

# THE BALANCING ACT: A CASE FOR STRUCTURED PROPORTIONALITY UNDER THE SECOND LIMB OF THE *LANGE* TEST

BONINA CHALLENGOR<sup>\*</sup>

*This article examines the inconsistent application of a proportionality principle under the implied freedom of political communication. It argues that the High Court should adopt Aharon Barak's statement of structured proportionality, which is made up of four distinct components: (1) proper purpose; (2) rational connection; (3) necessity; and (4) strict proportionality. The author argues that the adoption of these four components would help clarify the law and promote transparency and flexibility in the application of a proportionality principle.*

## INTRODUCTION

Proportionality is a term now synonymous with human rights.<sup>1</sup> The proportionality principle is well regarded as the most prominent feature of the constitutional conversation internationally.<sup>2</sup> However, in Australia, the use of proportionality in the context of the implied freedom of political communication has been plagued by confusion and controversy. Consequently, the implied freedom of political communication has been identified as 'a noble and idealistic enterprise which has failed, is failing, and will go on failing.'<sup>3</sup>

The implied freedom of political communication limits legislative power and the common law in Australia. In *Lange v Australian Broadcasting Corporation*,<sup>4</sup> the High Court unanimously confirmed that the implied freedom<sup>5</sup> is sourced in the various sections of the *Constitution* which provide

<sup>\*</sup> Final year B.Com/LL.B (Hons) student at the University of Western Australia. With thanks to Murray Wesson and my family.

<sup>1</sup> Grant Huscroft, Bradley W Miller and Grégoire Webber, *Proportionality and the Rule of Law* (Cambridge University Press, 2014) 1.

<sup>2</sup> See, eg, Kai Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 31, 31.

<sup>3</sup> *Monis v The Queen* (2013) 249 CLR 92, [251] (Heydon J).

<sup>4</sup> (1997) 189 CLR 520 ('*Lange*').

<sup>5</sup> References to 'implied freedom' in this thesis refer specifically to the implied freedom of political communication.

the system of representative and responsible government.<sup>6</sup> Thus the implied freedom is not absolute, and ‘is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*.’<sup>7</sup> In *Lange*, the Court proposed a two-limb test to guide the limits of this constitutional restriction:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law *reasonably appropriate and adapted* to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.<sup>8</sup>

This thesis focuses on the second *Lange* question, where the principle of proportionality is equated with the ‘reasonably appropriate and adapted’ analysis.<sup>9</sup> Since the *Lange* decision, the High Court has repeatedly accepted proportionality as the appropriate test to be applied under its second limb.<sup>10</sup> However, there has been little agreement and clarity regarding the ‘series of different enquiries’<sup>11</sup> involved in answering the proportionality question. Indeed, many judges have criticised the two-stage test on the basis of the numerous difficulties in its application.<sup>12</sup>

The High Court’s divergent approach to proportionality has led to uncertainty surrounding the substance of the implied freedom, and the scope of this limitation on legislative power. This uncertainty produces a chilling effect on political speech,<sup>13</sup> and creates a proportionality principle that is ‘devoid of

<sup>6</sup> *Lange* (1997) 189 CLR 520, 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (Their Honours identified ss 1, 7, 8, 13, 25, 28 and 30 *Constitution*).

<sup>7</sup> *Ibid* 561.

<sup>8</sup> *Ibid* 567. The second limb of the *Lange* test has subsequently been modified to read ‘is the law reasonably appropriate and adapted to serve a legitimate end *in a manner* which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?’. *Coleman v Power* (2004) 220 CLR 1, [92]–[96] (McHugh J), [196] Gummow and Hayne JJ), [211] (Kirby J).

<sup>9</sup> *Lange* (1997) 189 CLR 520, 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (Their Honours held that there was ‘no need to distinguish’ between the concepts of ‘proportionality’ and ‘reasonably appropriate and adapted’).

<sup>10</sup> See, eg, *Tajjour v New South Wales* (2014) 88 ALJR 860, [35] (French CJ), [60] (Hayne J), [110] (Crennan, Kiefel and Bell JJ), [149] (Gageler J); *Unions New South Wales v New South Wales* (2013) 252 CLR 530, [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92, [283] (Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1, [77] (Kiefel J).

<sup>11</sup> *Monis v The Queen* (2013) 249 CLR 92, [279] (Crennan, Kiefel and Bell JJ).

<sup>12</sup> See, eg, *Unions New South Wales v New South Wales* (2013) 252 CLR 530, [129] (Keane J); *Monis v The Queen* (2013) 249 CLR 92, [246]–[251] (Heydon J).

<sup>13</sup> It is well established that uncertainty in the law produces a chilling effect of political communication. See, eg, Nicholas Aroney, ‘The Constitutional (In)validity of Religious Vilification Laws: Implication and Interpretation’ (2006) 34 *Federal Law Review* 287, 314

clear meaning'.<sup>14</sup>

This thesis offers a solution. It is argued over the following three chapters that the High Court should adopt a specific statement of the principle propounded by Aharon Barak, former Chief Justice of the Israeli Supreme Court and 'one of the greatest jurors of our time'.<sup>15</sup> Barak's approach to proportionality falls under the genus of 'structured proportionality', akin to the approaches taken by the constitutional courts of Germany,<sup>16</sup> Canada,<sup>17</sup> Israel,<sup>18</sup> the European Court of Human Rights,<sup>19</sup> and the United Kingdom.<sup>20</sup> This thesis argues that Barak's statement of the principle is preferable to any approach the High Court has taken under the second limb of the *Lange* test.

Chapter I analyses the High Court's approach to proportionality under the second limb of the *Lange* test, highlighting the inconsistencies in the application of the principle. Chapter II sets out the suggested method: Barak's statement of proportionality. The four components of Barak's framework are explained with some discussion of their application in other jurisdictions. Chapter III then explains why the High Court should adopt Barak's statement of proportionality, by outlining the benefits of the approach and addressing its main criticisms.

The influence of Barak's statement of proportionality on the High Court's implied freedom jurisprudence is clear from the recent decision of *Tajjour v New South Wales*.<sup>21</sup> However, there is no existing scholarship which considers the direct application of Barak's framework to the second limb of the *Lange* test. This thesis therefore considers whether Barak's approach would be appropriate in this context, and concludes that it would bring structure and clarity to the

(arguing that 'ambiguity in the law itself has a chilling effect on speech') citing Dan Meagher, 'A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225, 227-228.

<sup>14</sup> *Coleman v Power* (2004) 220 CLR 1, 234 (Kirby J).

<sup>15</sup> Sir Anthony Mason, 'Proportionality and its use in Australian Constitutional Law' (Speech delivered at the Sir Anthony Mason Lecture, The University of Melbourne, 6 August 2015) <<http://www.youtube.com/watch?v=4xOsIVLTWASg>>. For further discussion of the influence of Barak's jurisprudence and scholarly work on comparative constitutional law, see Daphne Bark-Erez, 'Judicial Conversations and Comparative Law: The Case of Non-Hegemonic Countries' (2011) 47 *Tulsa Law Review* 405 (Bark-Erez's research found that the supreme courts of 11 different countries, including Australia, had cited Barak's judicial opinions and academic writings).

<sup>16</sup> See, eg, *Secret Tape Recordings* Bundesverfassungsgericht [German Constitutional Court] 2 BvR 454/71, 31 January 1973 reported in (1973) 34 BVerfGE 238.

<sup>17</sup> See, eg, *R v Oakes* [1986] 1 SCR 103.

<sup>18</sup> See, eg, *United Mizrahi Bank Ltd v. Migdal Cooperative Village* (1995) CA 6821/93, 49(4)P.D.221 (Supreme Court of Israel).

<sup>19</sup> See, eg, *Handyside v The United Kingdom* (1976) 24 Eur Court HR (ser A) 23.

<sup>20</sup> See, eg, *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39.

<sup>21</sup> (2014) 88 ALJR 860, [110], [113]-[114], [129], [131] (Crennan, Kiefel and Bell JJ).

doctrine in Australia.

## I PROPORTIONALITY UNDER THE SECOND LIMB OF *LANGE*

This Chapter analyses the different approaches taken by judges to the proportionality question posed by the decision in *Lange v Australian Broadcasting Corporation*.<sup>22</sup> The ‘series of different enquiries’<sup>23</sup> taken by the High Court under this limb are categorised into four different enquiries: legitimate end; rational connection; reasonable necessity; and balancing. The uncertainties surrounding each enquiry are discussed in turn.

### A *Legitimate End*

Cases have consistently recognised that the series of enquiries under the second limb of the *Lange* test begin with the identification of the object of the impugned provision and consideration of whether this object is legitimate.<sup>24</sup> However, the method by which the High Court has construed the end has varied significantly.<sup>25</sup> Two main approaches can be discerned. Under the wide approach, judges have identified the purpose<sup>26</sup> of the law as its end. Under the narrow approach, judges have focused on the means<sup>27</sup> of the law when construing the end.

In *Coleman v Power*,<sup>28</sup> the tension in this distinction was evident in the judgments of Gummow, Hayne, Heydon and Kirby JJ. The Court was considering a challenge to s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) (*Vagrants Act*), which made<sup>29</sup> it an offence to use insulting words to any person in a public place. The Solicitor-General for Queensland submitted two ends to which s 7(1)(d) was directed: ‘to avoid breaches of the peace’ and ‘to remove threats, abuses and insults from the arena of public discussion, so that persons would not be intimidated into silence’.<sup>30</sup> The former

<sup>22</sup> (1997) 189 CLR 520 (*Lange*).

<sup>23</sup> *Monis v The Queen* (2013) 249 CLR 92, [279] (Crennan, Kiefel and Bell JJ).

<sup>24</sup> See eg, *Unions NSW* (2013) 252 CLR 530, [46] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>25</sup> The division of the Court on this issue can be seen in the judgments of French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Monis v The Queen* (2013) 249 CLR 92, [74], [97], [317]. This was acknowledged by the plurality judgment in *Unions New South Wales v New South Wales* (2013) 252 CLR 530, [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>26</sup> This chapter defines the ‘purpose’ of a law to mean the wider social objectives of the legislation, which is more in line with Barak’s conception of a purpose: see Chapter II.A, and the approach taken by Crennan, Kiefel and Bell JJ in *Monis v The Queen* (2013) 249 CLR 92, [317].

<sup>27</sup> This chapter defines the ‘means’ of a law to be the legal and practical effect of the provision. Again this is more in line with Barak’s statement of proportionality: see Chapter II.A.

<sup>28</sup> (2004) 220 CLR 1.

<sup>29</sup> Although a majority of the High Court found s 7(1)(d) to be valid, the *Vagrants Act* was repealed in 2005 by s 50 *Summary Offences Act 2005* (Qld).

<sup>30</sup> *Coleman v Power* (2004) 220 CLR 1, [101] (McHugh J).

submission focuses on the purpose of the impugned law, whereas the latter submission focuses on its means.

The High Court was divided on their interpretation of the object of the impugned provision. Justices Gummow and Hayne construed the object of the impugned provision along the same lines as the first submission, finding that its object was 'keeping public places free from violence'.<sup>31</sup> Justice Heydon also undertook a purpose enquiry, and found many legitimate objects for the provision.<sup>32</sup> By contrast, Kirby J held that '[t]he Act, so interpreted, is confined to preventing and sanctioning public violence and provocation to such conduct.'<sup>33</sup> Compared to the approaches taken by Gummow, Hayne and Heydon JJ, Kirby J's narrow construction of the end of the impugned provision focuses on the means of the law, rather than its purpose.

Justice Kirby's narrow approach is comparable to that taken by French CJ and Hayne J in *Monis v The Queen*.<sup>34</sup> The High Court here was considering the validity of s 471.12 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'), which prohibits the use of a postal or similar service in a way 'that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.' Here, as in *Coleman v Power*, the High Court was divided in their approach to the legitimate end enquiry. Chief Justice French and Hayne J narrowly construed the legal and practical effect of the provision, and Crennan, Kiefel and Bell JJ focussed on the wider purpose of the law.<sup>35</sup>

Chief Justice French construed the purpose of s 471.12 in 'practical terms', finding that '[i]ts purpose is properly described as the prevention of the conduct which it prohibits'.<sup>36</sup> Likewise, Hayne J construed the object of the impugned provision by its 'legal and practical operation'.<sup>37</sup> His Honour held that '[b]oth legally and practically, the offensive limb of s 471.12 has only one object or end: to penalise, and thereby prevent, giving offence to recipients of, and those handling, articles put into a postal or similar service'.<sup>38</sup>

Justices Crennan, Kiefel and Bell, however, held that the 'question of

<sup>31</sup> Ibid [198].

