edwards* in 2019,[36] *LibertyWorks Inc v Commonwealth* in 2021,[37] *Farm Transparency International Ltd v New South Wales*[38]

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[25] Ibid.
[26] Ibid 144.
[27] [1997] HCA 25; (1997) 189 CLR 520 ('*Lange*').
[28] Ibid 562.
[29] Ibid.
[30] [2013] HCA 4; (2013) 249 CLR 92, [144].
[31] [2014] HCA 35; (2014) 254 CLR 508, [110]-[116] ('*Tajjour*').
[32] *McCloy* (n 2), [2]-[3] and [66]-[93].
[33] Ibid [146].
[34] *Murphy v Electoral Commissioner* [2016] HCA 36; (2016) 261 CLR 28, [294]-[297] ('*Murphy*').
[35] [2017] HCA 43; (2017) 261 CLR 328 ('*Brown*').
[36] [2019] HCA 11; (2019) 267 CLR 171 ('*Clubb*').
[37] [2021] HCA 18; (2021) 274 CLR 1 ('*LibertyWorks*').
[38] [2022] HCA 23; (2022) 277 CLR 537 ('*Farm Transparency*').

and *Ruddick v Commonwealth* in 2022.[39] The approach to proportionality adopted by successive majorities of the Court has evolved somewhat. Beyond the four judges in *McCloy*, it has been adopted in the implied freedom context by Nettle J,[40] Edelman J,[41] Steward J,[42] and Gleeson J.[43] For convenience, I will refer to the approach as one adopted by the 'majority'.

The decisions in *Murphy* and *Ruddick* were focused not on the implied freedom per se but on aspects of the constitutionally recognised protection of universal suffrage, which is founded on much the same basis as the implied freedom. That the same justification issue arises in this context, and that much the same test as is applied to the implied freedom should also apply, was accepted by many but not all members of the Court in the two cases.[44]

There is no dispute that assessing justification with respect to the implied freedom involves asking the following three questions:[45]

1. Does the impugned law effectively burden the freedom in its terms, operation or effect?

2. If 'yes' to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

The first question captures the first basic issue that arises for any constitutional guarantee – that is, whether the law in question infringes, restricts or otherwise burdens the protected interest. The second and third question are linked. They are both aspects of the second basic issue that arises in applying guarantees, that is, asking whether the burden imposed on the protected interest can be accepted because it is sufficiently justified as made in pursuit of some competing legitimate interest (being a purpose that is not antithetical to, but is consistent with, the constitutional guarantee in question).

The dispute arises in giving further content to the third question. The question, as stated, employs the historical 'reasonably appropriate and adapted' wording, which was invoked in *Lange*. But it is apparent that both sides of the recent debate have seen the need to give further content to this rather amorphous phrase.

The tripartite proportionality test favoured by the majority was articulated this way by the plurality in *McCloy*:[46]

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[39] [2022] HCA 9; (2022) 275 CLR 333 ('*Ruddick*').
[40] *Brown* (n 35) [277].
[41] *Comcare v Banerji* [2019] HCA 23; (2019) 267 CLR 373, [188] ('*Comcare*').
[42] *LibertyWorks* (n 37) [247].
[43] Ibid [46]-[48] (Kiefel CJ, Keane and Gleeson JJ).
[44] *Murphy* (n 34) [37]-[38] (French CJ and Bell J), [63]-[65] (Kiefel J), [98]-[105] (Gageler J), cf [205] (Keane J); *Ruddick* (n 39) [19] (Kiefel CJ and Keane J), [82]-[84] (Gageler J), cf [148]-[151] (Gordon, Edelman and Gleeson JJ).
[45] See *McCloy* (n 2) [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (n 35) [102]-[104] (Kiefel CJ, Bell and Keane JJ), [162]-[163] (Gageler J), [237] (Nettle J), [316]-[325] and [481] (Gordon J); *Clubb* (n 36) [5] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks* (n 37) [134] (Gordon J).
[46] *McCloy* (n 2) [2] (citation omitted).

> There are three stages to the test – these are the inquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
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> *suitable* – as having a rational connection to the purpose of the provision;
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> *necessary* – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
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> *adequate in its balance* – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

The joint judgment in *McCloy* referred to proportionality as 'an analytical tool rather than as a doctrine',[47] noting that it 'is not suggested that it is the only criterion by which legislation that restricts a freedom can be tested'.[48] The main rationale offered for its use has been that its structured nature promotes transparency of reasoning and lessens (without avoiding) the degree of subjectivity involved in the judgments required.[49] In *Palmer*, relating to s 92, Kiefel CJ and Keane J added that although proportionality was not suggested to be 'a perfect method', *some* method was necessary, and it was preferable to its competitors (by which they seemed to be referring to a calibrated or tiered scrutiny approach).[50] Their Honours also noted that proportionality analysis could long be discerned in s 92 cases, implying that that itself manifested the utility of the ideas involved.[51]

I previously suggested further reasons supporting the test, being that each of the three levels of the concept serves a justified role, that the test 'is sufficiently flexible to cope with any type of constitutional guarantee or any range of circumstances', and that its utility is illustrated by its widespread adoption in other jurisdictions.[52] The first of those justifications – which I will expand upon below – is also implicit in the reasoning of the plurality in *McCloy* and the judgments that have followed it. The point about flexibility (versus rigidity) is in some ways the hinge of the dispute that has developed.

(c) Justification vis-a-vis s 92 after Castlemaine Tooheys

After *Castlemaine Tooheys* in 1990, the issue next arose in a significant way, as regards the trade and commerce aspect of the s 92 guarantee, in *Betfair Pty Ltd v Western Australia* in 2008 ('*Betfair No 1*').[53] Betfair, which had obtained a licence to operate in Tasmania, ran a new type of online and phone betting business in the form of a betting exchange. Rather than offer odds on horse races or sports events itself, it provided a marketplace whereby people could place bets with others. That meant that punters could now bet that a particular horse would lose a particular race, whereas on orthodox bookmaking models the punter was backing a horse to

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[47] Ibid [72].
[48] Ibid [74].
[49] Eg ibid [74]-[77]; *Comcare* (n 41) [188] (Edelman J); *Liberty Works* (n 37) [200]-[202] (Edelman J); *Palmer* (n 16) [261]-[268] (Edelman J).
[50] *Palmer* (n 16) [56].
[51] Ibid [57].
[52] Kirk 1997 (n 4) at 19-20 (quotation from 20); see further Adrienne Stone, 'Proportionality and its Alternatives', in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020, Federation Press), 182 (fn 72) and 190-193.
[53] [2008] HCA 11; (2008) 234 CLR 418.

win the race, with the bookmaker on the other side of the transaction backing that it would lose. That was seen by Western Australia to give rise to an integrity concern. It was said to be much easier dishonestly to ensure that a horse loses a race than it is dishonestly to increase its chances of winning, and the pool of people with an interest in doing so was greatly expanded. Western Australia passed laws which prohibited people betting through a betting exchange, and made it an offence for any business to use Western Australian race field information without authorisation by the relevant Minister. The integrity concern was proffered as the main justification for these measures.

