

Proportionality in Australian Constitutional Law: Towards Transnationalism?

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Abstract

Courts around the world are increasingly adopting tests of proportionality to assess limitations on constitutional rights. This essay considers the recent adoption of a proportionality test by the High Court of Australia in the case of *McCloy v New South Wales*. In particular, it assesses the extent to which this development can be seen as part of a growing globalisation of public law adjudication. In considering this question of transnational convergence the essay examines (i) the degree to which the Australian approach is analytically similar to the traditional approach to proportionality developed in Germany and, (ii) whether the Australian Court was influenced, either overtly or implicitly, by developments abroad. The essay concludes by making some observations about the potential implications of this convergence.

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I. Introduction

The proliferation of proportionality as a method of review has meant it is frequently held up as a “global” or “transnational” model of adjudicating constitutional rights. Yet while it is difficult to dispute that the rubric of proportionality is now employed across many jurisdictions, it is not self-evident that the language of proportionality is always used in precisely the same way. Are we really witnessing a great methodological convergence in public law adjudication? And if we are, what are some of the implications of this convergence?

This essay explores these questions in the context of the Australian High Court’s recent adoption of a standardised framework of proportionality in *McCloy v. New South Wales*.¹ Despite the High Court’s traditional ambivalence towards proportionality, four members of the Court have now embraced a structured three-part test to determine whether the implied constitutional freedom of political communication has been infringed. Given these developments, this essay compares the Australian High Court’s revised approach to proportionality with that adopted in Germany, commonly considered to be the “home” of modern proportionality reasoning. In particular the essay examines the degree of convergence between the two jurisdictions; while there are now clear parallels in the framing of the relevant test, this does not necessarily mean that the Australian and German concepts of proportionality are, in fact, analytically identical. In considering this issue the paper hopes to clarify how the concept of proportionality, with its global reach, has been translated in the Australian constitutional setting. This will contribute to understanding whether and, if so, in what sense, the adoption of proportionality can be seen as part of the growing globalisation of public law.

II. Proportionality and the Transnational Legal Landscape

To begin, it is necessary to clarify a few definitional issues. In particular, what is transnationalism, and what is proportionality? And what is the rela-

¹ *McCloy v. New South Wales*, (2015) 89 ALJR 857. Note that since this article was written the High Court has handed down the decision of *Murphy v. Electoral Commissioner*, (2016) 90 ALJR 1027 which concerns the Commonwealth Parliament’s power to regulate elections. A majority of the Court did not consider it appropriate to apply proportionality reasoning (in the sense developed in *McCloy*) in this context. An examination of this decision is beyond the scope of this essay but awaits further consideration.

tionship between the two? Both are terms with a variety of shades of meaning and both can be used to describe a variety of different concepts.

1. What Is “Transnationalism”?

The term “transnational law” was coined in 1956 by renowned international lawyer *Philip Jessup*. For *Jessup*, the concept included “all law which regulates actions or events that transcend national frontiers”.² He sought to convey the idea that the existing legal categories were inadequate to capture the complexity of legal relations. This understanding of transnational law as a “hybrid” between the national and international has remained,³ but it has diversified beyond state-centred conceptions of the law to capture a wider array of sources of authority and actors.⁴ As *Roger Cotterell* acknowledges, the term “transnational law” is “widely invoked but rarely defined with much precision”.⁵ Even a brief survey of the literature on “transnationalism” reveals that it is used in a variety of ways to encompass a range of different ways in which the “law” is no longer bounded along traditional national or international lines. At times, for instance, it refers to the regulation of disputes that transcend traditional boundaries,⁶ whereas at other times it refers to the convergence – either procedurally or substantively – across national borders.⁷ This essay does not attempt to resolve these taxonomical debates, but instead focuses on how recent developments in Australia might be seen as part of a growing transnationalisation of constitutional law. In particular, the focus is on the adoption of common methodological tools or techniques by courts in different jurisdictions. As *Menkel-Meadow* notes:

“In our modern era, transnational law is law that moves back and forth from the international to the domestic and often back again, such as when one’s na-

² *P. C. Jessup*, *Transnational Law*, 1956, 2.

³ *H. Hongju Koh*, *Why Transnational Law Matters*, *Penn State International Law Review* 24 (2006), 745.