<sup>32</sup> Ibid [323]-[324] (These included: diminishing the 'risk of acrimony leading to breaches of the peace, disorder and violence', forestalling the 'wounding effect on the person publically insulted', preventing 'other persons who hear the insults from feeling intimidated or otherwise upset', preserving 'an ordered and democratic society', and protecting or vindicating 'the legitimate claims of individuals to live peacefully and with dignity within such a society').

<sup>33</sup> Ibid [256].

<sup>34</sup> (2013) 249 CLR 92.

<sup>35</sup> For more discussion about the wide versus narrow approach to the legitimate end enquiry, see James Stellios, 'The Second Limb of Lange: The Continuing Uncertainties with the Implied Freedom of Political Communication' (Research Paper No 14-49, ANU College of Law, 2015) 1-6.

<sup>36</sup> *Monis v The Queen* (2013) 249 CLR 92, [74].

<sup>37</sup> Ibid [97].

<sup>38</sup> Ibid [178].

purpose is rarely answered by reference only to the words of the provision, which commonly provide the elements of the offence and no more'.<sup>39</sup> Thus, their Honours focused on more than just the legal and practical effect of the provision, and looked to the 'wider social objective of the legislation'.<sup>40</sup> This led the plurality to conclude that s 471.12 was directed towards a legitimate end – the protection 'of people from the intrusion of offensive material into their personal domain.'<sup>41</sup>

The same division of the High Court occurred in *Attorney-General (SA) v Corporation of the City of Adelaide*.<sup>42</sup> The case concerned the validity of paras 2.3 and 2.8 of the *Corporation of Adelaide By-law No. 4*, which prohibited persons from preaching, canvassing, haranguing or distributing printed material on a road without a permit to do so. While Crennan, Kiefel and Bell JJ construed the object of the impugned by-law as 'ensur[ing] the safety and convenience of road users',<sup>43</sup> French CJ and Hayne J adopted a narrower construction of the by-law's object. Chief Justice French found that the impugned provisions 'on the face of it, served legitimate ends in terms of the regulation of the public use of roads and public places.'<sup>44</sup> Justice Hayne again focused on the 'legal and practical operation of the impugned by-law', holding that this was 'central' to the proper construction of the end of the impugned provisions.<sup>45</sup> Accordingly, his Honour rejected the 'wider objects' proposed by the Attorney-General for South Australia,<sup>46</sup> and found that 'the only purpose of the impugned provisions is to prevent the obstructions of roads'.<sup>47</sup>

Significantly, it appears from the more recent case of *Tajjour v New South Wales*,<sup>48</sup> the High Court is moving towards the wider approach. The case involved a challenge to the validity of s 93X of the *Crimes Act 1900* (NSW) ('*Crimes Act*'), which makes guilty of an offence, a person who 'habitually consorts'<sup>49</sup> with convicted offenders after receiving an 'official warning'<sup>50</sup> in

<sup>39</sup> Ibid [317].

<sup>40</sup> Ibid.

<sup>41</sup> Ibid [324].

<sup>42</sup> (2013) 249 CLR 1 ('*Corporation of the City of Adelaide*').

<sup>43</sup> Ibid [221].

<sup>44</sup> Ibid [66].

<sup>45</sup> Ibid [139].

<sup>46</sup> Ibid [135] (The wider objects included the 'safe use of ... roads', 'keeping of the peace' and 'balanc[ing] the competing interests of those who seek to use them').

<sup>47</sup> Ibid [141].

<sup>48</sup> (2014) 88 ALJR 860 ('*Tajjour*').

<sup>49</sup> Qualified by s 93X(2) *Crimes Act* to only include person who consort with at least two convicted offenders (whether on the same or separate occasions), and consorts with each offender on at least 2 occasions.

<sup>50</sup> Defined by s 93X(3) *Crimes Act* as a warning given by a police officer (orally or in writing) that: (a) a convicted offender is a convicted offender; and (b) consorting with a convicted offender is an offence.

relation to each of those offenders. Chief Justice French and Hayne J this time agreed with Crennan, Kiefel and Bell JJ, and took a wider approach to identifying the end of the provision. This was described ‘generally as the prevention of crime’.<sup>51</sup> Justice Gageler similarly focused on more than just the legal and practical operation of s 93X, and found that ‘the object of the section is to prevent or impede criminal conduct’.<sup>52</sup>

Admittedly though, it may well be that a move towards a wider approach will have little effect upon the ultimate ruling of validity. However, a wider approach will at least result in more laws succeeding at this first stage. Further, it will facilitate a clearer distinction between the purpose and the means of the law, which will also enable the independent application of a rational connection enquiry. This last point is discussed further below.

### B Rational Connection

A rational connection enquiry has had some use in the implied freedom jurisprudence. However, judges characterising the means adopted by the impugned provision as the end the law pursues often forestalls the proper application of the rational connection test.

For example, in *Monis v The Queen*, Hayne J’s narrow approach to identifying a legitimate object of s 471.12 *Criminal Code* has the effect of conflating a legitimate end and rational connection test. In his Honour’s reasons, Hayne J rejects the submissions that the end of the impugned provision could be protecting the integrity of the post, because the provision ‘does not deal at all with, and is not directed to, the safety, efficiency or reliability of those [postal or similar] services’.<sup>53</sup> Further, Hayne J holds that:

It is convenient to accept that, despite the very large changes that have occurred in the last years of the 20<sup>th</sup> century and the first 12 years of this, the existence of efficient postal service remains important and valuable. But it by no means follows that preventing users sending material that will cause others offence, even really serious offence, *bears upon* whether the postal service continues to exist or continues to operate efficiently.<sup>54</sup>

His Honour can be understood as rejecting the proffered legislative end because

<sup>51</sup> *Tajjour* (2014) 88 ALJR 860, [77] (Hayne J), [41] (French CJ) (‘the legitimate object or end of s93X is to prevent or impede criminal conduct by deterring non-criminals from consorting in a criminal milieu and deterring criminals from establishing or building up a criminal network’), [111] (Crennan, Kiefel and Bell JJ) (‘provision is targeted, albeit indirectly, to the prevention of crime’).

<sup>52</sup> *Ibid* [160].

<sup>53</sup> *Monis v The Queen* (2013) 249 CLR 92, [184].

<sup>54</sup> *Ibid* [186] (emphasis added).

the means adopted by s 471.12 are not rationally connected to the purpose of protecting the integrity of the post. Justice Hayne applies this same reasoning to the other two proposed ends, welfare of the recipients of the post,<sup>55</sup> and the prevention of violence.<sup>56</sup>

Another example of this conflation can be seen in *Unions New South Wales v New South Wales*,<sup>57</sup> where the High Court was discussing the validity of ss 95G(6) and 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('*EFED Act*'). Section 96D prohibited<sup>58</sup> the acceptance of a political donation that is made by anyone other than an individual who is qualified and enrolled to vote. The provision therefore effectively prevented any corporation, organisation or other entity from making political donations. Section 95G(6) aggregated a political party's electoral expenditure with the expenditure incurred by an affiliated organisation,<sup>59</sup> in order to determine whether a political party has exceeded the applicable cap on electoral campaign expenditure. The plaintiffs argued that these provisions impermissibly burdened the implied freedom of political communication and should therefore be found to be invalid.

In determining this issue, French CJ, Hayne, Crennan, Kiefel and Bell JJ recognised that the identification of the legitimate statutory purpose of ss 95G(6) and 96D, was the 'first enquiry which arises on the second limb of the *Lange* test'.<sup>60</sup> However, what follows is a mixture of a rational connection and legitimate end enquiry, as the plurality attempt to find the 'true purpose'<sup>61</sup> of the impugned provisions. Their Honours take a narrow approach to identifying the ends to which the impugned provisions are directed, instead of accepting the proposed general anti-corruption purposes of the *EFED Act*. For example, their Honours find that s 96D does 'not reveal any purpose other than that political donations may not be accepted from persons who are enrolled as electors, or from corporations of other entities',<sup>62</sup> and that the aims of s 95G(6) are 'to reduce the amount which a political party affiliated with industrial organisations may incur by way of electoral communication expenditure and likewise to limit the amount which may be spent by an affiliated industrial organisation.'<sup>63</sup> However, instead of discussing whether these ends are

<sup>55</sup> Ibid [180]-[181].

<sup>56</sup> Ibid [182].

<sup>57</sup> (2013) 252 CLR 530 ('*Unions NSW*').

<sup>58</sup> The High Court found both provisions to be invalid, and they were later amended by *Election Funding, Expenditure and Disclosures Consequential Amendment Act 2014 No 28* (2014).

<sup>59</sup> Defined by s 95G(7) *EFED Act* to mean a body, or other organisation that is authorized under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection candidates for that party (or both).

<sup>60</sup> *Unions NSW* (2013) 252 CLR 530, [46].

<sup>61</sup> Ibid [47].

<sup>62</sup> Ibid [52].

<sup>63</sup> Ibid [64].



legitimate, and whether the measures adopted by the impugned provisions are rationally connected to these objects, the plurality examines whether these purposes show a connection to the anti-corruption purposes of the *EFED Act*.<sup>64</sup> And because the plurality could not find such a connection, they held that the further consideration of the proportionality of these provisions was ‘forestalled’.<sup>65</sup>

In their Honour’s judgment there is no clear distinction between the purposes of the impugned provisions and their means, nor is there a clear distinction between a rational connection enquiry and a legitimate end enquiry. However, the decision has later been interpreted by the High Court as authority for the independent application of a rational connection enquiry. For example, Crennan, Kiefel and Bell JJ in *Tajjour* hold that:

The proportionality analysis which is central to the second limb of the *Lange* test first requires the identification of the legislative purpose of s 93X and the means by which it is sought to be achieved. *Unions NSW* confirms that it is necessary that there be shown to be a rational connection between the two.<sup>66</sup>

Likewise with Hayne J, after determining that s 93X is directed ‘generally’ towards the prevention of crime, and that this legislative end is legitimate, his Honour then conducts a rational connection enquiry. He concludes that, ‘[u]nlike one of the laws in issue in *Unions NSW*, there is a rational connection between the provisions made by s 93X and the end to which it is directed: preventing crime. Section 93X is rationally connected to a legitimate end.’<sup>67</sup>

Therefore, it appears as though the Court is starting to apply an independent rational connection enquiry. This may be due to the Court moving towards a wider approach to the legitimate end enquiry, which facilitates the distinction between the purposes of the law versus its means.

### C Reasonable Necessity

Some judges have applied the test of ‘reasonable necessity’ when answering the second *Lange* question. The enquiry requires consideration of ‘whether there are alternative, reasonably practicable means which are capable of achieving that purpose and which are less restrictive in their effect upon the freedom.’<sup>68</sup> However, there remains uncertainty about the appropriateness of a necessity component in the Australian context, and for the judges who have applied this test, there is disagreement about its scope and operation.

<sup>64</sup> Ibid [52]-[60], [61]-[65].

<sup>65</sup> Ibid [47].

<sup>66</sup> *Tajjour* (2014) 88 ALJR 860, [110] citing *Unions NSW* (2013) 252 CLR 530, [50], [60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>67</sup> *Tajjour* (2014) 88 ALJR 860, [78] (citations omitted).

<sup>68</sup> Ibid [113] (Crennan, Kiefel and Bell JJ).

1 *High Threshold of Proportionality, Margin of Appreciation and Incidental Burdens*

Some judges appear to have refused to apply the reasonable necessity test altogether, such as Brennan CJ in *Levy v Victoria*,<sup>69</sup> and Gleeson CJ and Heydon J in *Coleman v Power*. In *Levy v Victoria*, the High Court upheld the validity of the *Wildlife (Game) (Hunting Season) Regulations 1994* (Vic),<sup>70</sup> which placed restrictions on persons entering a permitted hunting area during prescribed periods.<sup>71</sup> The plaintiff entered the permitted hunting area during the prescribed periods without a valid game license, and was charged pursuant to these regulations. The plaintiff had entered the area for the purpose of protesting against the hunting, and argued that these regulations, by restricting the opportunity to protest, invalidly burdened the implied freedom of political communication.