Betfair successfully challenged the validity of these provisions. The plurality of six judges concluded that the provisions burdened interstate trade and commerce in a discriminatory and protectionist way.[54] The plurality also addressed whether there was an 'acceptable explanation or justification' for the law.[55] Their Honours noted the argument of Betfair (and its supporter, Tasmania) that this required the existence of a 'proportionality' between the differential burden between interstate and intrastate traders, then indicated in effect that this notion must 'give significant weight' to considerations going to the constitutional interest in preventing discrimination.[56] The plurality then said that such considerations 'suggest the application here, as elsewhere in constitutional, public and private law, of a criterion of "reasonable necessity"'.[57] Their Honours held that the integrity concern did not justify the two measures because it had not been established that the concern was not sufficiently addressed by the measures adopted in Tasmania, which involved regulatory oversight of the operations of Betfair.[58] The efficacy of those measures were not examined in any detail by the Court. Their Honours' core reasoning on point was as follows:

> [110] What is involved here is an attempt at an evidentiary level to measure something of an imponderable. But, allowing for the presence to some degree of a threat of this nature, a method of countering it, which is an alternative to that offered by prohibition of betting exchanges, must be effective but non-discriminatory regulation. That was the legislative choice taken by Tasmania and it cannot be said that that taken by Western Australia is necessary for the protection of the integrity of the racing industry of that State. In other words, the prohibitory State law is not proportionate; it is not appropriate and adapted to the propounded legislative object.
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> [111] Part 4A of the Tasmanian Act contains the detailed regulatory provisions which the Treasurer had outlined. It does not discriminate against interstate trade and commerce. Counsel for Tasmania points to evidence which indicates that the prescribed standards have been fully satisfied by Betfair. Seen from the other perspective, there was a lack of evidence of any increase in Australia of dishonest practices attributable to the operation of the betting exchange by Betfair. It will be recalled that Betfair's exchange remains accessible under the laws of the other States.
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> [112] In that setting, it cannot be found in this case that prohibition was necessary in the stated sense for the protection or preservation of the integrity of the racing industry.

The following observations are pertinent. First, the plurality's adoption of a 'reasonable necessity' test was not presented as an alternative to proportionality testing but as a manner of

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[54] Ibid [118]-[122].
[55] See the heading at ibid [106].
[56] Ibid [101]-[102].
[57] Ibid [102].
[58] See ibid [64].

expressing it. Thus proportionality was re-invoked at [110]. Second, nothing in the reasons suggested a rejection of any need to undertake balancing. The fact that necessity was spoken about as being *reasonable* itself suggests evaluative judgments taking account of the significance of the interests at stake on either side of the equation. Third, as was implicit in use of the phrase 'reasonable necessity' and the emphasis on the constitutional interest in preventing discrimination, the plurality was indicating that a justification for a discriminatory burden would not readily be found; a strong justification was needed. That stringent approach is consistent with *Castlemaine Tooheys*, as discussed above in Part 1(a). Fourth, the conclusion that it had not been established that the regulatory measures adopted by Tasmania were not an adequate response to the integrity concern raised was reached without close analysis of the adequacy of those measures. It is difficult to conclude that those measures would achieve the integrity goal to exactly the same extent as Western Australia's strict measures. The plurality's lack of fine analysis is consistent with requiring a strong justification for any law which imposes a discriminatory burden on interstate trade and commerce.

In the subsequent cases of *Betfair Pty Ltd v Racing NSW* and *Sportsbet Pty Ltd v New South Wales* in 2012 the High Court did not have to reach the stage of considering justifications in those cases as the challengers failed to establish any discriminatory burden.[59]

The justification issue did arise in Clive Palmer's challenge to the validity of the COVID-19 induced border closures put in place by the government of Western Australia. The main basis of the challenge was that the measures unduly infringed the s 92 guarantee of freedom of interstate intercourse, with a faintly pressed argument also made based on the trade and commerce aspect of the guarantee. The Court (with only five judges sitting) unanimously held that the intercourse aspect of the guarantee should also be understood as involving discrimination against interstate intercourse. It was evident that the measures did discriminate against interstate intercourse – they involved controls at the State borders – but all judges held that the relevant provisions could be justified and were not invalid. Kiefel CJ and Keane J (writing together) and Edelman J held that the proportionality approach developed with respect to the implied freedom should also be applied to s 92 in assessing justification.[60] Gageler and Gordon JJ disagreed.[61] In large part they did so because of their broader view that it was not an appropriate test generally, for reasons which I set out below. However, both also gave reasons specific to s 92 which it is convenient to address here.

Gageler J said that the standard of reasonable necessity was adopted in *Betfair No 1* 'in preference to continuing with the more general expressions of appropriateness and adaptedness or proportionality, in order to convey the stringency of the scrutiny to be applied'.[62] As already indicated, I agree it was intended to convey a stringent degree of scrutiny but do not agree this was adopted instead of a proportionality approach. His Honour also invoked some words of Sir Anthony Mason about the certainty and stability brought to s 92 by *Cole*, then said '[n]othing is broken; nothing should be fixed'.[63] Yet *Cole* did not grapple in any significant way with the justification issue. That occurred two years later in *Castlemaine Tooheys*. And the main joint judgment in that case invoked the notion of proportionality, being a judgment of five of the judges who had determined *Cole* just two years earlier.

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[59] Respectively [2012] HCA 12; (2012) 249 CLR 217 and [2012] HCA 13; (2012) 249 CLR 298.
[60] *Palmer* (n 16) respectively, [49]-[61] and [261]-[268].
[61] Ibid, respectively, [129]-[151] and [190]-[199].
[62] Ibid [138].
[63] Ibid [151].

Gordon J argued, as regards balancing, that s 92 'neither permits nor requires this further inquiry' including because, as had been said in *Castlemaine Tooheys*, the two tests of validity are combined into one test of characterising the law as discriminatory or otherwise.[64] As already discussed, the main joint judgment did say there was one such test. But it was evident that in substance that was a way of expressing the conclusion, with two key steps taken towards reaching such a conclusion: assessing burden then assessing whether there was an acceptable explanation or justification. The existence of two steps was illustrated in the 2012 cases, which did not progress beyond the first step. Further, as noted, *Castlemaine Tooheys* appeared to recognise a role for considerations of both necessity and balancing. There is nothing inherent in s 92 which precludes the application of a tripartite proportionality analysis. It has regularly been invoked by the European Court of Justice in a similar sort of context.

(d) The Lim requirement

Five members of the High Court, including Edelman J, indicated in *Falzon v Minister for Immigration and Border Protection* that the concept of proportionality had no role to play with respect to the *Lim* principle, derived from the separation of judicial power, limiting executive detention.[65] Edelman J recanted that view in *Jones v Commonwealth*,[66] in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[67] and in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*.[68] The other members of the Court did not agree in those cases. Yet the other six judges said in *NZYQ* that 'application of the principle in *Lim*, although ultimately directed to a single question of characterisation (whether the power is properly characterised as punitive), requires an assessment of both means and ends, and the relationship between the two'.[69] Why that understanding does not involve a notion of proportionality, at least in some sense, was not explained. Addressing that topic is beyond the scope of this paper.

Part 2: The critique by Gageler and Gordon JJ

Gageler and Gordon JJ have made the following criticisms of 'structured proportionality'. The criticisms overlap; the delineation is mine.

First, both judges have said that they are unpersuaded that 'one size fits all'.[70] Gageler J explained his concern this way:[71]

> I am not convinced that standardised criteria, expressed in unqualified terms of 'suitability' and 'necessity', are appropriate to be applied to every law which imposes a legal or practical restriction on political communication irrespective of the subject matter of the law and no matter how large or small, focused or incidental, that restriction on political communication might be.

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[64] Ibid [199].
[65] [2018] HCA 2; (2018) 262 CLR 333, [25]-[32] (Kiefel CJ, Bell, Keane and Edelman JJ) and [95] (Nettle J); see also *Jones v Commonwealth* [2023] HCA 34; (2023) 97 ALJR 936, [43] and [78] ('*Jones*').
[66] *Jones* (n 65) [150]-[156].
[67] [2023] HCA 37; (2023) 97 ALJR 1005, [54].
[68] [2024] HCA 40, [145]-[161].
[69] *NZYQ* (n 67) [44].
[70] *McCloy* (n 2) [142] (Gageler J); *Brown* (n 35)[475]-[476] (Gordon J); *Comcare* (n 41) [161] (Gordon J); *Clubb* (n 36)[391] (Gordon J).
[71] *McCloy* (n 2) [142]; *Clubb* (n 36) [391] (Gordon J).

