IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H3 of 2016

BETWEEN:

ROBERT JAMES BROWN
First Plaintiff

and

JESSICA ANNE WILLIS HOYT
Second Plaintiff

and

THE STATE OF TASMANIA
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

1. These submissions are in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland ('**Queensland**') intervenes in these proceedings in support of the defendant pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

Intervener's submissions
Filed on behalf of the Attorney-General for the State of Queensland (intervening)
Form 27C

Dated: 28 March 2017
Per Wendy Ussher
Ref PL8/ATT110/3460/UWE
Document No: 7069966

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PART IV: Statutory provisions

4. Queensland adopts the statement of relevant statutory provisions set out in Annexure A to the plaintiffs' submissions.

PART V: Submissions

Summary

5. Queensland adopts the submissions of the defendant. Queensland's submissions are limited to the use of a structured proportionality test in the context of the implied freedom of political communication as expressly applied by the majority in *McCloy v New South Wales*.[1]

6. Respectfully, Queensland submits that a structured proportionality test is not an apt test to determine the constitutional validity of legislation in Australia. Whilst structured proportionality has acquired a central position in determining whether legislative infringement upon personal rights are justified in overseas jurisdictions where there are prescribed constitutional, statutory or international statements of human rights, and to which it is apt,[2] prescribed human rights are not part of Australian constitutional arrangements.

7. In Australia, human rights flow from the common law,[3] and are ultimately entrusted to the people rather than the judiciary. This 'great underlying principle' that 'the rights of individuals are sufficiently secured by ensuring, as far as possible, each a share, and an equal share, in political power'[4] is a material feature which distinguishes Australia from other jurisdictions that have enshrined rights. In so far as such fundamental laws prevail over inconsistent legislation in those other jurisdictions, respectfully the framework for testing the validity of that legislation against those rights does not appropriately transfer to Australia.[5]

8. To the extent that *McCloy* decided that a structured proportionality analysis is required when this Court is called upon to determine whether legislation impermissibly infringes

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1 *McCloy v New South Wales* (2015) 257 CLR 178 ('***McCloy***').

2 See for example: *Human Rights Act 1998* (UK) c 42; *Canada Act 1982* (UK) c 11, sch B, pt I (*Canadian Charter of Rights and Freedoms*); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*'); *Constitution of the Republic of South Africa, 1996* ch 2 'Bill of Rights'; *Constitution of India*, Part III 'Fundamental Rights', in particular cl 13(2).

3 Owen Dixon, *Jesting Pilate* (Law Book Co, 1965) 203, 205; Sir William Blackstone, *Commentaries on the Laws of England* (A Strahan, first published 1765, 1809 ed), Book 1, Ch 1 ('The Absolute Rights of Individuals'); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562-564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

4 Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329, cited with approval in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136, 139-140 (Mason CJ), *McCloy v New South Wales* (2015) 257 CLR 178, 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110]-[111] (Gageler J), 258 [219] (Nettle J); *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1048 [87] (Gageler J).

5 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1050 [101], 1054 [141]-[142] (Gageler J).

the implied freedom of political communication, Queensland supports the defendant's application for leave to reopen *McCloy*.[6]

Principle of proportionality

9. Structured proportionality is a test to determine whether an interference with a *prima facie* right is justified. Its core is the balancing stage, which is termed proportionality in the strict sense.[7] The balancing stage requires the right to be balanced against the competing right or interest;[8] which in turn requires the relevant court to make a value judgment. There are several slightly different formulations of the principle in various jurisdictions overseas, including Canada and Europe.[9]

The opportunity to discuss proportionality

10. In adopting a test of appropriate and adaptedness in *Lange v Australian Broadcasting Corporation* (***'Lange'***), this Court held that there was 'no need to distinguish' the concept of proportionality.[10] Judges and academics since have on occasions discussed the precise nature of proportionality analysis, if any, required by the test set down in *Lange*, and what such an analysis would mean for the role of the judiciary[11] That discussion regarding proportionality domestically has coincided with the spread of a structured approach to proportionality, which first developed from a uniquely German legal tradition and in the unique set of circumstances in wake of World War II.[12] That migration of structured proportionality beyond its German origins has in turn led to a discussion at the international level of whether proportionality inheres in all constitutions[13] or whether the applicability of proportionality depends on what the framers of the constitution actually decided.[14] In the circumstances of such discussion

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6 Defendant's submissions, 11 [54].

7 *McCloy v New South Wales* (2015) 257 CLR 178, 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

8 Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10(3) *International Journal of Constitutional Law* 709, 710.

9 For a comparison of the Canadian and German understandings, see Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 396.

10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby J) (***'Lange'***).

11 See eg *Coleman v Power* (2004) 220 CLR 1, 48 [88], 49-50 [91] (McHugh J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 196-200 [31]-[39] (Gleeson CJ); *Monis v The Queen* (2013) 249 CLR 92, 213 [345] (Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 574-575 [130] (Crennan, Kiefel and Bell JJ), 579-580 [149]-[150] (Gageler J); 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; Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505..

12 Moshe Cohen-Eliya and Iddo Porat, 'American balancing and German proportionality: The historical origins' (2010) 8(2) *International Journal of Constitutional Law* 263, 271-276; LE Weinrib, 'The Post War Paradigm and American Exceptionalism' in S Choudrhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 84.

13 See, for eg, Robert Alexy 'Constitutional Rights and Proportionality' (2014) 22 *Revus – Journal for Constitutional Theory and Philosophy of Law* 51; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72.

14 See, for eg, Matthias Jestaedt, 'The Doctrine of Balancing – Its strengths and weaknesses' in Matthias Klatt (ed), *Institutionalized Reason* (Oxford University Press, 2012) 152.

regarding the constitutional framework to which proportionality (and in what form) is appropriate, this Court's decision in *McCloy* has provided the opportunity to discuss the place, if any, of structured proportionality in Australia's constitutional setting.

11. It is uncontroversial that the joint judgment in *McCloy* adopted structured proportionality '[w]ithout the benefit of full argument'.[15] In fact,[16]

> No party or intervener challenged the decision in *Lange v Australian Broadcasting Corporation* or the reasoning which justifies the implication of the freedom of political communication. No party or intervener sought to have the Court discard or modify the substance of the two questions identified in *Lange* and restated in *Coleman v Power* as the questions that must be asked and answered in deciding whether a statutory provision is beyond power because it infringes the implied freedom. No party or intervener suggested that the Court should now state a new method of analysis of the two questions or a new mandatory structure for the reasoning that should be adopted in considering those questions.