In discussing the relevant criterion of validity to be applied, Brennan CJ held that it was not the role of the court to assess alternatives:

Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could *reasonably be considered to be appropriate and adapted* to the fulfilment of the purpose.<sup>72</sup>

A similar test was also applied by Toohey and Gummow JJ, who also concluded that '[i]n the present case... the curtailment was *reasonably capable of being seen as appropriate and adapted* to the aim pursued in the Regulations.'<sup>73</sup>

Chief Justice Brennan, Toohey and Gummow JJ can be understood here as adopting a 'high threshold' proportionality test,<sup>74</sup> which was originally applied by Deane J in *Commonwealth v Tasmania*<sup>75</sup> to determine the validity of a law made pursuant to a purposive power under the Constitution.<sup>76</sup> His Honour held that in this context, a law 'must be capable of being reasonably considered

<sup>69</sup> (1997) 189 CLR 579.

<sup>70</sup> Though note this subordinate legislation is no longer in force, was repealed in 2001 by the *Wildlife (Game) Regulations 2001* (Vic).

<sup>71</sup> These prescribed periods were set out in reg 5 *Wildlife (Game) (Hunting Season) Regulations 1994* (Vic).

<sup>72</sup> *Levy v Victoria* (1997) 189 CLR 579, 598 (emphasis added) (citations omitted).

<sup>73</sup> *Ibid* 614-615 (emphasis added) (citations omitted).

<sup>74</sup> French CJ in *Tajjour* also endorses this understanding: *Tajjour* (2014) 88 ALJR 860, [35].

<sup>75</sup> (1982) 158 CLR 1 ('*Tasmanian Dam Case*').

<sup>76</sup> For further discussion on the origins of a high threshold proportionality test, see *Corporation of the City of Adelaide* (2013) 249 CLR 1, [48]-[62] (French CJ).

to be appropriate and adapted to achieving' its purpose.<sup>77</sup> According to Deane J, this weaker test does not permit the Court to question the Parliament's decision on what is 'the appropriate method of achieving a desired result'.<sup>78</sup> The high threshold proportionality analysis is therefore more deferential to the judgment of the legislature, and courts must grant to the legislature a wide margin of appreciation.<sup>79</sup> Accordingly, under this weaker test, it appears as though courts must not take into consideration the availability of less restrictive means.<sup>80</sup>

Chief Justice Gleeson and Heydon J can also be understood as applying a high threshold proportionality test in *Coleman v Power*, even though their Honours adopted the terminology of a low threshold test.<sup>81</sup> Their Honours relied on the judgment of Brennan CJ in *Levy v Victoria* in refusing to conduct a reasonable necessity enquiry.<sup>82</sup> Chief Justice Gleeson found that it was not the role of the Court to invalidate a law 'incidentally' burdening the freedom, 'simply because it can be shown that some more limited restriction "could suffice to achieve a legitimate purpose"'.<sup>83</sup> And according to Heydon J, the 'question is not "Is this provision the best?", but "Is this provision a reasonably adequate attempt at solving the problem?"'<sup>84</sup>

Rather than rejecting the necessity test altogether, it could be understood that Gleeson CJ and Heydon J were only applying a high threshold proportionality test in *Coleman v Power* because the impugned provision incidentally (rather than directly or intentionally) burdened political communication. Indeed, Gleeson CJ accepts the direct/incidental distinction proposed by Gaudron J in *Levy v Victoria* before finding that courts reviewing laws in 'the second category' must not consider alternatives.<sup>85</sup> Therefore, it would seem reasonable to suggest that their Honours would have considered

<sup>77</sup> *Tasmanian Dam Case* (1982) 158 CLR 1, 259.

<sup>78</sup> *Ibid.*

<sup>79</sup> The distinction between this wide margin of appreciation and the margin of choice granted under Barak's statement of proportionality is discussed further in Chapter III.A.2.

<sup>80</sup> Admittedly though, the judgment of French CJ in *Corporation City of Adelaide* (2013) 249 CLR 1 makes it unclear whether the consideration of alternatives is strictly forbidden under the high threshold test. In relation to the proportionality of delegated legislation, which requires a high threshold test, his Honour holds that: 'The availability of an alternative mode of regulation may be relevant in cases in which the question of want of reasonable proportionality is raised with respect to delegated legislation... It is suffice to say that, having regard to the high threshold of reasonable proportionality going to the validity of delegated legislation, *this approach requires caution*. Counterfactual explorations run the risk of descending to a lower level test and second-guessing the merits of the delegated legislation.' (at [65]) (emphasis added).

<sup>81</sup> *Coleman v Power* (2004) 220 CLR 1, [26] (Gleeson CJ), [320] (Heydon J) (Their Honours applied the 'reasonably appropriate and adapted' test, though perhaps this preference for the terminology of the low threshold test is only due to constraints of the *Lange* precedent).

<sup>82</sup> *Ibid* [31] (Gleeson CJ), [238] (Heydon J).

<sup>83</sup> *Ibid* [31].

<sup>84</sup> *Ibid* [238].

<sup>85</sup> *Coleman v Power* (2004) 220 CLR 1, [31].

alternatives if the law fell within the first category.

The direct/incidental burden distinction originates from the judgments of Mason CJ, Deane, Toohey JJ and McHugh JJ in *Australian Capital Television Pty Ltd v Commonwealth*.<sup>86</sup> Justices Deane and Toohey here held that

a law whose character is that of a law with respect to the prohibition or restriction of communications about government or governmental instrumentalities or institutions ('political communications') will be much more difficult to justify as consistent with the implication than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications.<sup>87</sup>

The High Court has repeatedly accepted this distinction since *ACTV*.<sup>88</sup> However, that is not to say that a majority of the Court has accepted the high threshold proportionality test for laws whose effect on political communication is incidental. Indeed, most judges appear to have rejected the applicability of the weaker test, along with the wide margin of appreciation principle, in this context.<sup>89</sup>

In fact, four justices of the Court in *Coleman v Power* rejected the argument that the second limb of the *Lange* test should be weakened to a high threshold proportionality test when the law only incidentally burdens political communication.<sup>90</sup> Justice Kirby held that the high threshold test had 'never attracted a majority of this Court', and if it were to gain acceptance by the High Court, it 'would involve a surrender to the legislature of part of the judicial power that belongs under the Constitution to this Court'.<sup>91</sup> Likewise, McHugh J defended the right of the Court to consider alternatives:

<sup>86</sup> (1992) 177 CLR 106, 143 (Mason CJ), 169 (Deane and Toohey JJ), 234-235 (McHugh J) ('ACTV').

<sup>87</sup> Ibid 169.

<sup>88</sup> *Levy v Victoria* (1997) 189 CLR 579, 618-619 (Gaudron J), 645 (Kirby J); *Coleman v Power* (2004) 220 CLR 1, [30]-[31] (Gleeson CJ), 326 (Heydon J); *Hogan v Hinch* (2011) 243 CLR 506, [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1, [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [78] (Kiefel J); *Corporation City of Adelaide* (2013) 249 CLR 1, [217] (Crennan and Kiefel JJ); *Monis v The Queen* (2013) 249 CLR 92, [64] (French CJ), [342] (Crennan, Kiefel and Bell JJ); *Tajjour* (2014) 88 ALJR 860, [151] (Gageler J).

<sup>89</sup> See, eg, *Unions NSW* (2013) 252 CLR 530, [33]-[34], [45] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (The plurality observe that the high threshold test and the margin of appreciation doctrine have not been accepted by a majority of the Court, nor has it 'been seriously debated since the decision in *Lange*'), [133]-[134] (Keane J) (His Honour appears to prefer the high threshold test, yet acknowledges that constraints of the *Lange* formulation prevent his Honour from applying it).

<sup>90</sup> *Coleman v Power* (2004) 220 CLR 1, [87] (McHugh J), [196] (Gummow and Hayne JJ), [212] (Kirby J).

<sup>91</sup> Ibid [212].

the Constitution's tolerance of the legislative judgment ends once it is apparent that the selected course unreasonably burdens the communication given the availability of other alternatives. The communication will not remain free in the relevant sense if the burden is unreasonably greater than is achievable by other means. Whether the burden leaves the communication free is, of course, a matter of judgment. But there is nothing novel about Courts making judgments when they are asked *to apply* a principle or rule of law. Much of the daily work of courts requires them to make judgments as to whether a particular set of facts or circumstances is or is not within a rule or principle of law.<sup>92</sup>

It is at least clear then, that the same standard of review is to be applied regardless of whether the impugned law directly or incidentally burdens political communication. Thus the availability of less burdensome alternative measures will be relevant to determining the second limb of *Lange*. What remains unclear, however, is the standard required of less burdensome alternatives, and whether the presence of less burdensome alternatives will necessarily invalidate law.

## 2 A High Standard for Alternatives?

The application of the reasonable necessity test has varied considerably, and it is unclear what standard should be adopted in undertaking this enquiry.

Justices Crennan, Kiefel and Bell in *Monis v The Queen* and *Tajjour* appear to support a high standard for the necessity enquiry.<sup>93</sup> In the later case their Honours hold that, to be a 'true alternative', the less burdensome alternative must be 'as practicable' and 'as effective in achieving the legislative purpose' as the means chosen by the legislature.<sup>94</sup> For the plurality, this means that a true alternative must be as capable of fulfilling the legislative purpose, 'quantitatively, qualitatively, and probability-wise.'<sup>95</sup> Anything less than this standard is impermissible.<sup>96</sup> Likewise in *Monis v The Queen*, the plurality observed that, '[g]iven the proper role of the courts in assessing legislation for validity', a conclusion that the impugned provision is invalid due to the existence of alternative means, 'would only be reached where the alternative means were obvious and compelling.'<sup>97</sup>

Chief Justice French in *Tajjour* also appears to support this high standard approach to the necessity enquiry. His Honour cited, with approval, Crennan,

<sup>92</sup> Ibid [100] (emphasis in original).

<sup>93</sup> This high standard is comparable to Barak's strict necessity test, discussed in Chapter II.C.

<sup>94</sup> *Tajjour* (2014) 88 ALJR 860, [114] (citations omitted).

<sup>95</sup> Ibid [110], citing Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, (Cambridge University Press, 2012), 324.

<sup>96</sup> *Tajjour* (2014) 88 ALJR 860, [115].

<sup>97</sup> *Monis v The Queen* (2013) 249 CLR 92, [347].

Kiefel and Bell JJ's formulation of the test in *Monis v The Queen*, finding that the 'cautionary qualification that alternative means be "obvious and compelling"' was essential to prevent the Court from exceeding 'their constitutional competence'.<sup>98</sup>

This can be contrasted to the low standard of necessity analysis applied by the High Court in *ACTV*. Later judgments have interpreted the *ACTV* decision as applying a necessity test to invalidate the impugned provisions. For example, in *Lange*, the High Court provides the decision of 'a majority of this Court' in *ACTV* as an example of what might contravene the second limb of the test. Their Honours explained that the impugned law in *ACTV* was found to be invalid 'because there were other less drastic means by which the objectives of the law could be achieved'.<sup>99</sup>

However, out of the seven judges deciding that case, McHugh J was the only judge to mention alternatives in his judgment, and even then it is only in one sentence. His Honour states that '[i]f the electoral process has been, or is likely to be, corrupted by the cost of television and radio advertising, means less drastic than the provisions of Pt IIID are available to eradicate the evil.'<sup>100</sup> His Honour does not proceed to identify what less drastic means are available, or establish how they would be equally as effective as the impugned provisions or even less burdensome on political communication.

By French CJ standards, it appears as though McHugh J may be exceeding his Honour's 'constitutional competence'. Contrary to the 'obvious and compelling' test, it seems that even the mere possibility of 'less drastic means' will satisfy McHugh J's necessity analysis. As this test was later accepted by a unanimous Court in *Lange*, the question arises as to which standard is to be applied?

### 3 Are Alternatives Determinative?

Another area of uncertainty surrounding the scope of the reasonable necessity test is whether the existence of 'true alternatives' will necessarily lead to invalidity. Justice McHugh, in *Coleman v Power*, seems to suggest that it will, as evidenced by his Honour finding that '[t]he communication will not remain free in the relevant sense if the burden is unreasonably greater than is achievable by other means'.<sup>101</sup>

This is consistent with the approach taken by Crennan, Kiefel and Bell JJ in *Monis v The Queen* and *Tajjour*, though the plurality are perhaps more clear in their support for this proposition. For example, in *Monis v The Queen*, their Honours held that '[w]here there are other, less drastic, means of achieving a

<sup>98</sup> *Tajjour* (2014) 88 ALJR 860, [36].