The approach has been said to be too rigid.[72] Gageler J said of 'necessity' testing that it 'is too prescriptive, and can be quite mechanical if confined to an inquiry into "less restrictive means"'.[73] His Honour has doubted that one should limit in advance the considerations which might legitimately bear on justification of a particular measure.[74] For example, in *Murphy* he queried how historical legislative practice would fit into proportionality analysis.[75]

Second, Gageler J said 'I have never considered it to be a particularly useful tool'.[76] His Honour seems thereby to suggest that, contrary to the rationale offered by other members of the Court, tripartite proportionality does not provide a useful structure for analysing justification issues.

Third, the judges have raised a purposive concern, namely that in assessing justification it is necessary always to keep in mind the basis of and rationale for the freedom in question, asking whether the particular impugned law can be justified as a permissible infringement of the freedom.[77] Gordon J has said, quoting approvingly a point made by Anne Twomey, that 'there is a risk that "[t]he rules themselves [will] take over, ceasing to be a means to an end and becoming the end itself"'.[78] Gageler J has stated that 'the sequencing and linguistic precision of the standardised three-stage test tends to obscure the purpose for which the overall inquiry is undertaken'.[79]

Fourth, Gageler and Gordon JJ have argued that the standard of scrutiny applied to an impugned measure must be responsive to the degree of burden imposed on the protected freedom – the greater the burden, the greater the justification required. Gageler J has referred to the appropriate level of scrutiny as 'lying within a spectrum'.[80] Gordon J similarly has spoken of applying a 'graduated inquiry',[81] and has said that '[d]etermination of the nature and extent of the burden cannot be left to the end of the analysis' (implicitly in contrast to addressing that issue just at the last, balancing stage of a proportionality analysis).[82] Their Honours perceive that this is not, or at least not sufficiently, allowed for on a proportionality approach.

Fifth, both judges have raised concerns about the balancing aspect of proportionality, albeit concerns of a slightly different nature. Gageler J has indicated that he is not convinced that assessing whether a law is 'adequate in its balance' is sufficiently focused to reflect the reasons for the implied freedom or 'adequately to capture considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed'.[83] Gordon J's concern is somewhat more fundamental, appearing to question whether it is an appropriate judicial function to assess and balance the importance of the legislative purpose with the burden imposed on the protected freedom.[84] That said, in *Farm Transparency* her

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[72] *Brown* (n 35)[477] (Gordon J); *Palmer* (n 16)[144] (Gageler J).
[73] *Brown* (n 35)[160].
[74] Ibid [163]; *Palmer* (n 16)[143].
[75] *Murphy* (n 34) [103].
[76] *Brown* (n 35)[159].
[77] *McCloy* (n 2)[149]-[151] (Gageler J); *Brown* (n 35)[162] (Gageler J), [433]-[434] (Gordon J); and see, to apparently similar effect, Edelman J in *LibertyWorks* (n 37) [201].
[78] *Brown* (n 35)[433].
[79] *Palmer* (n 16)[145].
[80] *Brown* (n 35)[201].
[81] Ibid [480].
[82] *Comcare* (n 41) [161]; see also *Farm Transparency* (n 38) [175].
[83] *McCloy* (n 2) [145]; see also *Brown* (n 35) [160].
[84] *Brown* (n 35) [430]-[432].

Honour accepted that the tripartite test of suitability, necessity and adequacy 'is a tool of analysis that may be of assistance',[85] thus appearing to accept some possible role for balancing.

In my view there is some force in the first, third and fourth criticisms. But they do not mean that proportionality is not a useful and appropriate mode of analysis.

Part 3: The benefits of proportionality and its limits

The notion of 'proportion' involves, relevantly, a 'proper relation between things or parts'.[86] It is unsurprising that it has been held in the context at issue that it is necessary that there be a proper relation – a proportionality – between the end said to justify the burden and the means employed to achieve that end. But that is just the start of the analysis of how existence of such a proper relationship should be assessed. In what follows I address: (a) the link between assessing burden and justification; (b) the nature and utility of the ideas involved in the legal concept of proportionality in this context; (c) the need for an additional idea, namely variable scrutiny or justification; and (d) the advantages and limits of proportionality.

(a) Burden and justification are not entirely distinct

If it is accepted that a constitutionally protected freedom or interest is not to be protected at all costs, then it is inevitable that two stages of inquiry arise in considering the validity of a legal measure: does the measure burden the protected freedom and, if so, can that burden nevertheless be accepted as justifiably imposed in achieving some other legitimate legislative end. Those two stages are not, however, entirely distinct.[87] In some instances, the nature of the guarantee will be such that a burden (ie a prima facie infringement) will be found readily, encompassing a broad range of laws. For such guarantees, if the justification stage is tested in a strict manner for all laws then a large number of laws will be invalidated, which may well exceed the appropriate operation of the guarantee. That was one of the problems that arose with the pre-*Cole* case law on s 92.[88] For other guarantees, finding a prima facie infringement will be a much rarer occurrence. For such narrower guarantees the finding of a burden at the first stage of analysis is more likely to be significant than for broader ones. That being so, it would be reasonable to require a significant degree of justification for any such burden.

Recognition of this interrelationship between the two stages is implicit in the Australian case law. In the implied freedom context it is relatively easy to find that an impugned law burdens the freedom. Few challenges fail at this first stage. Many modern laws regulate communication in one way or another. Any such regulation will be likely be capable of applying to some communication about political or governmental matters without that being the focus of the law. In *Tajjour*,[89] for example, s 93X of the *Crimes Act 1900* (NSW) made it an offence habitually to consort with convicted offenders after having received a warning about doing so. The provision was challenged on the basis that it unduly burdened the implied freedom. The law could not be described as directed to regulating political communication. Yet all members of the Court other than Keane J accepted that the law did impose a burden on the freedom. The validity of the law was upheld.

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[85] *Farm Transparency* (n 38) [172].
[86] *Macquarie Dictionary* (5th ed, 2009) 'proportion' (def 2).
[87] See further Kirk 1997 (n 4) 54; Kirk 2020 (n 19) 277.
[88] See *Cole* (n 13) 402-404.
[89] *Tajjour* (n 31).

Conversely, following the *Cole* re-interpretation of the trade and commerce aspect of the s 92 guarantee, followed by a similar re-interpretation of the intercourse aspect in *Palmer*, relatively few laws have been or will be found to be in prima facie contravention of the guarantee. Finding that a law imposes a discriminatory burden on interstate trade, commerce or intercourse is of greater constitutional significance than finding that the implied freedom is burdened. There is good reason to require a strong justification for allowing such a burden in order to give real effect to the constitutional prohibition. As already discussed, in *Castlemaine Tooheys* and *Betfair No 1* a relatively stringent approach was applied.

Giving effect to a justification test is part of the process of giving content to protected rights or interests.[90] Application of the test cannot be divorced from the guarantee in issue. What is being assessed is directed to one ultimate issue: whether the impugned legal measure unduly intrudes on the protected freedom or interest such that it should be held to be invalid.

Thus I agree with Gageler and Gordon JJ's view that it is necessary when assessing justification to keep in mind the basis of and rationale for the guarantee in question (the third concern outlined above). This conclusion affects the issue of the intensity of review (the fourth concern), which I address below in Part 3(c).

(b) Five useful, overlapping ideas

Proportionality analysis of justification involves at least five ideas: burden, purpose, suitability, necessity and balance.

The need to identify a burden is not in dispute, although the significance of the extent of the burden – and whether that issue only arises at the balancing stage – is.