12. It is respectfully submitted that leave to reopen *McCloy* in this case will provide the benefit of full argument on a question of 'vital constitutional importance',[17] which ultimately goes to whether judicial power should be extended at the expense of legislative power, effectively on a one-for-one basis; whether a tool of analysis from a human rights context is compatible with Australia's resolve to trust the people through Parliament to strike the right balance on questions of rights and freedoms; and whether the test of justification for burdening the implied freedom should remain anchored in the rationale for the implied freedom in the text and structure of the Constitution.

13. It is submitted that, even adopting a 'strongly conservative cautionary principle ... in the interests of continuity and consistency in the law',[18] the magnitude of the constitutional principles at stake support the re-opening of *McCloy*. Indeed, respectfully, the Court's strongly conservative cautionary approach warrants correcting the deviation of *McCloy* in order to return to orthodox principle.

The Lange test before and after McCloy

14. Prior to *McCloy*, the test for whether a law infringed the implied freedom was well settled. The test was set down by a unanimous full bench in *Lange*,[19] and reframed

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15 *McCloy v New South Wales* (2015) 257 CLR 178, 235 [141] (Gageler J).

16 *McCloy v New South Wales* (2015) 257 CLR 178, 281 [308] (Gordon J) (references omitted). See also at 200 [23] (French CJ, Kiefel, Bell and Keane JJ).

17 *Alqudsi v The Queen* (2016) 90 ALJR 711, 731 [66] (French CJ), quoting *Queensland v Commonwealth* (1977) 139 CLR 585, 630 (Aickin J).

18 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572, 579 [28] (French CJ, Kiefel, Bell, Gageler and Keane JJ), 594 [131] (Gordon J agreeing), quoting *Wurridjal v Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby J) ('***Lange***').

slightly by a majority in *Coleman v Power*.[20] According to that test, the question of validity is answered by asking two familiar questions. First, does the law effectively burden the implied freedom in its terms, operation or effect? Second, if so, is the law nonetheless reasonably appropriate and adapted to serve a legitimate end which is compatible with the maintenance of the constitutionally prescribed system of representative government?

15. A bare majority[21] in *McCloy* 'altered the traditional formulation'[22] and introduced a new 'structured approach', in which appropriate and adaptedness was 'unpack[ed]' into cumulative requirements of suitability, necessity and adequacy in its balance.[23] The nett effect of that structured approach by reference to the specific elements of each test is considered below.[24]

16. There is, in Australia, a long history of judicial application of the locution 'reasonably appropriate and adapted',[25] which can be traced to Marshall CJ in *McCulloch v Maryland*.[26] That language was first adopted in the Australian context by Barton and O'Connor JJ in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*.[27] The two questions posed in *Lange* and *Coleman* have been consistently applied by this Court in cases concerning the implied freedom of political communication.[28]

17. It has been said that structured proportionality was adopted 'to an extent in *Unions NSW v New South Wales*,[29] and then more fully in *McCloy*.'[30] While it is true that the joint

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20 *Coleman v Power* (2004) 220 CLR 1, 50-51 [92]-[96] (McHugh J), 77-78 [196] (Gummow and Hayne J), 82 [211] (Kirby J).

21 The approach of this Court to the second *Lange* question in *McCloy* was: French CJ, Kiefel, Bell and Keane JJ endorsed, explained and justified the structured proportionality approach at 195-196 [3]-[5], 211 [58], 212-221 [66]-[93]; Gageler J rejected this approach at 222 [98], 234 [140], 235 [143]; Nettle J considered it made no real difference at 258-260 [221]-[222], [225]; and Gordon J preferred simply to apply the *Lange* questions according to their terms at 282 [310]-[311].

22 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1079 [294] (Gordon J).

23 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1038 [37] (French CJ and Bell J).

24 Paras [PART II:25]PART II:32].

25 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 199-200 [39] (Gleeson CJ); *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1037 [32] (French CJ and Bell J). The test is applied in a variety of constitutional and judicial review contexts (*Murphy* at [32]) including, the purposive and incidental law-making powers derived from the Constitution and from statutes (for example, *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*') regarding the external affairs power, see Deane J at 260); franchise cases; s 92 freedom of interstate trade and commerce cases (for example, see *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473-474); and in administrative law as an adjunct to review for '*Wednesbury* unreasonableness'.

26 *McCulloch v Maryland*, 17 US (4 Wheat) 316, 421 (1819).

27 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 344 (Barton J), 357 (O'Connor J). See also *Commonwealth v Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457, 469 (Higgins J).

28 See, for eg, *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ), 555-556 [94]-[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1, 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, 553 [35], 556 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 547-548 [32] (French CJ), 560 [71], 562 [76] (Hayne J), 568-569 [103] (Crennan J), Kiefel and Bell JJ), 578 [145], 579 [148] (Gageler J), 594 [199] (Keane J).

29 *Unions NSW v New South Wales* (2013) 252 CLR 530.

reasons in *Unions NSW* identified 'necessity' as potentially relevant, respectfully, their Honours did not hold that necessity will be relevant in every implied freedom case. Their Honours reasoned, 'The inquiry whether a statutory provision is proportionate in the means it employs to achieve its object may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so.'[31] Moreover, no Justice in *Unions NSW* applied strict proportionality.[32]

18. Following *Unions NSW*, this Court again refrained from structured proportionality in *Tajjour v New South Wales*. In that case a majority of the Court upheld anti-consorting laws. Among the majority, Keane J upheld the provision on the basis that, properly construed, it did not burden the implied freedom.[33] The remaining four members of the majority considered whether the law was suitable[34] and necessary.[35] However, as to adequacy in its balance, but not by applying strict proportionality, Hayne J concluded that the provision did not impose an undue burden.[36] The plurality reasons of Crennan, Kiefel and Bell JJ expressly declined to apply strict proportionality as the burden was not substantial.[37] In dissent, French CJ found that the provision impermissibly burdened the implied freedom because it failed to distinguish between preventing criminogenic associations and preventing political communication. In doing so, his Honour applied a test of appropriate and adaptedness,[38] albeit, as 'a species of the genus of proportionality tests'.[39] Gageler J more narrowly held that the burden imposed by the law was not justified when it applied to association for the purpose of engaging in political communication.[40] Although his Honour used the word 'proportionality', he was clear that he was not adopting 'a generic proportionality analysis of the kind used in Canada'.[41] Thus, in the last implied freedom case immediately prior to *McCloy*, no Justice applied structured proportionality nor strict proportionality more specifically.[42]

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30 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1044 [63] (Kiefel J). See also *McCloy v New South Wales* (2015) 257 CLR 178, 215 [72] (French CJ, Kiefel, Bell and Keane JJ).