<sup>99</sup> *Lange* (1997) 189 CLR 520, 568.

<sup>100</sup> *ACTV* (1992) 177 CLR 106, 238.

<sup>101</sup> *Coleman v Power* (2004) 220 CLR 1, [100].

legitimate object, the relationship with the legislative purpose may not be said to be proportionate.’<sup>102</sup> Similarly in *Tajjour*, their Honours find that the presence of ‘equally practicable’ alternatives will result in a finding that ‘the legislature has exceeded the limits of its power to make laws which burden the freedom’.<sup>103</sup>

However, other members of the Court in *Tajjour* did not endorse this view. By contrast, Gageler J found that whilst less burdensome alternatives ‘have long been recognised as relevant to the inquiry’, they will not necessarily invalidate a law effectively burdening political communication.<sup>104</sup> His Honour held that ‘[t]he weight they will be accorded will vary with the nature and intensity of the burden to be justified’.<sup>105</sup>

A similar proposition can be drawn from French CJ’s dismissive treatment of proffered alternatives in this case. His Honour was able to conclude that the burden of s 93X on political communication, ‘measured by the breadth of its application to entirely innocent habitual consorting’, was disproportionate. Though in doing so, his Honour did not ‘require further support by the identification of less restrictive alternatives to s 93X in its present form’.<sup>106</sup> This reasoning seems to accord with Gageler J’s view that when determining the proportionality of an impugned provision, the presence or absence of less restrictive alternatives ‘will not necessarily be decisive’.<sup>107</sup>

Therefore it remains unclear whether a law that fails the necessity test will necessarily be, *ipso facto*, disproportionate.

## D Balancing

The issue of balancing under the second limb of the *Lange* test has been extremely controversial,<sup>108</sup> and the High Court has been reluctant to accept that

<sup>102</sup> *Monis v The Queen* (2013) 249 CLR 92, [347].

<sup>103</sup> *Tajjour* (2014) 88 ALJR 860, [116].

<sup>104</sup> *Ibid* [152].

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid* [46].

<sup>107</sup> *Ibid* [152].

<sup>108</sup> See, eg, Tom Campbell and Stephen Crilly, ‘The Implied Freedom Twenty Years On’ (2011) 30 *University of Queensland Law Journal* 59, 74 (‘If one accepts that the implied freedom involves a balancing of interests, a weighing up of policies’ complex effects, and ultimately a measure of the adjudicators’ personal preferences, then the High Court is not the appropriate body to decide these cases’). See generally Dan Meagher, ‘The Protection of Political Communication Under the Australian Constitution’ (2005) 28 *UNSW Law Journal* 30; Elisa Arcioni, ‘Politics, Police and Proportionality – An Opportunity to Explore the Lange Test: Coleman v Power’ (2003) 25 *Sydney Law Review* 379; Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668.

explicit balancing is ‘appropriate and useful in the Australian context’.<sup>109</sup> Indeed, McHugh J in *Coleman v Power*, in response to various criticisms about the reasonably appropriate and adapted test, even goes so far as to hold that there is ‘no question of ad-hoc balancing involved in the two-pronged test formulated in *Lange*’.<sup>110</sup>

However, on close analysis of the implied freedom cases, judicial balancing has played an important role in deciding the validity of legislation since the initial implication of a freedom in *Nationwide News Pty Ltd v Wills*<sup>111</sup> and *ACTV*.<sup>112</sup> Though this balancing is usually conducted in a discreet and obscure manner.<sup>113</sup> There are two main ways the High Court has attempted to avoid balancing: McHugh J’s ‘trump’ approach in *Coleman v Power*, and Gageler J’s categorical approach in *Tajjour*.

### 1 *The Implied Freedom as a ‘Trump’ and the Free Flow of Political Communication*

As mentioned above, McHugh J in *Coleman v Power* explicitly states that the second limb of the *Lange* test does not involve balancing. According to McHugh J, ‘[f]reedom of communication always trumps federal, State and Territorial powers when they conflict with the freedom’.<sup>114</sup> Although his Honour here seems to suggest that the implied freedom is absolute, McHugh J later clarifies that it is not and may be curtailed in order to ‘enhance or protect’ communication on political and governmental matters.<sup>115</sup>

Thus the implied freedom has limits which must be defined. However, from the understanding of the implied freedom of political communication as a

<sup>109</sup> *Tajjour* (2014) 88 ALJR 860, [130] (Crennan, Kiefel and Bell JJ). (Their Honours here were referring to the strict proportionality component of Barak’s statement of proportionality, which is discussed further in Chapter II.D).

<sup>110</sup> *Coleman v Power* (2004) 220 CLR 1, [88].

<sup>111</sup> (1992) 177 CLR 1.

<sup>112</sup> See, eg, Stone, above n 87, 681-685. (‘Although the Court has not always been explicit about it, it is clear that the balancing of the interest pursued by the law against that pursued by the freedom does form part of its analysis’) (citations omitted).

<sup>113</sup> However there are some judges who openly balance: see, eg *ACTV* (1992) 177 CLR 106, 143 (Mason CJ) (‘Whether those restrictions are justified calls for a balancing of the public interest in free communication against the competing interest which the restriction is designed to serve’); *Monis v The Queen* (2013) 249 CLR 92, [145]-[146] (Hayne J) (His Honour recognises the need for the court to compare ‘how the law curtails or burdens political communication on the one hand and how it relates to what has been identified as the law’s legitimate end on the other’), [278] (Crennan, Kiefel and Bell JJ) (Perhaps less explicitly, their Honours apply a separate test of ‘compatibility’ of the impugned law with the implied freedom, which incorporates the ‘enquiry into whether the burden imposed by the law upon the implied freedom is too great or “undue”’) (citations omitted).

<sup>114</sup> *Coleman v Power* (2004) 220 CLR 1, [91].

<sup>115</sup> *Ibid* [97].



‘trump’, which must remain ‘free’,<sup>116</sup> McHugh J is able to avoid explicitly balancing when determining these limits. Essentially, his Honour refuses to acknowledge that a justified limitation on political communication burdens the implied freedom at all. ‘Hence,’ his honour concludes in *Coleman v Power*, ‘a law that imposes a burden on the communication of political and governmental matter may yet leave the communication free in the relevant sense’.<sup>117</sup> Likewise, Keane J, in his dissenting judgment in *Unions NSW*, seems to favour McHugh J’s understanding of the operation of the implied freedom.<sup>118</sup> His Honour emphasises the need for an impugned law to be ‘compatible with the free flow of political communication’.<sup>119</sup>

However, this reasoning still requires an element of balancing to determine when laws, which impose burdens on political communication, still leave these communications free. For example, in considering whether the prohibition in s 7(1)(d) could be justified on the basis that it prevents the intimidation of participants in debates on political and governmental matters, McHugh J finds that:

insults are a legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom. Such a prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted to maintaining the system of representative government.<sup>120</sup>

The language used here – ‘justified’ and ‘goes beyond’ – clearly indicates that McHugh J has made a value judgment about the importance of protecting political communication in this instance. His Honour has weighed up this importance with the need to prevent the ‘chilling effect on political debate’<sup>121</sup> these ‘insults’ may have, and has concluded that an unqualified prohibition is disproportionate.

Similarly Keane J, when discussing whether s 95G(6) is proportionate, held that the harms caused by the impugned provision, in discriminating between sources of political communication, outweighed the benefits. His Honour began by assessing the proffered justification for the impugned provision, which was to prevent ‘the possibility that political communication emanating from a political party may not accurately reflect the views of the members of the affiliate’.<sup>122</sup> Then his Honour found this to be insufficient to outweigh the

<sup>116</sup> Ibid.

<sup>117</sup> *Coleman v Power* (2004) 220 CLR 1, [98].

<sup>118</sup> *Unions NSW* (2013) 252 CLR 530, [133]–[134].

<sup>119</sup> Ibid.

<sup>120</sup> *Coleman v Power* (2004) 220 CLR 1, [105].

<sup>121</sup> Ibid.

<sup>122</sup> *Unions NSW* (2013) 252 CLR 530, [166].

### burden on political communication:

The effect of this deferential treatment is to distort the free flow of political communication by favouring entities, such as third-party campaigners, who may support a political party, but whose ties are not such to make them affiliates under the rules of that party even though they may promulgate precisely the same political messages... To discriminate between sources of political communication in this way... is to distort the flow of political communication.

This distortion of political communication cannot be regarded as appropriate and adapted to enhance or protect the free flow of political communication within the federation.<sup>123</sup>

It is clear that this reasoning involves some degree of balancing, despite McHugh J's insistence that the second question posed by *Lange* is 'not a question of giving special weight in particular circumstances to that freedom. Nor is it a question of balancing a legislative or executive end or purpose against that freedom.'<sup>124</sup> Even Sir Anthony Mason, when discussing the approaches of Keane J and McHugh J extra-curially, found that 'it is difficult to see how this method can operate without some balancing of conflicting interests'.<sup>125</sup>

## 2 The Categorisation Alternative

The categorisation approach, similar to that employed by the United States Supreme Court,<sup>126</sup> is another way judges have attempted to avoid balancing. Justice Gageler is a strong proponent of this approach.<sup>127</sup> In *Tajjour*, his Honour, although clarifying that the High Court has not 'overtly adopted a categorical approach of the kind used in the United States', states that the Court has recognised that the 'sufficiency of the justification will be calibrated to the

<sup>123</sup> Ibid [167]-[168].

<sup>124</sup> *Coleman v Power* (2004) 220 CLR 1, [91].

<sup>125</sup> Sir Anthony Mason, 'Proportionality and its use in Australian Constitutional Law' (Speech delivered at the Sir Anthony Mason Lecture, The University of Melbourne, 6 August 2015) <<http://www.youtube.com/watch?v=4xOsIVLTWASg>>. See also Nicholas Aroney, 'Justice McHugh, Representative Government & Elimination of Balancing' (2006) 28 *Sydney Law Review* 505, 522 (arguing that it is 'impossible to apply McHugh J's test without balancing the implied freedom against competing interests'); Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5<sup>th</sup> ed, 2008) 551 (arguing that '[i]t is difficult to see how this method can operate without some balancing of conflicting interests and without having some regard to the importance of the interest that the law seeks to enhance or protect').

<sup>126</sup> See, eg, *United States v Alvarez* 617 F 3d 1198 (2012); *United States v Carolene Products Co.* 304 US 144 (1938). See further, Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 *The Yale Law Journal* 3094. Though note that this two-tiered review approach has not attracted a majority of the Court: see Chapter I.D.1

<sup>127</sup> Justice Gageler draws substantially on the judgment of Mason CJ in *ACTV* (1992) 177 CLR, who also favours the tiered approach at [142].

nature and intensity of the burden' on political communication.<sup>128</sup> If the impugned law has a direct burden on political communication, his Honour holds that the 'establishment of a sufficient justification may require "close scrutiny"'. However, if the impugned law only incidentally burdens political communication, the 'establishment of a sufficient justification may require nothing more than demonstration that the means adopted by the law are rationally related to the pursuit of the end of the law, which has already been identified as legitimate'.<sup>129</sup> Justice Gageler is clearly drawing on the strict scrutiny/rational connection two-tiered approach of the United States Supreme Court.

By applying a categorical approach, Gageler J can avoid explicitly balancing the importance of the impugned provision with the harm caused to political communication. However the categorical approach does not eliminate balancing entirely.<sup>130</sup> Instead of weighing the importance of competing values in each decision, however, the Court balances in the abstract, when defining the different categories. Thus judicial policy-making is involved, 'no matter how categorical the body of law becomes'.<sup>131</sup>

Therefore it is clear that whilst the High Court has been reluctant to explicitly balance, balancing is an integral part of all judgments made under the second limb of the *Lange* test.<sup>132</sup>

### E Concluding Comments

The above analysis of the High Court's divergent approach to proportionality produces four conclusions. First, there is confusion surrounding the identification of the 'end' of an impugned law, with some judges identifying this as the law's means, and others identifying it as the law's purpose. Secondly, this confusion between purpose and means has forestalled the independent application of a rational connection enquiry. Thirdly, there is disagreement over the standard required when identifying 'true alternatives', and whether the

<sup>128</sup> *Tajjour* (2014) 88 ALJR 860, [151].