As for purpose, there has been no disagreement in recent times about the proposition that any infringement of the relevant guarantees can only be accepted if such burden as the law imposes comes about in pursuit of some legitimate purpose. Such a purpose is one not antithetical to the guarantee in question. Thus, as noted above in Part 1(b), in the implied freedom context there has been general agreement on the framework of asking about three things: burden; legitimate purpose; whether the law can be characterised as made in pursuit of that purpose. References to purpose here mean, in effect, the mischief to which the law is directed.[91]

As for suitability, once it is accepted that an infringement can only be justified if imposed in pursuit of some other legitimate purpose then one of the matters that is at issue is whether the law can be characterised as made in pursuit of that purpose. As was said in the joint judgment in *McCloy*, it 'is an inquiry which logic requires'.[92] If the law cannot rationally be said to advance the identified purpose then the measure could not be characterised as made in pursuit of that purpose. In the absence of some other legitimate justifying purpose being apparent – to

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[90] Kirk 1997 (n 4) 54.

[91] See eg *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, [178] (Gummow J); *McCloy* (n 2) [132] (Gageler J); *Brown* (n 35) [101] (Kiefel CJ, Bell and Keane JJ), [208]-[209] (Gageler J), [320]-[321] (Gordon J); *Unions NSW v New South Wales* [2019] HCA 1; (2019) 264 CLR 595 [171]-[172] (Edelman J) ('*Unions No 2*'); cf *Unions NSW v New South Wales* [2013] HCA 58; (2013) 252 CLR 530, [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions No 1*').

[92] *McCloy* (n 2) [80], see also Gageler J at [132]; see also James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 644.

be tested in the same way – the natural inference is that the law was intended to do something inconsistent with the guaranteed freedom.

The link between identification of a legitimate purpose and testing of suitability is illustrated by the High Court's decision in 2013 in *Unions No 1*. The case concerned two provisions of New South Wales law relating to political donations and electoral expenditure. The provisions were unanimously held invalid. In the joint judgment of five judges it was said that it was 'not possible to attribute a purpose' to the provisions consistent with the identified legitimate objects of seeking to prevent the exercise of undue or corrupt influence by way of political donations.[93] Their Honours indicated that this issue arose *before* testing for proportionality because the issue was 'the identification of a legitimate statutory purpose for the provision in question'.[94] One provision was said to be 'a burden on the freedom without a justifying purpose'.[95] However, the case can also be seen manifesting a conclusion that the provisions were not a rational means of achieving the identified legitimate ends, that is, it failed at the suitability level of analysis. That is how the judgment was later characterised in the joint judgment in *Brown*.[96]

Conversely, in *Unions No 2* Kiefel CJ, Bell and Keane JJ expressed some doubts about the claimed purpose attributed to an impugned measure by the State. However, their Honours stated that they were prepared to put those questions aside, assume the purpose was as claimed, and move to assess the proportionality of the measure.[97] Gageler J made essentially the same point in *Brown*, saying that where 'an asserted purpose is plausible … examination of how well the legal operation of the law conforms to that purpose can sometimes more profitably be left to be examined at the stage of asking whether the law is reasonably appropriate and adapted to advance that purpose'.[98]

These judgments illustrate that it may be more efficient to jump to some other criterion. That approach is simply an example of a commonplace technique of judicial reasoning, namely to be prepared to make some assumption or to step over some preliminary step because of the inevitable result reached at some later step.[99] The possible efficiency of skipping over suitability in some cases does not render it an inapposite criterion.

Testing suitability by considering whether the impugned measure has a rational connection to the claimed justifying purpose sets a low intensity level of review. It is difficult to see what normative or practical objection could be made to including this as an element of testing justification, at least once the necessity of identifying a legitimate purpose is accepted.

The next relevant idea is necessity, that is, asking whether there is some other means reasonably available to achieve the claimed end which is less burdensome on the protected freedom. Necessity in this context does not mean assessing whether it was appropriate to pursue the justifying end at all (that question can arise to some extent at the balancing stage). The force of there being less restrictive means available is evident. That, no doubt, is why the idea manifested itself in the pre-*Cole* s 92 case law. If there are other means available to achieve the claimed end then the imperative to protect the freedom militates against permitting the lawmaker to intrude in the freedom more than necessary. Moreover, the fact that the law does

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[93] *Unions No 1* (n 91) [60], [65].
[94] Ibid [46].
[95] Ibid [51].
[96] *Brown* (n 35) [133].
[97] *Unions No 2* (n 91) [31]-[38].
[98] *Brown* (n 35) [216].
[99] A point made in *Unions No 2* (n 91) [38].

intrude further than necessary on the freedom 'may show that the true purpose of the law is not to attain that object but to impose the impermissible burden'.[100] Necessity is often the 'heartland of the dispute' in assessing justification.[101] It tends to involve more searching review than the low threshold set by suitability. That is not to say that the degree of scrutiny here is fixed and unchanging, as I discuss below in Part 3(c). It involves a comparative assessment of a kind which courts are relatively well equipped to make. It does not involve making value judgments to the same degree as is involved in balancing. That is not to suggest that subjective and normative judgments are not involved.

The fifth idea is balancing. This concept has tended to be the most controversial because it involves a court weighing up incommensurables, being the benefit of the law achieving the legitimate end and the detriment of the constitutional freedom being impaired. Assessing the former may require weighing up the importance of competing social, environmental, cultural or economic ends. That is a task for which courts are neither naturally well-suited nor endowed with a democratic mandate. The point was well made by the five judges in *Castlemaine Tooheys*:[102]

> 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. The resolution of that problem by the Court would require it to sit in judgment on the legislative decision, without having access to all the political considerations that played a part in the making of that decision, thereby giving a new and unacceptable dimension to the relationship between the Court and the legislature of the State.

And yet, as was implicitly accepted in that case, that does not mean the task of balancing must be eschewed by courts. The rationale for this idea is simply that even if there are no alternative means available to achieve a legitimate end, the restriction imposed on the freedom may simply be too great to be justified; the end, in such a case, does not justify the means. The 'price is too high'.[103] The simple example sometimes given is that if a child is seen stealing fruit from a tree and running away, shooting the child may be a rational means of catching them, and may be the only way to achieve that result, yet such an extreme response could never be justified.[104]

Assessing balance is an uncomfortable task for courts. But as Gageler J has explained in the context of the implied freedom, an entrenched Constitution means that the courts 'have a duty to ensure that such burden as a particular democratically chosen legislative restriction places on political communication does not undermine the constitutionally prescribed system of government which made that democratic choice possible'.[105] Judicial weighing up of incommensurable interests is not unknown.[106] Giving effect to public interest immunity, for example, involves comparing a public benefit favouring non-disclosure of information with the importance of it being disclosed.[107]

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[100] *Castlemaine Tooheys* (n 12) 472.
[101] *LibertyWorks* (n 37) [202] (Edelman J).
[102] *Castlemaine Tooheys* (n 12) 473.
[103] *Farm Transparency* (n 38) [82] (Gageler J).
[104] Kirk 1997 (n 4) 9; *Clubb* (n 36) [70] (Kiefel CJ, Bell and Keane JJ), [494] (Edelman J).
[105] *Clubb* (n 36) [207] (Gageler J).
[106] Ibid [271] (Nettle J).
[107] As noted in *Clubb* (n 36) [72] (Kiefel CJ, Bell and Keane JJ); see eg *Commonwealth v Northern Land Council* [1993] HCA 24; (1993) 176 CLR 604, 616-617.

In *Clubb* Kiefel CJ, Bell and Keane JJ sought to draw a distinction between comparing the 'general social importance of the purpose' with the effects of the law in the sense of 'the benefits it seeks to achieve'.[108] They suggested that balancing here involved the latter but not the former. Yet it is difficult to see how the significance of the benefits sought to be achieved can be divorced from the significance attributed to the end. The majority in *McCloy* thus spoke of 'having regard to the public importance of the purpose sought to be achieved'.[109]

The imperative to show some deference to the primary role that democratic lawmakers have in deciding what public interests to pursue and to what extent can be expressed in different ways. In the implied freedom context there have been suggestions that any disproportionality must be 'gross' in order to warrant holding a law unjustified on this basis,[110] or that the benefit sought to be achieved must be 'manifestly outweighed' by the adverse effect on the freedom.[111] I accept that in general a substantial disproportionality would be required for a law to be held invalid at the balancing stage in the context of the implied freedom, although if the burden imposed on the freedom was very substantial and on a matter central to the freedom then less deference should be shown. Further, I do not agree that substantially disproportionality is required when considering s 92. As discussed, a greater degree of justification is required for laws found to be discriminatory in prima facie breach of the guarantee.