31 *Unions NSW v New South Wales* (2013) 252 CLR 530, 556 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added), citing *Monis v The Queen* (2013) 249 CLR 92, 214-215 [347]-[348] (Crennan, Kiefel and Bell JJ).

32 Cf general observation that law not 'calibrated' in *Unions NSW v New South Wales* (2013) 252 CLR 530, 579 [141] (Keane J).

33 *Tajjour v New South Wales* (2014) 254 CLR 508, 590-591 [186]-[188], 604-605 [235]-[241] (Keane J).

34 *Tajjour v New South Wales* (2014) 254 CLR 508, 562 [78] (Hayne J), 570-571 [110]-[112] (Crennan, Kiefel and Bell JJ).

35 *Tajjour v New South Wales* (2014) 254 CLR 508, 563-566 [79]-[90] (Hayne J), 571-573 [113]-[125] (Crennan, Kiefel and Bell JJ).

36 *Tajjour v New South Wales* (2014) 254 CLR 508, 566 [92] (Hayne J).

37 *Tajjour v New South Wales* (2014) 254 CLR 508, 575 [133] (Crennan, Kiefel and Bell JJ).

38 *Tajjour v New South Wales* (2014) 254 CLR 508, 553-554 [45]-[47] (French CJ).

39 *Tajjour v New South Wales* (2014) 254 CLR 508, 549 [35] (French CJ).

40 *Tajjour v New South Wales* (2014) 254 CLR 508, 585 [167] (Gageler J).

41 *Tajjour v New South Wales* (2014) 254 CLR 508, 580 [150] (Gageler J).

42 See also Murray Wesson, 'Tajjour v New South Wales, Freedom of Association and the High Court's Uneven Embrace of Proportionality Review' (2015) 40 *University of Western Australia Law Review* 102, 108-110.

19. It follows that structured proportionality was novel when it was adopted in *McCloy*. Its adoption was not the end of a 'stream of authority'[43] in which the principle was 'carefully worked out'.[44]

20. This Court had occasion to consider *McCloy* in the recent case of *Murphy v Electoral Commissioner* concerning voting rights secured by ss 7 and 24 of the Constitution.[45] The test of justification in franchise cases bears an 'affinity' with the *Lange* test, given that the right to vote and the implied freedom of political communication concern the operation of the same provisions of the Constitution.[46] Notwithstanding that affinity, this Court declined to apply structured proportionality.

21. Only Kiefel J (as her Honour then was) applied all three limbs of structured proportionality.[47]

22. French CJ, Bell, Keane and Gordon JJ held that there was no discernible restriction of the franchise, such that without a burden a *Lange*-style test was not engaged.[48] However, French CJ and Bell J nonetheless took the opportunity to note that structured proportionality 'is a mode of analysis applicable to some cases involving the general proportionality criterion, but not necessarily all.'[49] Keane J went on to record his view that even if *Lange* were engaged, care should be taken in comparing federal and State legislation at the necessity stage of proportionality.[50] Gordon J too went on to find that even if there were a restriction on the franchise, that restriction was reasonably appropriate and adapted.[51] In coming to that conclusion, her Honour eschewed any weighing analysis. Moreover, according to her Honour, '[t]he "structured" proportionality approach adopted by the joint judgment in *McCloy* is inappropriate in the constitutional context in this case.'[52] In particular, her Honour reasoned that comparisons with alternative laws 'may be instructive' but that 'they are not determinative'.[53]

23. With the possible exception of suitability, Gageler J held that each of the inquiries of structured proportionality is not 'warranted by performance of the Court's constitutional

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43 *Alqudsi v The Queen* (2016) 90 ALJR 711, 731 [66] (French CJ), quoting *Queensland v Commonwealth* (1977) 139 CLR 585, 630 (Aickin J).

44 *Alqudsi v The Queen* (2016) 90 ALJR 711, 730-731 [66] (French CJ), citing *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), in turn citing *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 56-58 (Gibbs CJ, Stephen and Aickin JJ agreeing).

45 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027; 334 ALR 369.

46 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199-200 [86] (Gummow, Kirby and Crennan JJ); *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1070 [293].

47 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1045 [69] (suitability), [70]-[73] (necessity), [74] (adequacy in its balance) (Kiefel J).

48 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1040 [42] (French CJ and Bell J), 1063 [204]-[205] (Keane J), 1080 [308], 1082 [321] (Gordon J).

49 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1039 [37] (French CJ and Bell J). See also at 1080 [305] (Gordon J).

50 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1064-1065 [215]-[216] (Keane J).

51 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1083 [332] (Gordon J).

52 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1079 [297] (Gordon J).

53 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1080 [305] (Gordon J).

role in the circumstances of this case.'[54] Without undertaking any of the analyses required by structured proportionality, his Honour held that there was a substantial reason for the impugned provisions.[55] Nettle J held that alternative means 'might be regarded as a relevant consideration' but that the alternatives offered by the plaintiffs involved 'questions of policy in which this Court has no role to play'.[56] His Honour held that the law had not been shown to be 'disproportionate' but did not engage in a detailed weighing exercise.[57]

24. It can be seen that at least five judges in *Murphy* declined to apply structured proportionality in a mandatory and cumulative fashion in the context of the core operation of ss 7 and 24 of the Constitution. It is difficult to identify a point of distinction with the penumbral operation of those provisions which would render their Honour's observations in *Murphy* inapplicable in the context of the implied freedom. Accordingly, respectfully, it is submitted that the error of *McCloy* in requiring structured proportionality has been 'made manifest' in *Murphy*.[58]

What difference does McCloy make to Lange?

25. The parallels and distinctions between the traditional *Lange* test and the *McCloy* test may be summarised as follows.