⁴ *H. P. Glenn*, *A Transnational Concept of Law*, in: *M. Tushnet/P. Cane* (eds.), *The Oxford Handbook of Legal Studies*, 2005, 839.

⁵ *R. Cotterrell*, *What Is Transnational Law?*, *Law & Social Inquiry* 37 (2012), 500 et seq.

⁶ See, e.g., *C. Menkel-Meadow*, *Why and How to Study “Transnational” Law*, *University of California Irvine Law Review* 1 (2011), 97 et seq.

⁷ See, e.g., *R. A. Miller/P. C. Zumbansen*, *Introduction – Comparative Law as Transnational Law*, in: *R. A. Miller/P. C. Zumbansen* (eds.), *Comparative Law as Transnational Law: A Decade of the German Law Journal*, 2011, 3 et seq.; *R. Cotterell* (note 5), 501.

tion's legal solutions are "copy-pasted" or "downloaded and uploaded" to the law of another nation or to the international legal system."⁸

It is here that the link between transnationalism and proportionality becomes apparent. As has been well-documented, in recent decades proportionality has swept around the world and is now widely applied by both national, international and supra-national courts.⁹ This widespread adoption of proportionality reasoning has prompted scholars to describe its spread as "viral",¹⁰ and some have suggested that it forms part of a "global" model of constitutional rights.¹¹

2. What Is "Proportionality"?

While the language of "proportionality" is now prevalent, it is not clear that the concept is always employed in exactly the same way.¹² In a recent contribution to the ever-evolving literature, *Stephen Gardbaum* reminds us of the need not only to identify what proportionality *is*, but also to identify what it is *not*. Importantly, *Gardbaum* notes the need to distinguish proportionality, as a "specific technique or tool", from both more abstract arguments made in support of a "culture of justification" and also from general notions of balancing or reasonableness review.¹³

⁸ *C. Menkel-Meadow* (note 6), 110.

⁹ Note that the United States is often viewed as the main "exception" to the global spread of proportionality, but there is a growing body of literature debating the extent to which proportionality-style reasoning in fact forms part of the tiered scrutiny of review: see, e.g., *E. T. Sullivan/R. S. Frase*, *Proportionality Principles in American Law: Controlling Excessive Government Actions*, 2009, Ch. 3; *V. C. Jackson*, *Constitutional Law in an Age of Proportionality*, *Yale L. J.* 124 (2015), 3094; *P. Yowell*, *Proportionality in United States Constitutional Law*, in: *L. Lazarus/C. McCrudden/N. Bowles* (eds.), *Reasoning Rights: Comparative Judicial Engagement*, 2014, 87; *M. Cohen-Eliya/I. Porat*, *Proportionality and Constitutional Culture*, 2013.

¹⁰ *A. Stone Sweet/J. Mathews*, *Proportionality Balancing and Global Constitutionalism*, *Colum. J. Transnat'l L.* 47 (2008), 72, 112.

¹¹ *K. Möller*, *The Global Model of Constitutional Rights*, 2012. See also *D. M. Beatty*, *The Ultimate Rule of Law*, 2004, Ch. 5.

¹² See also *Jacco Bomhoff*, who makes a similar point in relation to "balancing": *J. Bomhoff*, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse*, 2013, 15.

¹³ As *Gardbaum* reminds us, it is not the only tool available for resolving competing interests: *S. Gardbaum*, *Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?*, in: *V. C. Jackson/M. Tushnet* (eds.), *Proportionality: New Frontiers, New Challenges*, forthcoming.

The focus here is on proportionality as a specific formula employed by judges to resolve competing interests.¹⁴ The origins of this formula are most-often traced to the Prussian administrative courts in the late 19th Century, where a notion of proportionality was developed in the context of limiting police powers.¹⁵ It was then picked up, and further-refined, by the German Federal Constitutional Court in the 1950s.¹⁶ Although other jurisdictions frame the test slightly differently,¹⁷ the German formulation of proportionality involves three distinct sub-tests or stages: (i) suitability, (ii) necessity and (iii) proportionality “*stricto sensu*” or balancing. The *suitability* sub-test of proportionality assesses the connection between a particular measure and the aim it is stated to advance: Is the measure capable of achieving the particular objective? At the second stage, *necessity*, the court asks whether the measure in question is necessary by inquiring into whether there are other, less restrictive alternatives that might achieve the same end. Finally, under the *balancing* or proportionality “*stricto sensu*” stage, the court is required to evaluate whether the benefit (the achievement of the legitimate aim) is worth the cost of impinging on the right.¹⁸