Gageler J has doubted that the balancing aspect of proportionality is sufficiently focused 'adequately to capture considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed'.[112] Sir Anthony Mason has expressed sympathy with this view and has also said that a balancing assessment invites an 'answer [that] is largely intuitive and subjective, unless an answer proceeds from a principled approach'.[113] I have already indicated that in my view a proportionality analysis neither need nor should be undertaken in a manner divorced from consideration of the nature of and rationale for the freedom at issue. An acceptance of that point would seem to answer Gageler J's concern. Beyond that, his Honour seems to accept a role for some balancing analysis. Part of his approach to the implied freedom has been to say that for laws which impose a significant burden then a compelling justification is required. For such a law:[114]

> the purpose of the impugned provisions must be able to be seen to be compelling and the provisions must be able to be seen to be closely tailored to the achievement of that purpose in the sense that the burden they impose on political communication in pursuit of the purpose can be seen to be no greater than is reasonably necessary to achieve it.

Balancing is necessarily implicit in this approach, for that is what is involved in assessing whether the purpose is sufficiently 'compelling' to justify the infringement. This quotation also illustrates that his Honour's approach involves assessing necessity to some degree.

The language of 'compelling justification' reaches back to Mason CJ's judgment in *ACTV*. His Honour himself spoke there of having to engage in 'balancing'.[115] His main concerns in holding

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[108] *Clubb* (n 36) [72].
[109] *McCloy* (n 2) [86]; the point is illustrated eg in *Palmer* (n 16) [81] (Kiefel CJ and Keane J).
[110] *Brown* (n 35) [290] (Nettle J); *Clubb* (n 36) [275] (Nettle J), [497] (Edelman J).
[111] *Comcare* (n 41) [38] (Kiefel CJ, Bell, Keane and Nettle JJ).
[112] *McCloy* (n 2) [145]; see also *Brown* (n 35) [160].
[113] Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27 *Public Law Review* 109, 121.
[114] *Brown* (n 35) [204].
[115] Ibid 143; see further Stone (n 52) 194-195.

invalid the political advertising scheme were that the replacement regime favoured established political parties and that the Executive had power to make regulations, according to unspecified criteria, which could affect the operation of the scheme.[116] Implicit in that conclusion is an evaluative and necessarily subjective view that the burden on the freedom was of such a nature that despite the legitimate objects the scheme sought to pursue, the end could not justify the means to the requisite 'compelling' degree.[117] Brennan J, by way of contrast, considered the burden justifiable.[118] The conclusion of Mason CJ was no more nor less principled, nor more nor less subjective, than if it had been expressed in proportionality terms

Gordon J has manifested a deeper aversion to balancing. Judicial hesitance about embarking on the task is entirely understandable. Yet, as courts around the world have accepted, it may still be something required in order to give full and meaningful effect to constitutional guarantees. It may be that to a significant extent her Honour's concern could be addressed by showing a degree of deference to lawmakers' freedom of choice. So much is suggested by the fact that in *Brown* she quoted with approval Brennan J's statement in *Nationwide News* that '[t]he balancing of the protection of other interests against the freedom to discuss governments and political matters is, under our Constitution, a matter for the Parliament to determine and for the Courts to supervise'.[119]

Thus, in summary, all five of these ideas involved in proportionality analysis have a useful role to play in assessing justification. The first two are not controversial. As for suitability, necessity and balancing, to at least some extent Gageler and Gordon JJ have accepted their potential utility. In *Palmer* Gageler J accepted 'the need to consider the degree of connection between the legislatively chosen means and the legislatively chosen ends'; that there 'can often be utility in considering whether, and if so what, other means of achieving the same or similar ends might have a less drastic impact on the freedom protected'; and 'that need can arise to consider the systemic benefit of achieving the legislatively chosen ends relative to the systemic detriment caused by the impact of the legislatively chosen means on the freedom protected by the constitutional guarantee'.[120] Gordon J said in *Farm Transparency* that the tripartite test of suitability, necessity and adequacy 'is a tool of analysis that may be of assistance'.[121]

As noted, part of their Honours' concern about proportionality relates to what they perceived to be its rigidity and inappropriately mechanistic nature. Yet proportionality need not be understood or applied in that way. The nature and role of the ideas involved overlap. They are not completely distinct, to be stepped through in some mechanical and linear way.

Thus it is not uncommon that a key objection to the validity of a law can be articulated by employing a number of the ideas. An illustration is the dissenting judgment of French CJ in *Tajjour*.[122] His Honour held that 'the burden of s 93X on the implied freedom, measured by the breadth of its application to entirely innocent habitual consorting, is not appropriate and adapted reasonably, or otherwise, to serve the purpose of the section'.[123] In other words, the reach of the provision was overly broad and imposed a burden which could not be justified. This conclusion could have been expressed by invoking any or all of the proportionality

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[116] *ACTV* (n 21) 146-147.
[117] Note further the discussion in Stellios (n 92), 663-665, addressing an argument of McHugh J.
[118] *ACTV* (n 21) 157-162.
[119] *Nationwide News* (n 21) 50; quoted in *Brown* (n 35) [436].
[120] *Palmer* (n 16) [142].
[121] *Farm Transparency* (n 38) [172]; see also eg *McCloy* (n 2) [328] with respect to necessity.
[122] See also *LibertyWorks* (n 37) [119] (Gageler J).
[123] *Tajjour* (n 31) [45].

notions: given the excessive reach of the provision it could not be characterised as directed to achieving a legitimate purpose; given that excessive reach it was not suitable to achieve such a purpose; there were less restrictive means available to achieve that purpose, by excluding innocent habitual consorting; the burden on the implied freedom outweighed the legitimate end of restricting criminal consorting.

More generally, a point of degree made with respect to one idea may have something useful to say in relation to another. For example, it might be that there are no other available means to achieve the relevant end to substantially the same degree, such that a law would pass the necessity threshold. However, the availability of some other means which goes some significant way towards the relevant end might still feed into the balancing analysis as a relevant consideration – that is, taking account of the significance of the end, and the availability of other possible legislative responses (even if not quite as effective), it may be concluded that the constitutional cost of the measure is too high. A similar point may be made if the law does rationally advance the legitimate end, such as to satisfy the suitability threshold, but in a way which is rather ill-fitted to achieve that end – that consideration, too, might affect the balancing analysis. And, as I shall explain, to accept variable intensities of review is to take balancing issues into account to some extent at the necessity stage.

(c) The case for variable 'scrutiny'

The majority approach to proportionality has, by and large, resisted suggestions that the degree of scrutiny applied may vary depending upon the nature of the law and the burden it imposes. In *LibertyWorks*, for example, Kiefel CJ, Keane and Gleeson JJ said that 'there has been no majority support in this Court for the proposition that there may be a class of laws that under Australian constitutional law automatically attract stricter scrutiny'.[124] Earlier, in *Unions No 1*, French CJ, Hayne, Crennan, Kiefel and Bell JJ had said that 'the allowance of what is sometimes called the grant to the legislature of a margin of appreciation has [not] been accepted by a majority of this Court'.[125] That notion was said in *McCloy* to be a European notion manifesting an acceptance by European transnational courts 'of the advantage that courts of member states have with respect to particular matters, for example, moral standards applicable and the necessity for a restriction or penalty to meet them'.[126]

There are overlapping ideas in play here, including whether and why some degree of deference (ie less intense review) may be appropriate, and whether that varies for different types of case.[127] Notions of a reduced or variable degree of review cannot simply be dismissed as a European notion of no relevance here. No doubt some aspects of the European justification are not apposite.