26. The first question under the *Lange* test is unaffected by the *McCloy* reformulation.

27. The second question under the *Lange* test resolves into two limbs or stages. The first stage requires identification of an object or purpose of the impugned law which, together with the law's means, is compatible with the system of representative and responsible government established by the *Constitution*.[59] It approximates the second question under the *McCloy* formulation, which asks 'are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government'.[60]

28. The second stage of the second *Lange* question inquires whether the impugned law is reasonably appropriate and adapted to serve that end.[61] The third question under the *McCloy* formulation is presented in initially identical terms, but is then called a proportionality test which is administered in three stages: suitability, necessity and adequacy in balance.[62]

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54 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1050 [102] (Gageler J).
55 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1050 [104]-[105] (Gageler J).
56 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1072 [251], [253] (Nettle J).
57 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1072 [255] (Nettle J).
58 *Alqudsi v The Queen* (2016) 90 ALJR 711, 731 [66] (French CJ), citing *Queensland v Commonwealth* (1977) 139 CLR 585, 630 (Aickin J).
59 *McCloy v New South Wales* (2015) 257 CLR 178, 231 [130] (Gageler J), 258 [220] (Nettle J).
60 *McCloy v New South Wales* (2015) 257 CLR 178, 194 [2(B)(2)] (French CJ, Kiefel, Bell and Keane JJ).
61 Compare *McCloy v New South Wales* (2015) 257 CLR 178, 231-232 [131] (Gageler J).
62 *McCloy v New South Wales* (2015) 257 CLR 178, 194 [2](B)(2) (French CJ, Kiefel, Bell and Keane JJ).

29. While some earlier cases referred explicitly or implicitly to suitability and necessity in applying the appropriate and adaptedness stage of the *Lange* test, no previous case had identified adequacy in balance as a criterion in that stage, and certainly not one that can or should be invariably applied in all cases.

30. It is therefore respectfully submitted that *McCloy* does not constitute a mere parsing of the *Lange* test. In unpacking the appropriate and adapted element of the *Lange* test, it is submitted that *McCloy* has added a distinct element of adequacy in the law's balance, which demands a finer balancing exercise than required by the *Lange* test.

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31. As a result of the restructuring of the test, there are two material differences between the *Lange* test as it was applied in *McCloy* and as it was applied prior to *McCloy*. The first material point of distinction is that while it may be said that in some implied freedom cases, the *Lange* test involved an 'attenuated form' of balancing[63] or some 'level of proportionality analysis',[64] until *McCloy*, not every case did, and in none did a majority, embrace the strict proportionality derived from German jurisprudence or elsewhere. Whereas the arithmetic frame of strict proportionality may lull judges into the false sense that they are neutrally balancing 'technical weight, cost or benefit',[65] a judge applying a test of appropriate and adaptedness is simply identifying whether the
20 justification is sufficient, taking into account the standard of sufficiency required by the rationale for the implied freedom, as well as the confined role of the judiciary in not straying beyond policing that standard. Rather than a formulaic cost-benefit analysis, in cases where appropriate and adaptedness does involve weighing, it is in the nature of a synthesis of all relevant considerations as to justification along the lines of Professor John Finnis's injunction: 'Bear in mind, conscientiously, all the relevant factors, and choose'.[66] It might be said that strict proportionality does not pretend to be 'scientific or accurate'.[67] Against this, it is submitted that the identification of the metric of 'social importance' as a measurable value and the figurative language of scales and balancing 'unavoidably carries with it connotations of mathematical precision or, at any event,
30 seems to allude to some kind of quantification'.[68] It is submitted that that promise of precision inhering in the language of strict proportionality in turn invites this Court, even unwittingly, to finer degrees of balancing.

32. A second material way in which *McCloy* departs from *Lange* is that structured proportionality imports a 'one size fits all'[69] approach in which the subtests of suitable,

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63 Murray Wesson, 'Crafting a concept of deference for the implied freedom of political communication' (2016) 27 *Public Law Review* 101, 102.

64 *Monis v The Queen* (2013) 249 CLR 92, 213 [345] (Crennan, Kiefel and Bell JJ). Cf *Coleman v Power* (2004) 220 CLR 1, 48 [88], 49-50 [91] (McHugh J).

40 65 Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 90.

66 John Finnis, 'Natural Law and Legal Reasoning' in Robert George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1992) 134, 145, quoted in Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 97.

67 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 349.

68 Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7 *International Journal of Constitutional Law* 468, 474-475.

69 *McCloy v New South Wales* (2015) 257 CLR 178, 235 [142] (Gageler J).

necessary and adequate in its balance are now mandatory and cumulative, 'like a legal version of the Russian *matryoshka* doll'.[70] Prior to *McCloy*, it was clear that, depending on the circumstances of the case, suitability and necessity might be useful reasoning tools to determine whether a law is appropriate and adapted to a legitimate end. However, it was equally clear that those tools of analysis were not necessarily considered relevant in all implied freedom cases.

Why structured proportionality is not the appropriate test

(a) Where proportionality developed and plays a legitimate role

33. In *Mulholland v Australian Electoral Commission*, Gleeson CJ reasoned that if proportionality were to be appropriated from foreign legal systems, 'it would be important to remember, and allow for the fact, that it has been developed and applied in a significantly different constitutional context'.[71]

34. The historical roots of a structured proportionality test as a public law standard can be traced to eighteenth-century German administrative law; predating the modern German Constitution.[72] Carl Gottlieb Svarez, the principal drafter of the Prussian Civil Code of 1794, is credited, more than anyone else, for developing modern proportionality. As a positive legal concept, it began appearing in Prussian administrative law in the second half of the nineteenth century. Thus, for example, the Supreme Administrative Court of Prussia ruled in a long line of cases that certain police conduct was illegal because it was disproportionate.[73]

35. A structured proportionality test of legislation as to its 'suitability', 'necessity' and 'adequacy in its balance' imports the German approach towards proportionality.[74] The *Basic Law for the Federal Republic of Germany* ('**Basic Law**'), being the constitutional law of Germany adopted in 1949, protects human rights and freedoms including: the absolute right to human dignity; personal freedoms, including faith and conscious, expression, assembly, association, privacy of correspondence, movement and occupation. It does not contain any explicit provision relating to proportionality. Except for the right to human dignity, all the rights mentioned by the Basic Law are relative. Some have no explicit limitation, while others are limited only by the 'general laws' or 'by laws'.[75]

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70 Ariel Bendor and Tal Sela, 'How proportional is proportionality' (2015) 13 *International Journal of Constitutional Law* 530, 538.