¹⁴ Note that although proportionality sometimes takes on the status of an overarching “principle”, the focus here is on its use as a “formula”. For some discussion of this distinction, see *M. Cohn*, Proportionality in Israel and Beyond – Four Aspects, in: G. Sapir/D. Barak-Erez/A. Barak (eds.), *Israeli Constitutional Law in the Making*, 2013, 189, 191, 194 et seq.

¹⁵ See, e.g., *A. Stone Sweet/J. Mathews* (note 10), 97 et seq.; *M. Cohen-Eliya/I. Porat*, American Balancing and German Proportionality: The Historical Origins, *I.CON* 8 (2010), 263, 271 et seq.; but see *T. Poole*, Proportionality in Perspective, *New Zealand Law Review* (2010), 369.

¹⁶ *D. Grimm*, Proportionality in Canadian and German Constitutional Jurisprudence, *U. Toronto L. J.* 57 (2007), 383, 385.

¹⁷ Note that some jurisdictions and commentators prefer a four-stage classification, with the first (prior) question asking whether the challenged law or measure pursues a legitimate goal. See, e.g., *Bank Mellat v. Her Majesty’s Treasury (No. 2)*, (2014) AC 701, 771 (20) (*Lord Sumption* JSC).

¹⁸ The extent to which each stage is relied upon is a separate question that requires further consideration. *Niels Petersen* suggests that since 1978, balancing has been the “predominant argumentation framework” of the Federal Constitutional Court: *N. Petersen*, Balancing and Judicial Self-Empowerment: A Case Study on the Rise of Balancing in the Jurisprudence of the German Federal Constitutional Court, *Global Constitutionalism* 4 (2015), 49, 65. Also, while space precludes a detailed contextual examination, in Germany proportionality reasoning was developed against the backdrop of a constitutional system founded in the aftermath of the atrocities of World War II. The Basic Law, which begins with a catalogue of fundamental rights, is underpinned by an open acknowledgement of human dignity and other constitutional values. See *D. Grimm*, Values in German Constitutional Law, in: D. Davis/A. Richter/C. Saunders (eds.), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law*, 2015, 199.

III. The Australian Ambivalence

Despite this global popularity of proportionality, the Australian approach has been somewhat more cautious. Until recently there has been ambivalence about whether a structured, three-part formulation, akin to the German model, properly formed part of Australian law. This essay focuses only on the use of proportionality in constitutional law, and more particularly on the recent developments in *McCloy* (which concerned the implied freedom of political communication).¹⁹ It is worth noting that in the Australian context there is no bill of rights at the federal level. While the Constitution contains a limited number of express rights, there are also implied rights, such as that considered in *McCloy*, which have been derived from the institutional arrangements protected by the Constitution.²⁰ In addition, Australia has a particularly strict separation of judicial power.²¹

The High Court's traditional approach to the implied freedom of political communication – familiar to all students of Australian constitutional law – is framed in terms of the language of “appropriate and adapted”.²² Since the unanimous decision in *Lange v. Australian Broadcasting Authority* in 1997 the High Court has consistently confirmed, with only slight modifications, a two-stage test for assessing limitations on the implied freedom.²³ This test involves assessing, first, whether the law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect. Secondly, if the law effectively burdens that freedom, the law must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the con-

¹⁹ *McCloy* (note 1). In the constitutional context it has for some time been acknowledged there are two main fields where *some* form of proportionality reasoning arises: first, in relation to the characterisation of Commonwealth laws in relation to certain heads of legislative power in the Commonwealth Constitution and, secondly, in assessing the limits of constitutional guarantees: see, e.g., *H. P. Lee*, Proportionality in Australian Constitutional Adjudication, in: G. Lindell (ed.), *Future Directions in Australian Constitutional Law*, 1994, 126; *J. Kirk*, Constitutional Guarantees, Characterisation and the Concept of Proportionality, *Melbourne University Law Review* 21 (1997), 1.