First, issues of deference may still arise in the sense that for different issues courts may have more or less institutional ability or legitimacy to make certain assessments.[128] For example, with respect to ability, making fine judgments about the appropriate response to a serious health risk is not something to which courts are well-adapted. The readiness with which the Western Australian border restrictions were upheld in *Palmer* illustrates the point. That will not be true for all types of law. As for legitimacy, the majority emphasis on measures only being inadequate

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[124] *LibertyWorks* (n 37) [49]; see also *Tajjour* (n 31) [132]; *Unions No 2* (n 91) [51].
[125] *Unions No 1* (n 91) [34] (citation omitted).
[126] *McCloy* (n 2) [92].
[127] See discussion in Kirk 1997 (n 4) 53-63.
[128] See eg *R v Secretary of State for the Home Department* [2015] AC 700, [22]-[34], [68]-[72].

in their balance if that is manifestly or grossly so illustrates a recognition that the choices of what ends to pursue are fundamentally political ones.

The plurality in *McCloy* said that '[d]eference to legislative opinion, in the sense of unquestioning adoption of the correctness of these choices, does not arise for courts'.[129] So stated, that is self-evidently correct in our constitutional system. But it does not mean that there is no role for allowing some room for judgment to lawmakers, as the joint judgment in *McCloy* itself emphasises.[130] The later statement in *Unions No 2*, drawing on *McCloy*, that 'deference would seem not to be appropriate' does not appropriately acknowledge this issue.[131] It may be that 'part of the difficulty arises from the word', with some seeing it as inappropriately denoting an acceptance of having an inferior role to play.[132]

Second, variability of review is a manifestation of the broader point that justification analysis is in the end always tied to consideration of the constitutional interest at stake and the nature and extent of the burden placed on that interest. Indeed, variable scrutiny has been applied in Australia, as I will develop. This issue is often discussed in terms of intensity of review or variability of judicial scrutiny. That is one way of expressing the issue. But what is really at stake is the degree to which the law must be justified. The greater the burden, the greater the degree of justification required.

The proportionality idea for which this issue appears most controversial is necessity. As explained, suitability, as employed in this country, manifests an inherently low intensity of review. Thus the issue of variable scrutiny or justification does not meaningfully arise in relation to this aspect of the proportionality test. As for balancing, it is inherent in the exercise that one is taking account of the extent of the burden imposed. That being said, issues of institutional ability might arise for particular laws, inclining the court to caution before finding a measure to be invalid. Moreover, the higher degree of justification required for a prima facie infringement of s 92 than that for a law found to burden the implied freedom illustrates that variable review is already manifest in the Australian case law. There is no reason in principle why variability should be limited to having one standard for one guarantee and a different standard for another but with no potential variability within the approach to any particular guarantee.

The case law on the implied freedom has from the beginning acknowledged that some laws will require a higher degree of justification than others. Since that point was first made in *ACTV* (see Part 1(a) above) it repeatedly has been accepted that laws which burden the freedom in a direct as opposed to incidental way, or which regulate the content as opposed to the manner of communication, will be more difficult to justify.[133] Yet as Nettle J noted in *McCloy*, 'in subsequent cases, there has been an apparent lack of unanimity as to what follows from the distinction, and in particular as to whether different kinds of burden attract different levels of scrutiny'.[134]

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[129] *McCloy* (n 2) [91].
[130] Ibid [2], [77], [89]-[90].
[131] *Unions No 2* (n 91) [51] (Kiefel CJ, Bell and Keane JJ).
[132] *R v Secretary of State for the Home Department* [2015] AC 945, [22] (Lord Sumption JSC).
[133] See eg *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506, [95]-[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), and authority there cited; *Wotton v State of Queensland* [2012] HCA 2; (2012) 246 CLR 1, [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[134] *McCloy* (n 2) [253].

The force of this type of distinction seems obvious and appropriate. For example, in *O'Flaherty v City of Sydney Council* the impugned measure was a local council sign prohibiting – rather unsurprisingly – camping or staying overnight in Martin Place in the centre of Sydney.[135] The notice was challenged by an 'Occupy Sydney' protestor who had been charged with camping there in breach of the notice. The restriction was not directed to communication per se, let alone to the content of any communication, yet it was nevertheless held to burden the freedom, illustrating the breadth of the implied freedom. Its validity was upheld in the Federal Court. Such burden as was imposed on the implied freedom was slight. It is counter-intuitive that such a commonplace regulatory notice directed to common public amenity should undergo the same rigour of scrutiny as a law which directly restricted political communication, to the advantage of incumbent politicians, as was at stake in *ACTV*. Any such suggestion fails to recognise the quite different practical and legal significance of what is at stake.

Consideration of the issue has become clouded by a perception that the issue involves taking a categorical approach where distinct degrees of review are applied to distinct classes of case,[136] as is applied in the constitutional law of the United States.[137] The majority may have understood references, going back to the judgment of Mason CJ in *ACTV*, that a 'compelling justification' is required for certain types of law as suggesting as much. Yet a categorical approach is not required. Indeed, one of the very advantages of applying the proportionality approach is its flexibility. That flexibility can include a sliding scale of the degree of justification required. Taking such an approach is consistent with the imperative, discussed above, of always keeping in mind the ultimate issue of assessing whether any infringement on the protected freedom can be justified. Gageler and Gordon JJ have each accepted that a graduated spectrum of review is appropriate.[138]

How does variable justification potentially apply to assessing necessity? In general, different regulatory aims can be achieved in a range of ways, with variable reach, variable effects on those subject to the law, variable effects on the ease and expense of administering the law, and various other costs and benefits. Lawmaking involves choices not only in relation to what public interest ends to pursue but how to go about pursuing them. A different law will not do precisely the same thing as the law under challenge. When considering necessity issues of degree arise in assessing whether the proposed comparator is practical, whether any detriments associated with enacting that proposed alternative law are such as to render it a reasonable comparator, and whether it would achieve the claimed end to the same degree. So much implicitly is recognised in the language employed in the *McCloy* formulation, speaking of an 'obvious and compelling alternative, reasonably practicable means of achieving the same purpose'.[139] As Gordon J said in *Palmer*, much 'depends on what is meant by "compelling" and "reasonably practicable means"'.[140]

If the necessity assessment is applied very strictly then laws will commonly fail. Blackmun J said, evocatively, that a 'judge would be unimaginative indeed if he could not come up with

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[135] [2013] FCA 344; (2013) 210 FCR 484 (Katzman J); [2014] FCAFC 56; (2014) 221 FCR 382 (Full Court)('*O'Flaherty*').
[136] See *LibertyWorks* (n 37) [49] (Kiefel CJ, Keane and Gleeson JJ).
[137] See eg explanation in Rosalind Dixon, 'Calibrated Proportionality' (2020) 48 *Federal Law Review* 92, 116-117.
[138] *McCloy* (n 2) [152] (Gageler J); *Brown* (n 35) [201]-[205] (Gageler J) and [480] (Gordon J); *Comcare* (n 41) [161] (Gordon J).
[139] *McCloy* (n 2) [2].
[140] *Palmer* (n 16) [198].

something a little less "drastic" or a little less "restrictive"' in almost any situation, and thereby enable himself to vote to strike legislation down'.[141]

Where the burden imposed by a measure on a constitutional freedom is light, courts should not be quick to invalidate simply because a challenger can point to some less restrictive means of achieving substantially the same aim. To do so unduly impinges on the legitimate freedom of choice of lawmakers to make decisions about the costs and benefits of pursuing one means versus another.