<sup>129</sup> *Ibid*, citing *ACTV* (1992) 177 CLR 106, 142 (Mason CJ).

<sup>130</sup> See further Niels Peterson, 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2013) 14 *German Law Journal* 1387, 1406 ('If certain constitutional rights enjoy the protection of strict scrutiny, while others are subject to intermediate scrutiny or the rational basis test, the tiered system attributes different values to different rights. At least the establishment of the categories thus requires an implicit balancing.') (citations omitted).

<sup>131</sup> Nicholas Aroney, 'The Freedom of Political Communication since *Lange*: Commentary' in Adrienne Stone and George Williams (eds) *The High Court at the Crossroads: Essays in Constitutional Law* (The Federation Press, 2000) 21, 25.

<sup>132</sup> See also Campbell and Crilly, above n 87, 70 ('we do not consider that the properly legalistic moves adopted by the High Court over the succeeding years are successful in excluding the difficult empirical and controversial moral questions from implied rights jurisprudence').

presence of these alternatives will be determinative. And fourthly, whilst the Court has been reluctant to openly balance, judges have been covertly balancing since the freedom of political communication was first implied.

It is therefore clear that the identification and application of a consistent, rigorous and legal proportionality test would enhance the doctrine in Australia. Chapter II considers such a method: Barak's statement of proportionality.

## II BARAK'S STATEMENT OF PROPORTIONALITY

Outside of Australia, proportionality is a 'legal construction'<sup>133</sup> that dominates constitutional law systems around the world.<sup>134</sup> It is a 'rule of reason'<sup>135</sup> that is widely accepted as a basic principle of 'generic constitutional law'.<sup>136</sup> According to Aharon Barak, 'we now live in the age of proportionality'.<sup>137</sup>

The principle can be applied in various contexts with different meanings.<sup>138</sup> In the context of constitutional rights jurisprudence, Barak defines proportionality as 'the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible'.<sup>139</sup> On this view of proportionality, a law limiting a constitutional right will only be constitutionally valid if it is proportional.

Barak's statement of the principle is derived from German Basic Law,<sup>140</sup> and consists of four separate enquiries. Under this approach, the court will ask:

1. Does the law limiting the human right serve a proper purpose?<sup>141</sup>
2. Are the measures adopted to achieve such a limitation rationally connected to the fulfilment of that purpose?<sup>142</sup>
3. Are the means adopted necessary, in that there aren't any less restrictive,

<sup>133</sup> Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012), 131.

<sup>134</sup> See, eg, *ibid* 181-210; Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012); Grant Huscroft, Bradley W. Miller and Grégoire Webber (eds) *Proportionality and The Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 31, 31.

<sup>135</sup> Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 86.

<sup>136</sup> David S Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652, 695; Barak, above n 1, 146 (arguing that '[p]roportionality is a central term in modern constitutional law').

<sup>137</sup> Barak, above n 1, 457.

<sup>138</sup> *Ibid* 146 (observing that the principle 'serves different and various functions. Its meanings may change with the different roles it purports to fill'). See also Kiefel, above n 3, 85 (Her Honour remarks that in Australia, '[t]he term is employed in many disciplines, including mathematics, musical theory and philosophy').

<sup>139</sup> Barak, above n 1, 3. Barak defines constitutional rights to include human rights explicitly and implicitly drawn from a constitution, therefore including Australia's implied freedom of political communication within its scope: at 49-58.

<sup>140</sup> See *ibid* 178-181.

<sup>141</sup> See *ibid* 245-302. This thesis will refer to this stage as 'proper purpose'.

<sup>142</sup> See *ibid* 303-316. This stage will be referred to as 'rational connection'.

but equally effective measures?<sup>143</sup>

4. Is there proportionality between the importance of achieving the purpose and the importance of protecting the right?<sup>144</sup>

As mentioned above, Barak's statement of the principle falls under the genus of 'structured proportionality', along with the approaches taken by the constitutional courts of Germany,<sup>145</sup> Canada,<sup>146</sup> Israel,<sup>147</sup> the European Court of Human Rights<sup>148</sup> and the United Kingdom.<sup>149</sup> However, not all of these legal systems align with Barak's interpretation of structured proportionality. Accordingly, this Chapter will discuss how each component is understood under Barak's statement of the principle, and compare how the stages are applied in the different jurisdictions.

### A Proper Purpose

Similar to the legitimate end enquiry discussed in Chapter I, the proper purpose component examines whether the purpose of the law limiting the constitutional right is legitimate. However, Barak's statement of proportionality is clear that this first stage does not consider the means used to achieve such a purpose. Further, it does not look to the effect of the law on the constitutional right. Instead, the proper purpose stage 'focuses on the law's purpose rather than its consequences'.<sup>150</sup>

The premise behind proper purpose is that a constitutional democracy requires more than just legal authorisation to limit a constitutional right: '[r]ather, a constitutional democracy requires, in addition to legality, a justification for the limitation on the constitutional right to be valid.'<sup>151</sup> Accordingly, '[o]nly a legitimate purpose can justify a limitation of a fundamental right',<sup>152</sup> and this legitimacy is determined by the democratic values of a state, embodied in the constitution.<sup>153</sup>

Barak puts forward general categories of legislative objectives that may be

<sup>143</sup> See *ibid* 317-339. This stage will be referred to as 'necessity'.

<sup>144</sup> See *ibid* 340-370. This stage will be referred to as 'strict proportionality', though Barak calls this 'proportionality *stricto sensu*': at 340.

<sup>145</sup> See, eg, *Secret Tape Recordings* Bundesverfassungsgericht [German Constitutional Court] 2 BvR 454/71, 31 January 1973 reported in (1973) 34 BVerfGE 238.

<sup>146</sup> See, eg, *R v Oakes* [1986] 1 SCR 103.

<sup>147</sup> See, eg, *United Mizrahi Bank Ltd v. Migdal Cooperative Village* (1995) CA 6821/93, 49(4)P.D.221 (Supreme Court of Israel).

<sup>148</sup> See, eg, *Handyside v The United Kingdom* (1976) 24 Eur Court HR (ser A) 23.

<sup>149</sup> See, eg, *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39.

<sup>150</sup> Barak, above n 1, 246-247.

<sup>151</sup> *Ibid* 245.

<sup>152</sup> Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 387.

<sup>153</sup> Barak, above n 1, 251-277.

considered ‘necessary to guarantee the continued shared existence of the people in a democracy’.<sup>154</sup> These include national security, public order and tolerance.<sup>155</sup> However, Barak acknowledges that the precise scope of proper purposes is unclear. This lack of clarity constitutes one of ‘the main problems of the notion of proper purpose’.<sup>156</sup>

In an attempt to narrow the proper purpose enquiry, the Supreme Court of Canada and the United Kingdom have added a qualification that the law’s purpose must be ‘pressing and substantial’.<sup>157</sup> In *R v Oakes*,<sup>158</sup> the Canadian Court held that

the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.<sup>159</sup>

However, commentary has criticised this superimposed criterion of urgency as a ‘premature anticipation of the final balance’.<sup>160</sup> Dieter Grimm, a former Justice of the German Federal Constitutional Court, argues that it is inappropriate for a court to consider the importance of the law’s purpose, a correlational notion, at the first stage without proper regard to the burden on the constitutional right. Grimm asserts that the question of whether the importance of the law is sufficient to justify its burden on a right can only be ascertained after all four components of proportionality have been considered.<sup>161</sup>

The separation of powers doctrine is another reason given for courts to refrain from considering the importance of a law’s purpose at the first stage.<sup>162</sup>

<sup>154</sup> Ibid 256.

<sup>155</sup> Ibid 267-273.

<sup>156</sup> Ibid 256. For more discussion on this problem, see generally Mattias Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’ in George Pavlakos (ed) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007) 131; Möller, above n 2, ch 7.

<sup>157</sup> *R v Big Drug Mart Ltd* [1985] 1 SCR 295, 352; *Oakes* [1986] 1 SCR 103, [69] (Dixon CJ, Chouinard, Lamer, Wilson and Le Dain JJ). See also *Bank Mellat v Her Majesty’s Treasury (No 2)* [2013] UKSC 39, [74] (Lord Reed) (His Honour held that the first enquiry of proportionality considers ‘whether the objective of the measure is sufficiently important to justify the limitation of a protected right’).

<sup>158</sup> [1986] 1 SCR 103 (*Oakes*).

<sup>159</sup> Ibid [69] (Dixon CJ, Chouinard, Lamer, Wilson and Le Dain JJ).

<sup>160</sup> Grimm, above n 20, 388.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid (arguing that ‘[w]hat is important enough to become an object of legislation is a political question and has to be determined *via* the democratic process’).

Barak affirms this, and draws the distinction between a court ruling that the purpose is unconstitutional (first stage), versus a court ruling that the means chosen by the legislator are unconstitutional (last stage). Barak explains:

In these kinds of cases, therefore, it is not the purpose's nature giving rise to the constitutional issue, but rather the disproportionality of the means chosen to achieve that purpose. The lack of proportionality does not turn the purpose into an 'improper' one; the conflict with the constitutional provision is not a matter of purpose but rather of the means chosen to achieve that purpose, means that limit the constitutional right in a disproportional manner.<sup>163</sup>

Accordingly, Barak argues that considerations of separation of powers should operate in this context to ensure that the widest discretion is given to the legislator in choosing a purpose.<sup>164</sup>

### B *Rational Connection*

The rational connection stage asks whether the measures adopted by the impugned law are capable of advancing that law's purpose. They do not have to be the only means capable of realising the purpose, nor do they have to completely achieve the purpose, provided their contribution is not marginal or negligible.<sup>165</sup> Thus it will be rare for a law to fail the rational connection stage of the analysis, and as such, the second component is not considered to be as important as the other stages. In effect, the purpose of the rational connection stage is 'to eliminate the small number of runaway cases'.<sup>166</sup>

### C *Necessity*

The next stage of Barak's statement of the principle requires the measures adopted by the impugned law to be strictly necessary. It is a test of 'the less restrictive means'.<sup>167</sup> A law will not be necessary where there are other available alternative measures, which can realise the purpose of the limiting law to the same extent as the measures chosen by the legislature, whilst also imposing a lesser burden on the constitutional right. It is based on the expectation that the legislator has explored all the possible ways of achieving the law's purpose, and has chosen the least restrictive means possible.<sup>168</sup>

<sup>163</sup> Barak, above n 1, 248.

<sup>164</sup> Ibid 248, 401.

<sup>165</sup> Ibid 305. See also Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *The Cambridge Law Journal* 174, 189.

<sup>166</sup> Grimm, above n 20, 389.

<sup>167</sup> Barak, above n 1, 317.

<sup>168</sup> Ibid 317.

The necessity test is an expression of the idea of ‘Pareto-optimality’.<sup>169</sup> Pareto-optimality is an economic theory that describes the state of affairs where no change could be made to benefit someone, without causing some detriment to someone else.<sup>170</sup> As Professor Julian Rivers explains, ‘an act is necessary if no alternative act could make the victim better off in terms of right-enjoyment without reducing the level of realisation of some other constitutional interest.’<sup>171</sup>

Barak’s understanding of this component aligns with the ‘strict interpretation of necessity’,<sup>172</sup> as does the approach favoured by Professor Robert Alexy,<sup>173</sup> the German Constitutional Court<sup>174</sup> and the Israeli Supreme Court.<sup>175</sup> The strict necessity test requires the alternative measures to realise the law’s purpose ‘at the same level of intensity and efficiency’<sup>176</sup> as the impugned measures, in order to render the law strictly unnecessary. Thus alternative measures that burden other constitutional rights will not suffice, nor will those that cost the state more to implement.<sup>177</sup>

A strict interpretation of necessity can be contrasted to the approach taken by the Canadian Supreme Court. The Court here has held that the limiting law will not be necessary if ‘there is an alternative, less drastic means of achieving the objective *in a real and substantial manner*’.<sup>178</sup> Accordingly, the Court considers a ‘more realistic threshold of “acceptability”’,<sup>179</sup> and imports a greater degree of balancing into this stage of the analysis. As Professor David Bilchitz explains, under this approach

it becomes possible to recognise that two measures may both realise a government’s objective in a substantive manner though one may be

<sup>169</sup> Rivers, above n 33, 198. See also *ibid* 320 (though Barak terms it ‘Pareto efficiency’); Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2002) 105, 398 [trans of: *Theorie der Grundrechte* (first published 1985)].