71 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 199 [38] (Gleeson CJ). See also at 197-198 [34], 200 [39] and *McCloy v New South Wales* (2015) 257 CLR 178, 229 [120] (Gageler J).

72 Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 384.

73 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 177-179.

74 Anne Twomey, 'McCloy v New South Wales: Out with US corruption and in with German proportionality' (15 October 2015) *Australian Public Law Blog* <https://auspublaw.org/2015/10/mccloy-v-new-south-wales/>.

75 For example *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] arts 5(2) and 14(1).

36. The Constitutional Court, established in 1951, soon began following the notion that all rights under the Basic Law, other than the right to human dignity, are bound by the concept of structured proportionality and all of its components. Thus, in each case, the court must find a proper purpose for the limiting statute, a rational connection between the means used by the limiting statute and the proper purpose, the absence of less intrusive means, and a proper balance between the limitation of the right and the benefit gained by limiting the right.[76]

37. It has been observed that in Germany, nearly all cases involving structured proportionality are decided at the balancing stage.[77] Before engaging in the balancing exercise it first must be established that there exists a conflict between the right and the impugned legislation and the impugned legislation has a rational connection to its purported purpose (suitable) which cannot be resolved in a less restrictive way (necessity). It is therefore possible for a law to fail the proportionality test even if it served a legitimate end and did so in the least restrictive manner practicable. It may be observed that the human rights enshrined in the Basic Law, coupled with the structured proportionality approach that the German Constitutional Court commenced to use at that time, reflected a post-war paradigm of human rights protection.[78]

38. The export of structured proportionality to Canada and the United Kingdom coincided with their embrace of Bills of Rights.[79] The obvious lure of proportionality reasoning was that in each case the enshrined rights were explicitly limited to the extent 'necessary'[80] or 'demonstrably justified'[81] in a democratic society.[82]

(b) The essential aspects of the Australian Constitution

39. By relevant contrast to the contexts in which proportionality is applied in Europe and Canada, Australia's Constitution, being as it is bespoke constitutional architecture, is characterised by a deliberate paucity of individual rights, and instead by the primacy accorded to Parliament and the 'great underlying principle'.

40. Shortly after Federation, Professor Harrison Moore noted the absence of enshrined rights in the Australian Constitution and the 'prevalence of the democratic principle, in its most modern guise'. From this he concluded that '[t]he great underlying principle is,

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76 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 180.

77 Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10(3) *International Journal of Constitutional Law* 709, 711.

78 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 181, citing LE Weinrib, 'The Post War Paradigm and American Exceptionalism' in S Choudrhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 84.

79 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 188-189, 193; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 113-114.

80 See, for eg, *Human Rights Act 1998* (UK) c 42, sch 1, arts 8(2), 9(2), 10(2), 11(2).

81 *Canada Act 1982* (UK) c 11, sch B, pt I, art 2 (*Canadian Charter of Rights and Freedoms*)

82 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 198 [36] (Gleeson CJ).

that the rights of individuals are sufficiently secured by ensuring, as far as possible, each a share, and an equal share, in political power.'[83]

41. As Barwick CJ observed in *Attorney-General (Cth) ex rel McKinlay v Commonwealth*:[84]

> it is well known that the Constitution of the United States would not have been accepted except on the footing that it would be amended to include a Bill of Rights. It is very noticeable that no Bill of Rights is attached to the Constitution of Australia and that there are few guarantees. Not only are the powers given to the Parliament plenary but there is a large number of provisions in the Constitution which leave to the Parliament the power of altering the actual constitutional provisions. In other words, unlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility.

42. Sir Owen Dixon too noted that:[85]

> The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to control of the legislature itself.

43. Likewise, Professor AV Dicey noted that the rigidity of the Australian Constitution is tempered by the 'very wide legislative authority' conferred upon the Commonwealth Parliament.[86]

44. It has also been said that, 'Belief in the strength of our common law heritage explains why we did not adopt a bill of rights at federation.'[87] Australia's inheritance of the common law – including the reception of the *Magna Carta 1215* and *Bill of Rights 1688* – did not import a role for judges in invalidating inconsistent legislation.

45. It can be seen then that European and Canadian jurisprudence on proportionality developed in a materially different context in at least two respects.

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83 Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329, cited with approval in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136, 139-140 (Mason CJ), *McCloy v New South Wales* (2015) 257 CLR 178, 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110]-[111] (Gageler J), 258 [219] (Nettle J); *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1048 [87] (Gageler J).

84 *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 24 (Barwick CJ).

85 Owen Dixon, *Jesting Pilate* (Law Book Co, 1965) 102.

86 AV Dicey, *Introduction to the Study of the Law of the Constitution* (6th ed, 1902) 481-482, quoted in *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1045-1046 [75] (Gageler J).

87 Hon Justice Virginia Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (The Sir Ninian Stephen Lecture delivered at University of Newcastle, Newcastle, 29 April 2016) 8.

46. First, courts there are called upon to protect 'freedom of expression generally as a fundamental human right'.[88] It is accurate to say that the contrast is stark to Australia, where there is a studied paucity of individual rights granted by the Australian Constitution. As Barak has acknowledged, Australia's Constitution 'is mostly institutional in nature.'[89] More particularly, as this Court has held repeatedly, the implied freedom is a limit on legislative power, rather than a personal right.[90] It serves to protect 'systemic integrity, not personal liberty'.[91]

47. Second, and connected to the first point of distinction, in a human rights context, a legitimate role for the judiciary is the 'enhancement of political outcomes in order to achieve some notion of Pareto-optimality.'[92] That naturally gives rise to a greater scope for judicial intervention in questions of policy. Moshe Cohen-Eliya and Iddo Porat have also shown that optimisation is reflected in Germany's legal culture as it developed even prior to the advent of human rights. In Germany the state is conceived in a communitarian light in which its various organs – including the courts – 'play an important role in realizing common values and are perceived as having an organic relationship with the citizens'.[93] The culture of German courts is to assist the state in realising common values to the maximum extent possible.