Moreover, in a case of low burden there is less reason to suspect that the lawmaker is in substance seeking to achieve an illegitimate end. In *Brown*, Kiefel CJ, Bell and Keane JJ said that in some instances a 'legislative measure could not rationally be justified by an inexplicable legislative choice'.[142] Implicit in that statement is that the *explicability* of the choice is relevant. If there is a range of reasonable options open to achieve the legislative end, or some particular approach has historically been adopted, that may throw light on why the lawmaker chose the path it did and the justifiability of that choice. The case of *Murphy*, discussed below, is an example of the point.

Whether or not the burden imposed can be justified as an acceptable intrusion on the protected freedom is always the ultimate justification issue. If the burden is light, then it is appropriate that a lesser degree of justification be required. In contrast, if the constitutional detriment is substantial because there is a very significant burden placed on the protected freedom, and an alternative means is available which achieves the relevant end to substantially the same degree and which is materially less burdensome on the freedom, then a court would properly conclude that the burden imposed by the impugned law could not be justified. For example, for a law imposing a significant restriction on the implied freedom it may be reasonable to say that there could and should have been an exception or defence for activities involving political communication. For lower burdens directed to say public amenity – such as restrictions on camping overnight in Martin Place – the case for requiring such an exemption is weaker.

In a sense, an acceptance of this position involves some blurring of the lines between necessity assessment and balancing, insofar as the intensity of the review of alternatives is affected by the significance of the burden. Yet some such evaluative assessment is implicit anyway in the use of qualifying words such as 'reasonable', 'obvious' and 'compelling' when describing alternatives. And as explained above in Parts 3(a) and (b), the ideas involved in a proportionality analysis are not clinically distinct from each other.

That a variable degree of justification can and should be required, including as regards necessity, has not been developed on the majority approach to proportionality. But there have been some pointers in that direction. For example, in *Brown* Kiefel CJ, Bell and Keane JJ said – citing Gageler J in *Tajjour* – that '[g]enerally speaking, the sufficiency of the justification required for such a burden should be thought to require some correspondence with the extent of that burden'.[143]

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[141] *Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173, 188-189; see similarly *Clubb* (n 36) [277] (Nettle J); *Palmer* (n 16) [272] (Edelman J).
[142] *Brown* (n 35) [130]; see also [139].
[143] *Brown* (n 35) [118]; see also [128], and [291] (Nettle J); *LibertyWorks* (n 37) [288] (Steward J); *Farm Transparency* (n 38) [254] (Edelman J); *Palmer* (n 16) [79]-[80] (Kiefel CJ and Keane J).

(d) The utility and limits of proportionality

The five ideas tied up in a proportionality analysis are all useful and appropriate components of assessing whether a burden placed on a constitutionally protected freedom can be upheld as justified. That is not to say that all of these ideas must always be assessed in each case, or that they must necessarily be assessed in a particular order. James Stellios has said that what was 'innovative about structured proportionality was the sequencing of the inquiries into three discrete stages, failure at any stage resulting in invalidity'.[144] There is something to be said, of course, for only undertaking a balancing assessment – the most disputable and subjective component – if unavoidable. But there is no need to be rigid in approach. As discussed above in Part 3(b), sometimes it is more efficient to jump to one matter which is sufficient to resolve the dispute. Moreover, as illustrated at the end of the discussion in Part 3(b), the ideas involved here overlap, and not infrequently an objection to a law can be put in more than one way. Thus one should not become obsessive about the different components of the concept.[145] It is in part for that reason that I dislike the label '*structured* proportionality'.

Moreover, as discussed above in Part 3(a), and again in Part 3(c) (in discussing balancing), assessing whether there is a burden on a protected freedom and assessing whether that burden is acceptable are linked. The ultimate issue is whether any burden placed on the freedom is constitutionally tolerable. The joint judgment stated in *McCloy* that proportionality testing 'has evident utility as a tool for determining the reasonableness of legislation which restricts the freedom and for resolving conflicts between the freedom and the attainment of legislative purpose'.[146] Because it is a tool – a set of ideas useful in assessing justification – it is appropriate that the status of the concept not be unduly elevated. It is not the ultimate issue but a means of assessing it. The nature of the freedom at stake, and the degree to which and the manner in which it is burdened by the law, should infuse analysis.

For that reason, along with the further reasons addressed above in Part 3(c), it should be accepted that consideration of not only balancing but also necessity can and should take account of the significance and extent of the burden imposed. This can be called variable scrutiny; a more appropriate description may be variable justification.

Despite some sceptical statements in various judgments, the majority approach is not necessarily antithetical to these points. There have been various statements which appear to recognise variability in justification analysis.[147] Further, in *McCloy* the joint judgment said that '[c]entral to the question posed by *Lange* is how the [impugned law] affects the freedom'.[148] This statement appears to accept the need to always bear in mind the nature of the freedom. Their Honours also noted, after referring to the various references in the case law to some measures requiring a 'compelling justification', that 'this is to say no more than that a more convincing justification will be required when the restrictive effect of legislation on the freedom is direct and substantial'.[149] This statement implicitly accepts that the greater the burden imposed, the greater the justification required. Both points are also implicit in the statement by five judges in *Unions No 1* that a measure will be invalid if it 'so burdens the freedom that it may be taken to affect the system of government for which the Constitution

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[144] Stellios (n 92) 645.
[145] Kirk 1997 (n 4) 20.
[146] *McCloy* (n 2) [73].
[147] See n 143.
[148] Ibid [24].
[149] Ibid [70].

provides'.[150] And in *LibertyWorks* Edelman J said that there 'remains flexibility within each test and scope for development of the factors that will influence the application of it'.[151]

Sir Anthony Mason has suggested that the 'main alternative' to proportionality is a categorisation approach.[152] As explained in Part 3(c), neither Gageler J nor Gordon J has advocated for such; both have preferred a model of 'calibrated' scrutiny on a spectrum. That preference fits well with a flexible model of proportionality. A categorical approach creates its own characterisation issue of whether a law is within one category or another. For example, a law that regulates the means of communication rather than its content might still impose a significant restriction on political speech if that means was particularly favoured by one set of participants in the political process. Assessing the constitutional justification for a law does not seem an apt area for applying a bright line analysis where a significantly different approach will apply depending on a categorical characterisation.[153]

Another possibility would simply be to use the traditional phrase of 'reasonably appropriate and adapted'. Yet that phrase does not take analysis very far of itself. And 'adapted' itself raises issues of suitability. Further, in the context of assessing justifiable burden at least, 'reasonably appropriate' bespeaks an assessment of how reasonable the legislative measure is as a response to the legitimating end. Consideration of available alternatives, and of the significance of the burden compared to the constitutional detriment, could readily be regarded as relevant considerations in that regard.

A decision that illustrates the desirability of a middle path between 'structured proportionality' and the view of Gageler and Gordon JJ is *Murphy*.[154] The case was brought shortly before the 2016 federal election. The plaintiffs challenged provisions of the *Commonwealth Electoral Act 1918* (Cth) which provided that the electoral roll was closed to changes, including new enrolments, for a period commencing on the seventh day after election writs issued. The election could be held between 26 and 51 days later.[155] The plaintiffs argued that that constituted an impermissible restriction on universal adult suffrage which had previously been recognised as constitutionally required. Key to their argument was to refer to laws in place in three States which, given advances in the way the rolls were kept, allowed enrolment up to or just before polling day itself. Alternatively, they argued that a lesser suspension period could have been adopted by the Commonwealth. Thus the issue of necessity was central. The challenge was rejected unanimously by the High Court.