<sup>170</sup> See, eg, Robert Cooter and Thomas Ulen, *Law and Economics* (Glenview, Scott, Foresman and Company, 4<sup>th</sup> ed, 1988) 45.

<sup>171</sup> Rivers, above n 33, 198.

<sup>172</sup> For more discussion on the strict formulation of the necessity test, see generally David Bilchitz, ‘Necessity and Proportionality: Towards a Balanced Approach?’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 41.

<sup>173</sup> Alexy, above n 37, 67-68, 399.

<sup>174</sup> See, eg, *Cannabis decision* Bundesverfassungsgericht [German Constitutional Court], 2 BvR 20131/92, 9 March 1994 reported in (1994) 90 BVerfGE 145, [174].

<sup>175</sup> See, eg, *Beit Sourik Village Council v Government of Israel* (2004) HCJ 2056/04 (Supreme Court of Israel sitting as the High Court of Justice).

<sup>176</sup> Barak, above n 1, 323.

<sup>177</sup> *Ibid* 324.

<sup>178</sup> *Alberta v Hutterian Brethren of Wilson Company* (2009) SCC 37, [55] (McLachlin J) (emphasis added).

<sup>179</sup> Bilchitz, above n 40, 57.



better at doing so than another. If the alternative to the government measure impacts upon rights to a lesser degree (even is less effective from the perspective of realising the objective), then it has to be determined whether the gain for fundamental rights can off-set the loss in respect of the government's objective. Here we see that a balancing component becomes part of the necessity enquiry itself.<sup>180</sup>

Barak is critical of the Canadian approach. He argues that the necessity test, whilst involving a value-laden aspect, is not a balancing test.<sup>181</sup> And whilst this may create 'weaknesses' in the test,<sup>182</sup> Barak argues this is necessary to avoid covert balancing too early on in the proportionality analysis:

Judges should be honest with themselves. They must speak the truth and the truth is that in many cases the judge reveals that an alternative means that limits the right in question to a lesser extent does exist; but upon further examination it turns out that these means may not achieve the law's purpose in full, or that in order to achieve those purposes in full the state has to change its national priorities or limit other rights. In those cases, the judge should rule that the law is necessary, and the less limiting means cannot achieve the intended purpose. Then, the judge must proceed to the next stage of the examination – and determine the constitutionality of the law within the framework of proportionality *stricto sensu*.<sup>183</sup>

#### D Strict Proportionality

Under strict proportionality the court must ask whether the legislature has struck the proper balance between 'the social benefit of realizing the proper purpose and the social benefit of avoiding the limitation of the constitutional right'.<sup>184</sup> This stage is fundamentally different from the other three stages, which are purely means-end analyses.<sup>185</sup>

The balancing inherent in strict proportionality is normative,<sup>186</sup> and requires judges to make value judgments about the importance of the limiting law on one side of the scales, versus the importance of the constitutional right on the other. However, whilst it is accepted in several jurisdictions that this balancing is a crucial part of the proportionality analysis,<sup>187</sup> there remains

<sup>180</sup> Ibid.

<sup>181</sup> Barak, above n 1, 338.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid 338-339 (citations omitted).

<sup>184</sup> Aharon Barak, 'Proportionality (2)' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 738, 744.

<sup>185</sup> Rivers, above n 33, 200.

<sup>186</sup> Barak, above n 1, 346. See also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 26-28.

<sup>187</sup> Balancing is accepted in South Africa (*Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631, 656), Canada (*Oakes* [1986] 1 SCR 103), the United Kingdom (*Gaughran v The*

disagreement about how to actually conduct such a balance.<sup>188</sup> A critical question arises: What is the appropriate legal methodology to determine the relative weight of each side of the scales?

To counter this problem, Barak proposes his basic balancing rule, which is conducted in terms of ‘marginal social importance’.<sup>189</sup> Under this approach, the courts are to compare the ‘marginal social importance’ of realising the law’s purpose, with the ‘marginal social importance’ of preventing the harm caused to the constitutional right. Thus Barak’s basic balancing rule allows courts to determine the relative weight of each side of the scales and the proper relationship between the two. Barak explains:

The higher the social importance of preventing the marginal harm to the constitutional right at issue and the higher the probability of such an additional marginal harm occurring, then the marginal benefits created by the limiting law – either to the public interest or to other constitutional rights – should be of a higher social importance and more urgent and the probability of its realization should be higher.<sup>190</sup>

Factors affecting the ‘marginal social importance’ of realising the purpose include the harm caused to the public interest if the purpose is not achieved, and the probability of the law fulfilling its purpose.<sup>191</sup> The ‘marginal social importance’ of preventing the harm caused to the constitutional right will be determined by the relative normative status of the constitutional right compared to other rights, the intensity of the limitation of the right, and the probability that the law will actually limit the constitutional right.<sup>192</sup> Ultimately though, Barak concedes that questions of ‘marginal social importance’ will be guided by the history, political structure, social values, and political and

*Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29), Germany (*Cannabis decision* Bundesverfassungsgericht [German Constitutional Court], 2 BvR 20131/92, 9 March 1994 reported in (1994) 90 BVerfGE 145, [174]) and Israel (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* (1995) CA 6821/93, 49(4)P.D.221 (Supreme Court of Israel)).

<sup>188</sup> See, eg, Jochen von Bernstorff, ‘Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 63; Niels Petersen, ‘How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law’ (2013) 14 *German Law Journal* 1387, 1388; Barak, above n 51, 745.

<sup>189</sup> Barak, above n 1, 362-370.

<sup>190</sup> Ibid 363-364. Barak’s balancing rule can be distinguished from Alexy’s ‘Law of Balancing’, which only considers the degree of the constitutional rights limitation, rather than its marginal social importance. See also Alexy, above n 37.

<sup>191</sup> Barak, above n 1, 357-358.

<sup>192</sup> Ibid 358-362.

economic ideologies of a country.<sup>193</sup>

The question therefore arises as to whether courts are equipped to adequately discern these ideas and values. Indeed, much of the criticism of Barak's statement of proportionality is targeted towards the political nature and 'incommensurability' of these values.<sup>194</sup> These criticisms, along with others targeted towards structured proportionality, will be discussed in Chapter III.

### III WHY ADOPT BARAK'S STATEMENT OF PROPORTIONALITY?

As established in Chapter I, the High Court's approach under the second limb of the *Lange v Australian Broadcasting Corporation*<sup>195</sup> test has varied considerably. The inconsistencies in the test's application has led to significant criticism of the proportionality principle and uncertainty surrounding the scope of the implied freedom.<sup>196</sup> At least then, the adoption of Barak's statement of proportionality would promote a more consistent application of the principle, and to some extent resolve the uncertainties highlighted in Chapter I. Barak argues that the structured approach 'establishes a uniform analytical framework'<sup>197</sup> to assess the validity of legislation that may affect the implied freedom. This in turn would produce greater confidence in, and understanding of, the Court's use of proportionality under the second limb of the *Lange* test.

Clarification of the approach taken by the High Court and consistency in application are perhaps the two most obvious benefits in support of the Court adopting Barak's statement of proportionality. However, they do little to explain why the High Court should adopt structured proportionality over any other approach that the High Court has already taken. Arguably these same benefits would be produced by the High Court adopting Gageler J's categorical approach in *Tajjour v New South Wales*,<sup>198</sup> or Keane J's simplified approach in *Unions New South Wales v New South Wales*.<sup>199</sup> These two benefits could flow

<sup>193</sup> Ibid 348-349.

<sup>194</sup> See further discussion of these objections in Chapter III.B.

<sup>195</sup> (1997) 189 CLR 520 ('*Lange*').

<sup>196</sup> See, eg, James Stellios, 'The Second Limb of *Lange*: The Continuing Uncertainties with the Implied Freedom of Political Communication' (Research Paper No 14-49, ANU College of Law, 2015); Dan Meagher, 'The Protection of Political Communication Under the Australian Constitution' (2005) 28 *UNSW Law Journal* 30; Elisa Arcioni, 'Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Power*' (2003) 25 *Sydney Law Review* 379; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

<sup>197</sup> Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 459.

<sup>198</sup> (2014) 88 ALJR 860.

<sup>199</sup> (2013) 252 CLR 530 ('*Unions NSW*'). For further discussion of these two approaches, see Chapter I.E.

from the High Court adopting any particular interpretation of the proportionality principle, provided all members adopt the same interpretation.

Indeed, there are strong arguments against the adoption of structured proportionality in Australia, most of which, derive from an opposition to judges balancing under a strict proportionality test.<sup>200</sup> So why should Australia adopt Barak's statement of proportionality?

The aim of Chapter III is to answer this question through the following structure. First, this Chapter will outline the benefits of adopting Barak's statement of the principle specific to the uncertainties and problems discussed in Chapter I. This will be followed by a discussion of the main criticisms of adopting structured proportionality, and a reply to each.

### A *The Benefits of Structured Proportionality*

#### 1 *Structure Discretion and Analytical Clarity*

The first main argument in favour of adopting Barak's statement of the principle is that it promotes the emergence of a uniform framework for analysis based on a structured method of thought.<sup>201</sup> The approach clarifies what information will be relevant at each stage of the enquiry, and 'facilitates the provision of clear and detailed reasons for any decisions as to a law's validity'.<sup>202</sup> Barak's statement of proportionality therefore enhances the accessibility and transparency of decisions,<sup>203</sup> and allows for a greater understanding of the decision's foundation.<sup>204</sup>

What flows from this accessibility and transparency is the allowance of a 'bridge',<sup>205</sup> or 'dialogue',<sup>206</sup> between the legislature and the judiciary. The legislature would be aware of the need for the measures adopted by a law effectively burdening political communication to be rationally connected to a legitimate aim. They would also be sure that their legislation would be necessary only in the absence of true alternatives. And whilst the presence of alternatives would invalidate the law, their absence will not necessarily result in

<sup>200</sup> See, eg, Stone, above n 2; Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505, 532-534; Nicholas Aroney, 'The Freedom of Political Communication since *Lange*: Commentary' in Adrienne Stone and George Williams (eds) *The High Court at the Crossroads: Essays in Constitutional Law* (The Federation Press, 2000) 21, 24-27.

<sup>201</sup> Barak, above n 3, 459-467.

<sup>202</sup> Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 20.

<sup>203</sup> See further, Barak, above n 3, 462; Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 *The Yale Law Journal* 3094, 3142.

<sup>204</sup> See further, Barak, above n 3, 436.

<sup>205</sup> Jackson, above n 8, 3144.

<sup>206</sup> Barak, above n 3, 465.

a finding of proportionality. To be proportional, the marginal social benefits of realising the law's legitimate end must outweigh the marginal social importance of preventing the harm caused to political communication.

Accordingly, Barak's statement of the principle provides a common rubric for decision making for both the judiciary and the legislature,<sup>207</sup> which inevitably fosters the interaction between the two.<sup>208</sup> This interaction will promote a greater understanding of the actions taken by each branch in this context, and '[i]n that way, each branch is encouraged to be more considerate of each other.'<sup>209</sup>

## 2 *Judicial Deference*

Proportionality can be applied with varying degrees of intensity,<sup>210</sup> depending on whether the Court assesses each component rigorously or deferentially. Thus the second benefit of Barak's statement of proportionality is that it can accommodate a theory of deference.<sup>211</sup>

For example, deference could be granted at the first stage of the enquiry to reflect the notion that determining legislative purposes is one of the main functions of a legislator in a constitutional democracy.<sup>212</sup> Accordingly, the Court would accept wide statements about the general law at this stage, rather than focusing narrowly on the legal and practical effect of the provision. Further, questions of importance or compatibility with the implied freedom arise later in the balancing stage. As summarised by Barak, '[t]he legislator enjoys wide discretion in choosing the purpose, and the judge's "non-intervention" is an expression of the constitutionality of this legislative choice'.<sup>213</sup>

In regards to the rational connection enquiry, a theory of deference could be afforded to the legislature to recognise the limited ability of Courts to deal with 'epistemic uncertainty'.<sup>214</sup> Thus the legislature would be given a wide range of choice as to what measures can contribute to the legitimate end, provided their contribution is not marginal.<sup>215</sup> When reviewing this choice, the Court

<sup>207</sup> See Jackson, above n 8, 3144.