48. By contrast, the Australian Constitution is characterised by the primacy accorded to Parliament, which is entrusted foremost with realising our common values. That wide legislative ambit is a recognition that Parliament is best placed to address problems of social concern. Moreover, it is an acknowledgment that in our representative democracy, the sovereignty of the people is expressed through Parliament. While the Constitution vests power and responsibility in this Court to invalidate legislation which exceeds legislative power,[94] that role of the Court is 'in the last instance'.[95] In the first instance, 'the ordinary constitutional means of preventing misuse of the exercise of legislative and executive power' is 'the accountability of the legislature and the executive to electors.' Within that constitutional context of wide legislative authority,

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88 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 125 (Mason CJ, Toohey and Gaudron JJ).

89 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 195.

90 *McCloy v New South Wales* (2015) 257 CLR 178, 202-203 [30] (French CJ, Kiefel, Bell and Keane JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, 551 [30], 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 150 (Brennan J).

91 *McCloy v New South Wales* (2015) 257 CLR 178, 228 [119] (Gageler J).

92 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1051 [110] (Gageler J), citing Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002) 105; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 364-365.

93 Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) 47.

94 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1060 [188] (Keane J), citing *Marbury v Madison*, 5 US 137, 177 (1803); *New South Wales v Kable* (2013) 252 CLR 118, [51]. See also *McCloy v New South Wales* (2015) 257 CLR 178, 227-228 [116 (Gageler J).

95 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1048 [89] (Gageler J).

the Court's supervision of the implied freedom is 'limited to safeguarding that mechanism of accountability.'[96]

(c) *Structured proportionality undermines the separation of powers*

49. Because the Constitution requires this Court to police the boundary of legislative competence, any alteration of that boundary alters the scope of judicial power. In *Lange*, this Court adopted a test of appropriate and adaptedness to determine the limits of the implied freedom based on what is necessary for the constitutionally prescribed system of government.[97] As noted more recently by French CJ and Bell J in *Murphy*, that inquiry into appropriate and adaptedness 'marks the limits of legislative power and the borderlines of judicial power'.[98]

50. Respectfully, the problem is that structured proportionality erects a new borderline between legislative and judicial power which is incongruent with the borderline required by the Constitution. As a number of judges pointed out in *Murphy*, a mandatory test of necessity would embroil the Court in the ranking of policy options, which would 'invite[] the Court to depart from the borderlands of the judicial power and enter into the realm of the legislature.'[99] Gordon J questioned whether it would be 'appropriate at all in the Australian constitutional context, where the judicial branch of government cannot exercise legislative or executive power.'[100] As this Court held in *Castlemaine Tooheys Ltd v South Australia*, in the context of s 92 of the Constitution, the ranking of policy options would require the Court 'to sit in judgment on the legislative decision, without having access to all the political considerations that played a part in the making of that decision, thereby giving a new and unacceptable dimension to the relationship between the Court and the legislature of the State.'[101] Likewise, in *Australian Communist Party v Commonwealth*, Dixon J reasoned that while the boundaries of legislative competence 'must be decided by the Court, the reasons why it is exercised, the opinions, the view of facts and the policy upon which its exercise proceeds and the possibility of achieving the same ends by other measures are no concern of the Court.'[102] In *Unions NSW*, Keane J found that even the 'necessity' stage of proportionality analysis 'would seem to countenance a form of decision-making having more in common with the legislative than judicial power'.[103]

51. Proportionality *sensu stricto* also injects the judiciary into polycentric decision-making and political compromises between competing values, interests and priorities. Such

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96 *McCloy v New South Wales* (2015) 257 CLR 178, 230 [122] (Gageler J).

97 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

98 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1037 [31] (French CJ and Bell J). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [33] (Gleeson CJ).

99 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1039 [39] (French CJ and Bell J).

100 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1079 [299] (Gordon J).

101 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *McCulloch v Maryland*, 17 US 316, 423 (Marshall CJ) (1819), quoted with approval in *Unions NSW v New South Wales* (2013) 252 CLR 530, 576-577 [136] (Keane J).

102 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 198 (Dixon J), quoted with approval in *Unions NSW v New South Wales* (2013) 252 CLR 530, 576-577 [136] (Keane J).

103 *Unions NSW v New South Wales* (2013) 252 CLR 530, 576 [129].

'broad judgments'[104] are 'quintessentially legislative'.[105] And for the judiciary to arrogate that role to itself 'is to make politicians of judges'.[106] If, as per the German experience, nearly all cases involving the application of a structured proportionality test are decided at the balancing stage, that must inevitably shift the focus of the Court from a narrow consideration of the relationship between the means and the ends to a more expansive jurisdiction akin to that of the primary, legislative decision-maker.[107] Ultimately, a structured proportionality analysis encourages judicial interference with matters of legislative judgment or, as Toohey J put it, the Court could 'be drawn ... into areas of policy and ... value judgments.'[108]

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52. The separation of powers in Australia is more than a constitutional principle; it is a constitutional mandate. 'Section 1 [of the Constitution] positively vests the legislative power of the Commonwealth in the Parliament of the Commonwealth', not the judiciary.[109] Structured proportionality's incursion upon the separation of powers does more than undermine an ideal; it breaches a constitutional requirement.

(d) Structured proportionality is inconsistent with the 'great underlying principle'

53. When the Court strays from the borderlands of judicial power into the legislature's
20 domain, a further consequence is that the 'great underlying principle' of the Constitution is diminished. That principle, according to Professor Harrison Moore, is that an equal share in political power is the best guarantee of rights and freedoms.[110] When a court determines questions of policy, it deprives the people of their equal share in political power. In the words of Professor Jeremy Waldron, 'By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.'[111] For this democratic deficit, it should be noted, 'Barak offers no justification'.[112]

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104 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 134 [29] (French CJ, Crennan and Kiefel JJ).

105 *Department of Revenue of Kentucky v Davis,* 553 US 328, 360 (Scalia J) (2008).

106 Hon Justice PA Keane, 'In celebration of the Constitution' (Speech delivered in the Banco Court, Brisbane, 12 June 2008) 4.

107 Murray Wesson, 'McCloy, Proportionality and the Doctrine of Deference' (3 March 2016) *Australian Public Law Blog* <https://auspublaw.org/2016/3/mccloy-proportionality-and-the-question-of-deference>.

108 *Leask v Commonwealth* (1996) 187 CLR 579, 616. See also at 605 (Dawson J).

109 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1080 [303] (Gordon J).