There was some disagreement within the Court about whether a test of proportionality should be applied. The constitutional protection of the adult right to vote was not itself an aspect of the implied freedom but it has a similar foundation. French CJ and Bell J said that the 'three considerations relevant to proportionality set out in *McCloy* … may be relevant depending upon the character of the law'.[156] Kiefel J indicated that a proportionality analysis applied. On necessity, her Honour said that this 'requires that the alternative measure be otherwise identical in its effects to the legislative measures which have been chosen',[157] concluding that the

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[150] *Unions No 1* (n 91) [19] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[151] *LibertyWorks* (n 37) [200].
[152] Mason (n 114) 121.
[153] Note *Palmer* (n 16) [264] (Edelman J).
[154] *Murphy* (n 34).
[155] See ibid [9].
[156] Ibid [38].
[157] Ibid [65].

proffered alternatives were not, contrasting the case with application of necessity in the s 92 context in *Betfair No 1*.[158] Gageler J was scathing of the plaintiffs' use of proportionality:[159]

> The plaintiffs' attempt to shoehorn their argument within it highlights the inappropriateness of attempting to apply such a form of proportionality testing here. What is at best an ill-fitted analytical tool has become the master, and has taken on a life of its own.

Keane J suggested that proportionality did not apply as '[n]o question arises as to whether the pursuit of some legitimate end or purpose not expressly addressed by the Constitution is reconcilable with those express provisions',[160] but said that if it did apply what the plaintiffs pointed to were not 'compelling and obvious alternatives to achieve the same outcome'.[161] Nettle J had a similar view as to the claimed alternatives.[162] Gordon J said necessity testing should not be applied as the Parliament was faced with 'a multitude of options' in choosing how to enact an electoral system and those choices were for it.[163]

Objections can be made to both sides of the argument. As regards Kiefel J's view, *Betfair No 1* applied a more stringent type of analysis than has been applied in the implied freedom context thus one can question how much guidance that case had to offer.

As for Gageler and Gordon JJ's rejection of necessity, a case could be postulated where say a temporal limitation on suffrage was much more significant (eg no new enrolments for 12 months prior to an election), where that was claimed to be practically necessary to ensure the orderly conduct of elections, but other Australian jurisdictions did not require anything like that time. The practice elsewhere would be a significant consideration in assessing the reasonableness of the claimed justification. It would both suggest that the claimed justifying purpose did not truly explain the law and, conversely, that the law could not be justified based on that claimed purpose. Indeed, this type of analysis was important in the predecessor case to *Murphy*, *Rowe v Electoral Commissioner*.[164] There, a majority of the Court held that a federal amending law which reduced the period for which the electoral rolls were open after the writs were issued was invalid. The fact that a longer period had previously been available, serving the claimed purpose of preventing electoral fraud, was a significant consideration in the reasoning of the majority.[165]

Gageler and Gordon JJ may have been reacting to a perception that notions of proportionality were to be applied in a mechanistic, rigid way carrying with it a sense that if any reasonably available and less restrictive alternative could be identified then that would necessarily lead to invalidity. That was a reasonable concern in that case. As Keane J put it, the plaintiffs' case 'was no more than a complaint that better arrangements might be made to fulfil the mandate'.[166] They were seeking to fiddle at the edges in a context where the period for which the rolls were closed was relatively limited, had a long history, had a reasonable justification, and in a context

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[158] *Betfair No 1* (n 53).
[159] *Murphy* (n 34) [101].
[160] Ibid [205].
[161] Ibid [211].
[162] Ibid [252].
[163] Quotation from [301]; see generally [301]-[303].
[164] [2010] HCA 46; (2010) 243 CLR 1 ('*Rowe*').
[165] See ibid [75]-[78] (French CJ); [167] (Gummow and Bell JJ); [384] (Crennan J).
[166] *Murphy* (n 34) [181].

where there was indeed a multitude of choices to be made as to how to set-up the electoral system. Such limited burden as was imposed was not intolerable.

To return then to the critique of Gageler and Gordon JJ, their first point was that the doctrine was too rigid and one size does not fit all. That criticism of 'structured proportionality' has some merit but, as I have sought to show, proportionality need not and should not be a rigid tool of analysis.

Gageler J also doubted that one should limit in advance the considerations which might legitimately bear on justification of a particular measure. It should not be thought that the five ideas involved in a proportionality justification analysis capture every type of argument that will be made. Other ideas or types of argument can interact with such analysis. For example, implied freedom cases have spoken of the significance of the political playing field being distorted. That is a significant matter going to the nature and significance of the burden. Another example would be that historical practice may be a relevant consideration in undermining an attack on validity, as illustrated in *Murphy*. Such practice could be relevant to showing that the legislative choice was a reasonable and appropriate one within a range of available options, undermining any necessity attack, and becoming a consideration in a balancing assessment.

Second, it was suggested that proportionality was not a useful tool of analysis. I disagree; each component of it can play a useful role.

Third, their Honours have argued that in assessing justification it is necessary always to keep in mind the basis of and rationale for the freedom in question. I agree, and that can be done within a proportionality test.

Fourth, their Honours argued that the standard of scrutiny applied to an impugned measure must be responsive to the degree of burden imposed on the protected freedom. I agree, and proportionality is an apt tool to give effect to that goal.

Fifth, their Honours queried balancing, but some degree of balancing is inherent in most statements of an appropriate test, even if not expressly recognised. Gageler J suggested he did not consider talk of whether something was 'adequate in its balance' as being sufficiently focused. There is some force in this, but the point is addressed when the test is applied in a way that takes account of the nature of the freedom at issue and of the nature and significance of the burden imposed, and where it is accepted that the ultimate issue is always whether the law can be accepted as a tolerable, valid burdening of the protected freedom in light of its purpose.

In sum, the critique of Gageler and Gordon JJ has some force but does not necessitate the wholesale rejection of proportionality.

Part 4: A middle path

The differences between members of the High Court about proportionality over the last decade have sometimes been stark.[167] Yet there is merit on both sides of the debate. The differences are not as great as might first appear. And constitutional questions are not determined only in

[167] Eg *Brown* (n 35) [159] (Gageler J); *LibertyWorks* (n 37) [199] (Edelman J).

the High Court. Given these points, there is much to be said for the members of the Court to seek to achieve a clear, joint position.[168]

As regards applying the implied freedom, there is no dispute that the validity of a measure is to be assessed by asking whether the impugned measure burdens the freedom, whether it pursues a legitimate purpose, and whether it can be characterised as advancing that purpose in a manner consistent with the freedom. As regards s 92, there is similar agreement that analysis involves asking whether the measure imposes a burden of the prohibited kind and, if so, whether it can be justified as made in pursuit of a legitimate purpose. As regards other constitutional requirements connected to the guaranteed choice by the people, there is less agreement but there is no reason in principle why the basic structure of analysis should differ.

An appropriate way of assessing the justification issue in Australia is, in summary, as follows.[169] The first issue is whether the impugned legal measure burdens a protected freedom, and the second is considering whether the claimed purpose is legitimate, that is, not antithetical to the freedom. The third issue, then, is whether the burden imposed can be justified. In that regard, it will generally be relevant to ask whether the law can rationally be regarded as a suitable means to achieve that claimed purpose; whether there is an alternative means available which in substance achieves that end in a materially less burdensome way; and whether the burden imposed is too great to be justified taking account of the nature of the purpose and the extent to which the measure achieves that purpose. These issues may have more or less significance in particular cases. The nature and extent of the burden imposed on the freedom is relevant to the whole of the analysis, where the more significant the burden the greater the degree of justification required. The degree of justification required may also differ between constitutional guarantees. The ultimate issue is always whether the burden placed on the protected freedom is valid – that is, the guarantee is not unduly burdened – because the burden can be characterised as justifiably made in pursuit of a legitimate purpose. The proportionality questions are useful tools to assist in addressing this issue in a transparent and reasoned manner. They are not an algorithm.

[168] As occurred in *Lange* (n 27) 554-556; *The Queen v Bauer* [2018] HCA 40; (2018) 266 CLR 56, [47]-[48]; *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; (2024) 98 ALJR 610, [6]-[8]. See further Dixon (n 137) 101-103.

[169] This approach is similar to that suggested by Rosalind Dixon, save without 'archetypal categories' of levels of scrutiny: see Dixon (n 137) 113-114.