<sup>208</sup> Barak, above n 3, 467.

<sup>209</sup> Ibid.

<sup>210</sup> See Kirk, above n 7, 54; Dan Meagher, 'The Brennan Conception of the Implied Freedom: Theory, Proportionality and Deference' (2011) 30 *University of Queensland Law Journal* 119, 122; Thomas Poole, 'The Reformation of English Administrative Law' (2009) 68 *Cambridge Law Journal* 142, 146.

<sup>211</sup> Barak terms this a 'zone of proportionality': Barak, above n 3, ch 14.

<sup>212</sup> Ibid 401.

<sup>213</sup> Ibid 405.

<sup>214</sup> Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2002) 414-418 [trans of: *Theorie der Grundrechte* (first published 1985)].

<sup>215</sup> For further discussion on the rational connection test, see above Chapter II.B.

would examine the factual framework, ‘which served as the legislative prognosis’,<sup>216</sup> to examine whether a rational connection exists. Hence judicial review at this stage would be limited to an empirical assessment,<sup>217</sup> and the Court would not take into account considerations as to the effectiveness of the impugned provision. Professor Dan Meagher argues that this judicial deference is ‘consistent with the rationale of the implied freedom’ and the ‘more limited, supervisory judicial role that it entails’.<sup>218</sup>

The same level of deference could be accorded at the necessity stage. Barak holds that at this stage,

[t]he court should examine, based on the factual framework presented to it, whether an alternative exists that would fulfil the legislative purpose to the same extent as the chosen legislative means, but which would also cause less harm to the constitutional right. This decision is based, among others, on the prognosis as to the likelihood that the legislative purposes would actually be achieved while using the means chosen. In many cases, such a prognosis is a matter of uncertainty, which in turn enables the existences of several options that are likely to achieve the goal while harming the right to a lesser degree. The choice between those options is provided to the legislator and not to the judge.<sup>219</sup>

According to Lord Reed of the Supreme Court of the United Kingdom, this approach is necessary in a federal system:

To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a developed system such as that of the United Kingdom is to work, since a strict application of a ‘least restrictive means’ test would allow only one legislative response to an objective that involved limiting a protected right.<sup>220</sup>

The ‘margin of appreciation’ referred to here can be distinguished from the wide margin of appreciation proposed by Brennan CJ’s high threshold of proportionality.<sup>221</sup> Because whilst Barak’s ‘zone of proportionality’ allows substantial deference in cases of epistemic uncertainty, it does not rule out the ability of courts to invalidate a law once it is apparent that the measures adopted by the legislature were not the least restrictive ones available. Admittedly, the alternative measures must still pass the high threshold of strict necessity, which significantly limits the protection this component actually

<sup>216</sup> Barak, above n 3, 406.

<sup>217</sup> Ibid.

<sup>218</sup> Meagher, above n 2, 45.

<sup>219</sup> Barak, above n 3, 412 (citations omitted).

<sup>220</sup> *Bank Mellat v Her Majesty’s Treasury (No. 2)* [2013] UKSC 39, [75] (Lord Reed).

<sup>221</sup> For further discussion on the difference between the high threshold and low threshold proportionality tests, see Chapter I.D.1.

affords to political communication.<sup>222</sup> However, if less restrictive alternative measures exist, which can realise the impugned law's legitimate end 'at the same level of intensity and efficiency'<sup>223</sup> as the measures adopted by the legislature, the necessity test will not be met, and the law will fail the second limb of the *Lange* test.

Further, Barak's 'zone of proportionality' and Lord Reed's 'margin of appreciation' do not preclude courts from balancing if the law is found to be strictly necessary.<sup>224</sup> However, in the case of a 'normative stalemate', where the marginal social importance of the two competing values even out, 'legislatures have normative discretion to make different choices'.<sup>225</sup> Thus Barak's statement of the principle accommodates 'both democracy and rights in a way that optimizes each',<sup>226</sup> and brings the proportionality principle more inline with the separation of powers doctrine.<sup>227</sup> Barak's statement of proportionality strikes the right balance between the roles of Parliament and the Court, and resolves Kirby J's fears that a doctrine of deference would necessarily entail the surrender of too much judicial power.<sup>228</sup>

### 3 Focus on the Facts, Balancing and Flexibility

As established in Chapter I, the rational connection and strict necessity components have had relatively limited significance under the second limb of the *Lange* test. These enquiries focus purely on the facts of each individual case. Therefore, by adopting Barak's statement of the principle, the High Court will have a greater focus on the particular factual framework from which the legislature made their decision. The factual focus at these threshold stages will then guide and help anchor the normative determination to be made in the strict proportionality stage.

Further, the calibration of the Court's decision to the factual framework presented to the Court, together with the balancing conducted in the last stage,

<sup>222</sup> See further, David Bilchitz, 'Necessity and Proportionality: Towards A Balanced Approach?' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 41, 42 (arguing that Barak's strict necessity is 'too weak and thus having little value in the judicial review of measures that infringe fundamental rights').

<sup>223</sup> Barak, above n 3, 323. For further discussion on the strict necessity test, see Chapter II.C.

<sup>224</sup> *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39, [71], [74] (Lord Reed's dissenting judgment was later accepted by a majority of the UK Supreme Court in *Gaughran v The Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29, [20]).

<sup>225</sup> Jackson, above n 8, 3246. See also, Barak, above n 3, 413-414; Julian Rivers, 'Proportionality and Discretion in International and European Law' in Nicholas Tsagouris (ed) *Transnational Constitutionalism* (Cambridge University Press, 2007) 107, 108.

<sup>226</sup> David Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) 176.

<sup>227</sup> Rivers, above n 30, 108 (arguing that 'a theory of discretion must be co-extensive with the doctrine of proportionality if the separation of powers is not to collapse').

<sup>228</sup> See general discussion in Chapter I.D.1.

allows for a greater degree of flexibility to adapt the decision to the merits of the individual case.<sup>229</sup> It allows for the Court to account for ‘unforeseen facts, new technological or social developments’.<sup>230</sup> As explained by leading human rights scholar Professor Louis Henkin:

Balancing is highly appealing. It provides bridges between the abstractions of principle and the life of facts... It softens the rigors of absolutes, makes room for judgment and for sensitivity to differences of degree... The flexibility it provides may have been an important ingredient in making judicial review work and rendering it acceptable.<sup>231</sup>

Academics often emphasise this benefit of flexibility when assessing the value of proportionality in comparison to the categorisation alternative,<sup>232</sup> which is favoured by the United States Supreme Court and Gageler J in *Tajjour*.<sup>233</sup> Those in favour of proportionality argue that the rigid categorisation approach, with its focus on bright line rules and abstract ideas of the value of competing interests, loses the ability to cater to the circumstances of each case.<sup>234</sup> Accordingly, in this light, the flexibility of structured proportionality has value over strict rules, which are ‘often over- and under- inclusive’.<sup>235</sup>

#### 4 Compatibility with the *Lange* Precedent

The last benefit of adopting a structured proportionality analysis is that it is compatible with the *Lange* method,<sup>236</sup> or ‘consistent in the way in which the *Lange* criteria were applied in *Lange* itself.’<sup>237</sup> This is an important quality that any proposed criterion must have in order to gain acceptance by a majority of the Court. As explained by Kirby J in *Coleman v Power*:<sup>238</sup>

It is important that in undertaking that task close attention be paid to the reasons in *Lange* and the principles emerging from them. The

<sup>229</sup> Niels Peterson, ‘How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law’ (2013) 14 *German Law Journal* 1387, 1407.

<sup>230</sup> Stone, above n 2, 689.

<sup>231</sup> Louis Henkin, ‘Infallibility Under Law: Constitutional Balancing’ (1978) 78 *Columbia Law Review* 1022, 1047.

<sup>232</sup> See, eg, Peterson, above n 34, 1407.

<sup>233</sup> For further discussion of the categorisation approach, see Chapter I.E.2.

<sup>234</sup> See also Peterson, above n 34, 1399.

<sup>235</sup> Ibid 1402, citing Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2<sup>nd</sup> ed, 2005) 591.

<sup>236</sup> Stone, above n 2, 700.

<sup>237</sup> Sir Anthony Mason, ‘Proportionality and its use in Australian Constitutional Law’ (Speech delivered at the Sir Anthony Mason Lecture, The University of Melbourne, 6 August 2015) <<http://www.youtube.com/watch?v=4xOsIVLTWASg>>.

<sup>238</sup> (2004) 220 CLR 1.



absence of a sure and guiding text such as the written words of the Constitution itself requires this. This is so even though the Constitution is an instrument under which other laws are made and is in parts expressed in general language. There is still a clear and binding text. By contrast, it is the reasons for judgment in *Lange* that the implication is spelled out.<sup>239</sup>

## B The Case Against Structured Proportionality

### 1 Criticisms

Proportionality as a principle applied in constitutional law is widely criticised.<sup>240</sup> As observed by Barak, it is a doctrine that ‘is under constant attack’.<sup>241</sup> Below is an overview of the doctrinal objections to structured proportionality. As mentioned above, most critics centre their arguments around the judicial balancing – ‘the *enfant terrible* of modern judging’<sup>242</sup> – conducted as the fourth component.

The first line of criticism against the adoption of Barak’s statement of the principle derives from the flexibility it affords to judges.<sup>243</sup> The argument is targeted at the ad hoc nature of the strict proportionality test, namely its failure to ‘give any guidance as to ... how judges assign weight to the competing interests’.<sup>244</sup> Accordingly, critics argue that strict proportionality facilitates the unconstrained weighing of incommensurable values, which ‘cannot be rationalised’.<sup>245</sup> Professor Adrienne Stone contends that the rational deficiency of ad hoc balancing ‘gives rise to uncertainty and consequently problems for those who wish to rely on the law’.<sup>246</sup>

Thus the indeterminacy critique holds that the inability to predetermine the proportionality of a law<sup>247</sup> is inconsistent with the rule of law. Hence,

<sup>239</sup> *Coleman v Power* (2004) 220 CLR 1, [294] (Kirby J).

<sup>240</sup> See, eg, *Coleman v Power* (2004) 220 CLR 1, [83] (McHugh J).

<sup>241</sup> Barak, above n 3, 481 (citations omitted).

<sup>242</sup> Patrick M. McFadden, ‘The Balancing Test’ (1988) 29 *British Columbia Law Review* 585, 586.

<sup>243</sup> For more on the indeterminacy critique, see, eg, Grégoire Webber, ‘Rights and the rule of law in the balance’ (2013) 129 *Law Quarterly Review* 399, 400; Stravos Tsakyrakis, ‘Proportionality: An assault on human rights?’ (2009) 7 *International Journal of Constitutional Law* 468, 472.

<sup>244</sup> Stone, above n 2, 686.

<sup>245</sup> Jochen von Bernstorff, ‘Proportionality Without Ad Hoc Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 63, 65 (citations omitted).

<sup>246</sup> Stone, above n 2, 691.

<sup>247</sup> On the inability to predetermine the enquiry, see also *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 150-1 (Brennan J) (‘The proportionality of the restriction to the interest served is *incapable of a priori definition*: in the case of each law, it is necessary to

according to Stone, the flexibility of proportionality ‘contains the essence of its virtue’ and also ‘its principal flaw’.<sup>248</sup>

Where judicial law-making takes the form of particularised decisions made on the facts of each case, with the law gradually changing over time, it undermines both the ideal that laws should be certain, stable and thus be able to provide effective guidance to both citizens and courts, and the appearance of impartiality and fairness.<sup>249</sup>

In a similar vein, Professor Jochen von Bernstorff argues that ad hoc balancing liberates the judiciary from ‘methodological constraints and the burden of treating like cases alike’.<sup>250</sup> And whilst this ‘doctrinally unlimited flexibility undermines the authority of judicial institutions’,<sup>251</sup> it also undermines the separation of powers doctrine. Von Bernstorff argues that the ‘lack of predictability’ of normative balancing ‘leads to a situation where every act of parliament is potentially up for grabs in the judicial balancing exercise’.<sup>252</sup>

The counter-majoritarian nature of structured proportionality is a ‘widespread concern’.<sup>253</sup> For example, Professor Paul Kahn argues that a ‘balancing court will always appear as an uncertain usurper of the reins of power’.<sup>254</sup> Like Kahn, Richard Clayton views strict proportionality as ‘an excessively interventionist approach to human rights’, which is ‘undemocratic to the extent that the judiciary imposes its own views over on Parliament’.<sup>255</sup>

When applied to the Australian context, the absence of an express conferral of rights perhaps adds force to this counter-majoritarian critique of strict proportionality. In jurisdictions such as Germany, Canada and South Africa, one could at least argue – as Barak does – that the authority to balance competing principles is explicitly ‘anchored in the constitution’.<sup>256</sup> In this sense, the Courts have an explicit democratic basis for balancing. By contrast, the Australian High Court’s power to overrule democratically elected legislatures is founded on a controversial implication initially drawn by an activist High Court. In this sense, Barak’s retort that balancing has a democratic basis is less

ascertain the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served’) (emphasis added).