²⁰ *A. Stone*, Australia's Constitutional Rights and the Problem of Interpretive Disagreement, *Sydney L. Rev.* 27 (2005), 29.

²¹ *C. Saunders*, The Separation of Powers, in: B. Opeskin/F. Wheeler (eds.), *The Australian Federal Judicial System*, 2000, 3.

²² The High Court first recognised the implied freedom of political communication in *Nationwide News Pty Ltd v. Wills*, (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v. Commonwealth*, (1992) 177 CLR 106.

²³ *Lange v. Australian Broadcasting Corporation*, (1997) 189 CLR 520, 567 (*Lange*), as modified by *Coleman v. Power* (2004) 220 CLR 1, 50-51 (92)-(96) (*McHugh J.*), 77-78 (196) (*Gummow and Hayne JJ.*), 82 (211) (*Kirby J.*).

stitutionally prescribed system of representative and responsible government.

Although this test does not expressly use the word “proportionality”, or the language of “suitability”, “necessity” or “balance”, in *Lange* itself the Court took the view that its two-staged test was equivalent to, or involved some form of, proportionality reasoning. The Court in *Lange* noted that the test for assessing limitations on the implied freedom had been expressed in various ways in the past, and it observed that there was “little difference” between the formulations of “reasonably appropriate and adapted” and “proportionality”.²⁴ In later decisions a majority of the Court has expressed a clear preference for the language of “reasonably appropriate and adapted”, and has continued to maintain that the different expressions are alternative ways to express the same test.²⁵

There have, however, been some signs of disagreement within the Court. In *Mulholland v. Australian Electoral Commission*²⁶ and *Levy v. Victoria*,²⁷ for instance, Kirby J was critical of the traditional “appropriate and adapted” language. He argued it was “inappropriate and ill-adapted to perform the constitutional function repeatedly assigned to it by members of this Court”²⁸ and suggested that the “actual process of constitutional reasoning” was more usefully described by the language of proportionality.²⁹ More recently, similar criticisms were made by Crennan, Kiefel and Bell JJ in *Monis v. The Queen*, and their Honours questioned the continued use of the “more cumbersome and inexact phrase” of “appropriate and adapted”.³⁰

There has also been some disagreement in terms of the substance of the *Lange* test and the types of inquiries it involves.³¹ In *Tajjour v. New South Wales*, for instance, Crennan, Kiefel and Bell JJ integrated the language of “suitability” and “necessity” into the traditional *Lange* questions.³² While they did not adopt a test of “strict proportionality”, there were signs that

²⁴ *Lange* (note 23), 567 fn. 272 (the Court).

²⁵ For instance, Gleeson CJ noted that “whichever expression is used, what is important is the substance of the idea it is intended to convey”: *Mulholland v. Australian Electoral Commission*, (2004) 220 CLR 181, 197 (32) (*Mulholland*). See also *McCloy* (note 1), 885 (139) (Gageler J), 913 (309) (Gordon J).

²⁶ *Mulholland* (note 25).

²⁷ *Levy v. Victoria*, (1997) 189 CLR 579, 645-646 (Kirby J).

²⁸ *Mulholland* (note 25), 266 (247).

²⁹ *Mulholland* (note 25), 267 (250).

³⁰ *Monis v. The Queen*, (2013) 249 CLR 92, 195 (283).

³¹ For more detail, see A. Carter, *Political Donations, Political Communication and the Place of Proportionality Analysis*, PLR 26 (2015), 245, 251.

³² *Tajjour v. New South Wales*, (2014) 254 CLR 508, 570-571, (110)-(113) (*Tajjour*).

this question could arise in subsequent cases.³³ Justice *Gageler*, in contrast, adhered to the view that proportionality is an alternative way of describing whether a law is “reasonably appropriate and adapted”, and observed that the Court had not yet adopted a “generic proportionality analysis”.³⁴

IV. *McCloy* and the Development of a Structured Proportionality Test

Against this lingering uncertainty – and despite the fact that no parties or interveners made submissions that the longstanding *Lange* test required changing³⁵ – four members of the Court in *McCloy* took the opportunity to clarify the place of proportionality analysis. The case itself concerned a challenge to various provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), which imposed certain restrictions on political donations. A majority of the Court held that these provisions did not impermissibly burden the implied freedom of political communication.³⁶