40 110 Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329, cited with approval in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136, 139-140 (Mason CJ), *McCloy v New South Wales* (2015) 257 CLR 178, 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110]-[111] (Gageler J), 258 [219] (Nettle J); *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1048 [87] (Gageler J).

111 Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1353; Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) 199.

112 Ariel Bendor and Tal Sela, 'How proportional is proportionality' (2015) 13 *International Journal of Constitutional Law* 530, 543.

54. Moreover, the great underlying principle is about more than political equality; it is the Constitution's means of ensuring rights and liberties. As Keane J has opined extrajudicially:[113]

> our framers' choice not to fetter legislative experimentation by a Bill of Rights enforced by the unelected judiciary, was not a slip of the pen, but a deliberate choice to embrace an ideal of democracy which reposes a great responsibility on the citizenry to act justly towards their fellows, and confides in the intelligence and decency of that citizenry as the best guarantee that this responsibility will be discharged.

Judicial overreach which removes that trust in the people also does harm to the obverse of political equality: civic responsibility.

(e) Structured proportionality analysis is not grounded in the text of the Constitution and suffers a disconnect from the rationale underlying the implied freedom

55. The implied freedom is an implication drawn from the structure of the Constitution. Unless the implied freedom is to operate independently of its reason for existence, the limits of the implied freedom must likewise be grounded in the Constitution, so that the implication 'defines the nature and extent of the freedom'.[114] As this Court held in *Lange*, the freedom 'is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.'[115] As McHugh J reiterated in *APLA Ltd v Legal Services Commissioner (NSW)*, '[b]ecause it arises by necessity, the freedom is limited to 'the extent of the need'.[116]

56. According to Barak, strict proportionality 'determine[s] the scope – and set[s] up the boundaries – of the state's ability to realize its proper purposes'.[117] The problem is that the boundary of the implied freedom inheres in the Constitution whereas the boundary erected by strict proportionality does not. By equating the two, the possibility arises that the wrong boundary may be applied by this Court. The balancing required by *McCloy* 'compares the positive effect of realising the law's proper purpose with the negative effect of the limits on constitutional rights or freedoms.'[118] By placing an absolute freedom of political communication as the ideal on one side of the scales, this test

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113 Hon Justice PA Keane, 'In celebration of the Constitution' (Speech delivered at the Banco Court, Brisbane, 12 June 2008) 4

114 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), citing *Cunliffe v Commonwealth* (1994) 182 CLR 272, 326 (Brennan J).

115 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

116 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 361 [65] (McHugh J), quoting *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105, 118 (Kitto J). McHugh J's passage was quoted with approval in *Hogan v Hinch* (2011) 243 CLR 506, 554 [93] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

117 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 365.

118 *McCloy v New South Wales* (2015) 257 CLR 178, 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

assumes that the freedom should be optimised; that is, that the Constitution demands that the freedom be realised 'to the greatest extent possible given the legal and factual possibilities'.[119] With respect, as established in *Lange*, the Constitution requires less. It requires only that which is necessary for the effective operation of the system of representative and responsible government.

57. It is for this reason that Gageler J expressed his doubt in *McCloy* that strict proportionality is 'sufficiently focused adequately to reflect the reasons for the implication of the constitutional freedom and adequately to capture considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed.'[120]

58. *McCloy*'s mandatory requirement of 'necessity' suffers the same disconnect from the implied freedom's rationale. Necessity involves a comparison between the means selected by the legislature and hypothetical alternative means which would restrict the freedom to a lesser extent. That is, *McCloy*'s reference to 'necessity' is to the necessity of the impugned law, which has nothing to do with the Constitution's limit on the implied freedom to what is 'necessary' to maintain the constitutionally prescribed system of government. As Barak acknowledges, this test of necessity 'is an expression of the notion of efficiency, or, more specifically, of Pareto efficiency',[121] which when applied to the implied freedom assumes that the Constitution requires the freedom to be optimised. Again, our Constitution requires less. That is not to say that alternative means will never be relevant when considering whether a burden is justified. Rather, it is to say that if the test of necessity is treated as always decisive, the boundary of legislative competence erected by the test based on optimisation of the freedom will be different from the boundary required by the Constitution.

59. The joint reasons in *McCloy* appear to have acknowledged that structured proportionality has no foothold in the Constitution when their Honours said, 'The difference between the test of compatibility and proportionality testing is that the latter is a tool of analysis for ascertaining the rationality and reasonableness of the legislative restriction, while the former is a rule derived from the *Constitution* itself.'[122]

(f) Courts are institutionally ill-equipped to undertake structured proportionality

60. In *Murphy*, Gordon J observed that 'the judiciary is not equipped to make definitive judgments about whether there are obvious, compelling and practical alternatives to particular provisions.'[123] As to why the judiciary is ill-equipped, her Honour referred to the different 'skills and professional habits' of the three branches of government.[124] As Professor Lon Fuller noted long ago, one particular set of skills that courts lack is the

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119 Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002) 47.

120 *McCloy v New South Wales* (2015) 257 CLR 178, 236 [145] (Gageler J).

121 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 320.

122 *McCloy v New South Wales* (2015) 257 CLR 178, 213 [68] (French CJ, Kiefel, Bell and Keane JJ).

123 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1080 [303] (Gordon J).

124 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1080 [303] (Gordon J), quoting *R v Davison* (1954) 90 CLR 353, 381-382 (Kitto J).

resolution of polycentric problems. A decision about a polycentric problem is likely to have multifaceted and unforeseeable repercussions. Fuller likened such situations to a spider web: 'A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole.'[125] As Lord Sumption has said much more recently:[126]

> In deciding where the balance lies between individual rights and collective interests, the relevant considerations will often be far wider than anything that a court can comprehend simply on the basis of argument between the parties before it. Litigants are only concerned with their own position. Single-interest pressure groups ... have no interest in policy areas other than their own. The court, being dependent in the generality of cases on the material and arguments put before it by the parties, is likely to have no special understanding of other areas.

61. By contrast Parliament 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.'[127] Accordingly, it is respectfully submitted that structured proportionality is directed to questions of social policy for which courts lack institutional competence relative to the legislature.

The Lange test has not yielded adverse results

62. Even without all the foregoing reasons, it is respectfully submitted that the Court would not contemplate altering settled constitutional arrangements to fix a non-existent problem, *a fortiori* when the alteration raises the issues addressed above. In those circumstances, it is proper to ask what problem the *McCloy* reformulation sets out to solve.