<sup>248</sup> Stone, above n 2, 691.

<sup>249</sup> Ibid 705 (citations omitted).

<sup>250</sup> Von Bernstorff, above n 50, 70.

<sup>251</sup> Ibid 85.

<sup>252</sup> Ibid 71.

<sup>253</sup> Rivers, above n 30, 125.

<sup>254</sup> Paul W Kahn, ‘The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell’ (1987) 97 *The Yale Law Journal* 1, 59.

<sup>255</sup> Richard Clayton, ‘Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle’ (2001) 5 *European Human Rights Law Review* 504, 516.

<sup>256</sup> Barak, above n 3, 491.

applicable in the Australian debate.

Also tied into the counter-majoritarian critique is the ‘issue of institutional competence’.<sup>257</sup> The argument holds that comparing the social marginal importance of two competing values is more of a legislative rather than judicial competence. Courts are not equipped to make policy decisions, where issues of empirical uncertainty loom large. Rather, legislatures are better placed to make ‘decisions about what free speech rights ought to be respected and implemented through specific legislation and adequate financial expenditure’.<sup>258</sup>

The last criticism of Barak’s statement of proportionality, which is often raised by authors who favour the Canadian approach,<sup>259</sup> is that it ‘tends to push most of the issues into the last stage, the balancing stage’.<sup>260</sup> As Associate Professor Kai Möller explains:

At the legitimate goal stage, *any* goal that is legitimate will be accepted. At the suitability stage, even a *marginal* contribution to the achievement of the goal will suffice. At the necessity stage, it is very rare for a policy to fail because less restrictive alternatives normally come with *some disadvantage* and cannot therefore be considered equally effective. Thus, the balancing stage dominates the legal analysis and is usually determinative of the outcome.<sup>261</sup>

And because the balancing stage entails irrational and ad hoc judicial balancing, is counter-majoritarian and inconsistent with the rule of law, the inability of judges to avoid this stage is problematic.

## 2 A Reply

The first rejoinder to the criticisms discussed above is that the practice of strict proportionality under the second limb of the *Lange* test would not be irrational, and does not facilitate ad hoc balancing. As explained above, the indeterminacy critique is based on the argument that the Court is required to ‘weigh’ two unrelated interests that are incommensurable and have no common metric. However, under the implication as drawn out in *Lange*, the two competing interests do have a common metric: the constitutionally prescribed system of government. Justice Hayne addressed this point in *Monis v The Queen*:<sup>262</sup>

<sup>257</sup> Tom Campbell and Stephen Crilly, ‘The Implied Freedom of Political Communication, Twenty Years On’ (2011) 30 *University of Queensland Law Journal* 59, 76. See further, Meagher, above n 15, 123.

<sup>258</sup> Campbell and Crilly, above n 62, 76.

<sup>259</sup> For more discussion about the Canadian approach, see Chapter II.

<sup>260</sup> Kai Möller, ‘Constructing the Proportionality Test: An Emerging Global Conversation’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 31, 34.

<sup>261</sup> *Ibid* (emphasis in original).

<sup>262</sup> (2013) 249 CLR 92.

On the face of it, the comparison appears to require a court to balance incommensurables: the pursuit of some object or end that is within power and the maintenance of the constitutionally prescribed system of government and the freedom that the system requires. By contrast, if the legitimacy of an object or end is understood (as it should be) as referring to the compatibility of that object or end with that system and the freedom, the second *Lange* question can be sensibly applied. What is then being compared is, on the one hand, the means of pursuing a legislative object or end that has been determined to be compatible with the implied freedom and, on the other, the burden on the freedom itself. There is a common point of reference.<sup>263</sup>

However, it is important to note that this thesis argues, with respect, that the legitimacy of a law's end should not be understood as referring to the compatibility of that end with 'that system and the freedom'. To ask the compatibility question<sup>264</sup> in the first stage of the analysis would bring about balancing too early on in the enquiry, without adequate consideration of the factual framework underlying the legislature's determinations of the suitability and necessity of the law. It would essentially collapse the proportionality analysis into just one stage. This is precisely the thing that Barak's statement of the principle attempts to avoid.<sup>265</sup>

Instead, this thesis argues that the compatibility question should be incorporated into the last stage of the enquiry. Here, the social marginal importance of the law would be measured by its contribution to the maintenance of the system of representative and responsible government that the Constitution requires. Considering that the implied freedom of political communication is 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution',<sup>266</sup> the social marginal importance of preventing the burden to political communication is also measured by reference to that system of government. Thus the two sides of the scales become comparable.

With this 'common point of reference', the strict proportionality test does not ask the Court to consider 'whether a particular line is longer than a

<sup>263</sup> Ibid [138].

<sup>264</sup> To clarify, the 'compatibility question' is the question posed by the second limb of the *Lange* test, asking whether the impugned law's end 'is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government': *Lange* (1997) 189 CLR 520, 562.

<sup>265</sup> Note that the cost of avoiding balancing at this first stage may be to obscure the enquiry: what does legitimacy mean if it does not entail a compatibility question? Perhaps it is the mere requirement, at least for a Commonwealth law, that it is within a head of power under s 51 *Constitution*. However this issue is beyond the scope of this thesis, and should be considered for future research.

<sup>266</sup> *Lange* (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

particular rock is heavy',<sup>267</sup> to use the famous dictum of Scalia J. The balancing conducted under the second limb of *Lange* therefore becomes comparable, rational, and more inline with the rule of law.

Though there is room to argue that even without this common denominator, structured proportionality is not an irrational method of judicial review.<sup>268</sup> It appears as though the irrational critique tends to overlook the transparent and structured nature of judicial discretion under Barak's statement of the principle.<sup>269</sup> Indeed, Frederick Schauer argues that these critics are 'confused', and do not differentiate between 'the structured inquiry of proportionality review and an open-ended mandate simply to "do the right thing"'.<sup>270</sup>

Secondly, counter-majoritarian judicial review is constitutionally entrenched by the *Constitution*. The constitutional warrant for this function has been examined and upheld.<sup>271</sup> Accordingly, Barak's statement of proportionality is a tool by which the High Court can discharge the function constitutionally entrusted to it. It is well accepted that the High Court's 'sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn of the other'.<sup>272</sup> Thus, structured proportionality is a way in which the Court can prevent Parliament from eroding the constitutionally prescribed system of government, and the implied freedom which is its 'indispensible incident'.<sup>273</sup> Acceptance of this function is a rejoinder to the counter-majoritarian critique of judicial review in Australia.

And lastly, balancing is inherent in all alternatives to Barak's statement of the principle. As established above in Chapter II, the High Court has been

<sup>267</sup> *Bendix Autolite Corp v Midwesco Enterprises*, 486 US 888, 897 (1988).

<sup>268</sup> See further, Frederick Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' (2010) 4 *Law & Ethics of Human Rights* 35, 36; Robert Alexy, 'The Construction of Constitutional Rights' (2010) 4 *Law & Ethics of Human Rights* 19, 26-32 (arguing that '[b]alancing turns out to be an argument form of rational legal discourse' at 32) (citations omitted).

<sup>269</sup> Carlos Bernal Pulido, 'The migration of proportionality across Europe' (2013) 11 *New Zealand Journal of Public and International Law* 438, 514 ('Judicial decisions using this standard make up a network of precedents that, by means of spelling out the reasons why certain types of measures are unsuitable, unnecessary or disproportionate in the strict sense, allows constitutional rights to be applied in a consistent and coherent manner.')

<sup>270</sup> Schauer, above n 72, 36-37.

<sup>271</sup> See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262-263 (Fullagar J) ('there are those... who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of *Marbury v Madison* is accepted as axiomatic').

<sup>272</sup> Sir Owen Dixon, 'Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21<sup>st</sup> April, 1952', reprinted in *Jesting Pilate* (The Law Book Company Ltd, 1965) 245, 247.

<sup>273</sup> *Lange* (1997) 189 CLR 520, 559.

balancing since the beginning of the implied freedom jurisprudence. And, as pointed out by Stone, balancing seems to be ‘integral to *Lange*’.<sup>274</sup> Even the approach taken by the Canadian Supreme Court, which tries so hard to avoid strict proportionality, is only able to do so by incorporating more balancing in the earlier stages of review.<sup>275</sup> Thus it is preferable for the Court to balance openly and transparently rather than covertly and ambiguously.

Perhaps the only way to truly avoid balancing, would be to adopt Barak’s statement of the principle, along with its ‘zone of proportionality’, but without a strict proportionality component. Essentially this would reduce the form of enquiry to a high threshold proportionality review, similar to the test proposed by Brennan CJ. The question then arises as to the utility of an implied freedom of political communication with such a weak criterion of validity.

Take, for example, a law that allows police to shoot anyone that engages in hate speech.<sup>276</sup> Preventing incitement to violence is a proper purpose. Shooting those who engage in hate speech is certainly capable of contributing to this purpose. And on a strict interpretation of the necessity test, without any balancing, there are no true alternatives. Incarcerating the perpetrator or even issuing them a fine would not be as effective at preventing hate speech than shooting people. Further, these methods would arguably be more burdensome on the State to carry out. But is this law truly proportional? The legislator here is clearly using a ‘steam hammer to crack a nut’,<sup>277</sup> or a ‘cannon to hurt a fly’.<sup>278</sup>

Thus ‘balancing is unavoidable’.<sup>279</sup> In a sense, that is the nature of human rights adjudication, and the argument is equally applicable to the implied freedom of political communication.

## CONCLUSION

The implied freedom of political communication is an important constitutional implication. It ensures the civil liberties fundamental to Australia’s liberal democracy in the absence of a Bill of Rights. However, the High Court’s jurisprudence on the implication is confused and markedly divergent. This thesis argued that the High Court should adopt Aharon Barak’s statement of

<sup>274</sup> Stone, above n 2, 684.

<sup>275</sup> See above in Chapter II.

<sup>276</sup> This example is essentially a modified version of Dieter Grimm’s ‘hypothetical case of a law that allows the police to shoot a person to death if this the only means of preventing a perpetrator from destroying property’: Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383, 396.

<sup>277</sup> *R v Goldstein* [1983] 1 WLR 151, 155 (Lord Diplock).

<sup>278</sup> *Shtanger v. The Speaker of the Knesset* [2003] IsrSC 58(1) 786, 797 (Barak, P.) (Supreme Court of Israel).

<sup>279</sup> Möller, above n 64, 34. See also, Bradley Selway, ‘The Rise and Rise of the Reasonable Proportionality Test in Public Law’ (1996) 7 *Public Law Review* 212.

proportionality to resolve the uncertainties surrounding the second question posed by the *Lange v Australian Broadcasting Corporation*<sup>280</sup> decision.

Chapter I established these uncertainties, highlighting the inconsistent application of four separate enquiries pursuant to a proportionality analysis. Chapter II explained the proposed solution, detailing the four components of Barak's statement of proportionality. Chapter III set out the benefits of this approach and addressed the concerns of implementing it in the Australian context.

This thesis argued that the adoption of Barak's approach would help clarify the law and promote consistency in the application of a proportionality principle. Legislatures would be certain that a law effectively burdening political communication would be constitutionally valid, provided the law passes the four components of Barak's approach. Further, by contrast to the majority of approaches taken by the High Court, this approach would facilitate transparent and structured balancing. It would create a dialogue between the legislature and the judiciary, and allow for a degree of deference to be granted to the legislature.

<sup>280</sup> (1997) 189 CLR 520.