63. As Gordon J pointed out in *McCloy*, the two questions posed by the *Lange* test provided 'tools of analysis' which 'are known and have been applied without apparent difficulty since the decision in *Lange*.'[128] Nor has the application of the *Lange* test led to observed aberrant results. It has not resulted in a manifest curtailment of the implied freedom nor adversely affected democratic elections or the constitutionally prescribed system of government, or otherwise worked injustice. It is submitted that there is no implied freedom case since *Lange* in which the Court did not go far enough into questions of policy merits in order to strike down a law.

64. An example will suffice. As noted above, in *Tajjour*, a majority of the Court upheld anti-association laws. One member of the majority applied appropriate and adaptedness without an analysis of fine balancing,[129] and the plurality judgment expressly refrained from applying strict proportionality or weighing of any kind.[130] It follows that had the

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125 Lon L Fuller 'The Forms and Limits of Adjudication' (1978) 92(2) *Harvard Law Review* 353, 395.

126 Lord Sumption, 'The Limits of Law' in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016) 26. See also Christopher L Eisgruber, *Constitutional Self-Government* (Harvard University Press, 2007) 173.

127 *Turner Broadcasting System Inc v Federal Communications Commission*, 520 US 180, 195 (Kennedy J) (1997). See also Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) 221.

128 *McCloy v New South Wales* (2015) 257 CLR 178, 282 [310].

129 *Tajjour v New South Wales* (2014) 254 CLR 508, 566 [92] (Hayne J).

130 *Tajjour v New South Wales* (2014) 254 CLR 508, 575 [133] (Crennan, Kiefel and Bell JJ).

Court applied a structured approach to proportionality, it would have needed asked itself politically laden questions it deemed unnecessary under the *Lange* test. According to the majority in *McCloy*, strict proportionality involves 'compar[ing] the positive effect of realising the law's proper purpose with the negative effect of the limits on constitutional rights or freedoms.'[131] Applied retrospectively to *Tajjour*, this would have meant that the Court would have needed to ask itself how important it is to society to disrupt criminogenic associations.[132] It is difficult to see how that would not involve determining the 'desirability of consorting provisions such as this'.[133] Given the political milieu in which the law arose,[134] the Court may have had to ask itself more particularly how important it is to society to disrupt outlaw motorcycle gangs. Barak has clarified further that the Court must assign weight to the 'marginal' social importance of realising the law's object, meaning that the Court must take into account 'the state of affairs prior to the law's enactment and the changes caused by the law'.[135] It would seem to follow that in *Tajjour* the Court would have needed to inquire into policy justifications in favour of consorting offences and those against, including, for example, issues surrounding over policing and the possibility that police discretion would be exercised to disproportionately target marginalised groups.[136] It can be seen that very soon into the analysis, judges must pull on a number of threads of the spider web, to use Fuller's metaphor, all with further cascading policy questions. Moreover, these questions only address one side of scales and must be repeated in respect of the marginal importance of the implied freedom to society.

65. There is therefore, respectfully, no warrant in adjusting the role of the Court and boundaries of legislative competence in order to require the Court to ask itself additional questions which delve further into questions of policy merits unnecessarily.

Conclusion

66. Respectfully, much less than achieving a useful result, *McCloy*'s emphasis upon strict proportionality has the potential to distort both the framers' constitutional plan and legitimate contemporary legislative design. When faced with uncertain constitutional limits, 'State policy-makers and legislators may refrain from implementing novel institutional designs or regimes to address identified problems', for fear of breaching an unknown limit.[137] That risk is accentuated by *McCloy*. At the heart of the judgment required by proportionality *sensu stricto* is a trade-off between two values or interests that do not share a common denominator, namely the public interest and the freedom

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131 *McCloy v New South Wales* (2015) 257 CLR 178, 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

132 *Tajjour v New South Wales* (2014) 254 CLR 508, 552 [41] (French CJ), 562 [77]-[78] (Hayne J), 583 [160] (Gageler J).

133 Compare *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [112] (Crennan, Kiefel and Bell JJ).

134 See, for eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8100-8101, 8104, 8131.

135 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 350-351. See also at 357-358.

136 See, for eg, Ombudsman, New South Wales, *Review of the use of the consorting provisions by the NSW Police Force*, Issues Paper (2013) 9, 30.

137 Gabrielle Appleby and Anna Olijnyk, 'The impact of uncertain constitutional norms on government policy: Tribunal design after Kirk' (2015) 26 *Public Law Review* 91, 91.

which supports the constitutional system of government. Barak has attempted to solve the problem of incommensurability by prefacing both sides of the scales with 'marginal social importance',[138] but this does no more than beg the question of how one is to compare the marginal social importance of incomparable values.[139] The practical result is that the final criterion is subjective and 'dominated by intuition', and '[s]uch a vague and ambiguous standard does not provide guidance to lawmakers'.[140]

67. The uncertainty wrought by *McCloy* has meant that legislatures have not been in a position to rely upon it with any confidence when formulating new legislation. It can be assumed that this is because the final stage of the structured proportionality test in any particular case comes down to the judiciary making the value judgments that are an inescapable feature of the balancing exercise required by the final stage.

68. Accordingly, unlike in cases such as the *Second Territory Senators Case*, *McCloy* has not been independently acted upon in a way which militates against reconsideration.[141]

69. For the foregoing reasons, the structured proportionality analysis set out in the joint judgment in *McCloy* should not become a doctrinal methodology for the resolution of questions about whether a law impermissibly infringes the implied freedom of political communication in Australia. It is submitted that this Court should return to the orthodox *Lange* test.

PART VI: Time estimate

70. Queensland estimates that it will require 30 minutes to present its oral argument.

Dated 28 March 2017

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138 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 483-484.

139 Ariel Bendor and Tal Sela, 'How proportional is proportionality' (2015) 13 *International Journal of Constitutional Law* 530, 541-542.

140 Ariel Bendor and Tal Sela, 'How proportional is proportionality' (2015) 13 *International Journal of Constitutional Law* 530, 544.

141 *Alqudsi v The Queen* (2016) 90 ALJR 711, 730-731 [66] (French CJ), citing *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), in turn referring to *Queensland v Commonwealth* (1977) 139 CLR 585 ('*Second Territory Senators Case*').