The joint judgement of *French* CJ, *Kiefel*, *Bell* and *Keane* JJ, ostensibly confirming the *Lange* test, considered that the phrase “appropriate and adapted” was not to be understood as a “complete statement of what is involved”.³⁷ Instead, according to the joint judgement, the test required three questions to be considered: (i) “Does the law effectively burden the freedom in its terms, operation or effect?”;³⁸ (ii) If the answer to the first question is “yes”, “are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the constitutionally prescribed system of representative government?”;³⁹ (iii) If the an-

³³ *Tajjour* (note 32), 575 (133).

³⁴ *Tajjour* (note 32), 580 (150). Note also that in *Unions NSW v. NSW Keane* J was critical of the “indefinite and highly abstract language of *Lange*” and proposed a simplified test: *Unions NSW v. New South Wales*, (2013) 252 CLR 530, 576 (129).

³⁵ *McCloy* (note 1), 912-913 (308) (*Gordon* J).

³⁶ Note that a majority of the Court upheld all of the changed provisions (*French* CJ, *Kiefel*, *Bell* and *Keane* JJ delivered a joint judgement, and *Gageler* J and *Gordon* J delivered separate reasons). Justice *Nettle* dissented only in relation to the prohibited donor provisions: *McCloy* (note 1), 907 (266).

³⁷ *McCloy* (note 1), 874 (71).

³⁸ *McCloy* (note 1), 862 (2). This question remains in the same terms as the first *Lange* question.

³⁹ *McCloy* (note 1), 862 (2). This question was described as involving “compatibility testing”.

swer to the second question is “yes”, “is the law reasonably appropriate and adapted to advance that legitimate object?”⁴⁰

This final question was described as “proportionality testing”, and was broken down into three further stages. First, there is the question of suitability or “appropriateness or fit”, which asks whether there is a rational connection between the legislative provision the legitimate purpose which it pursues.⁴¹ According to the joint judgement, this “does not involve a value judgement about whether the legislature could have approached the matter in a different way”.⁴² The second question is that of necessity, which involves an inquiry into whether there are any obvious or compelling alternatives available that are less-restrictive of the freedom.⁴³ The final question is whether the law is “adequate in its balance”,⁴⁴ which was described as:

“a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.”⁴⁵

Despite acknowledging the role of value judgements in this way, the joint judgement was keen to emphasise that this “does not entitle the courts to substitute their own assessment for that of the legislative decision-maker”.⁴⁶ In its application of this third stage, the joint judgement held, without much elaboration, that the restriction on the freedom was “more than balanced by the benefits sought to be achieved”.⁴⁷

The joint judgement’s revised approach to proportionality was not accepted by the other three members of the Court, who saw no need to depart from the traditional *Lange* approach. The immediate upshot of *McCloy* is that, for the first time, there is a clear majority of the Court favouring a structured, three-part test of proportionality. Under this new approach proportionality represents an explicit and sequential test, rather than merely an alternative expression.

⁴⁰ *McCloy* (note 1), 862 (2).

⁴¹ *McCloy* (note 1), 875-876 (80).

⁴² *McCloy* (note 1), 875-876 (80).

⁴³ *McCloy* (note 1), 876 (81).

⁴⁴ *McCloy* (note 1), 875 (79).

⁴⁵ *McCloy* (note 1), 863 (2).

⁴⁶ *McCloy* (note 1), 877 (89).

⁴⁷ *McCloy* (note 1), 878 (93).

V. Towards Transnationalism?

Does this revised approach to proportionality in Australia signal the adoption of a global methodological approach? In considering the degree to which *McCloy* can be seen to represent a growing transnational convergence, a couple of distinct strands need to be disentangled. First, it is necessary to consider the extent to which the revised *McCloy* approach in fact conforms to the traditional German approach to proportionality. Secondly, there is the issue of whether the Court was influenced – either overtly or implicitly – by transnational developments. Each of these aspects is considered in turn before some observations are made about the implications of this trend.

1. An Analytically Similar Structure?

At first glance it is apparent that there are some key similarities between the revised Australian approach and the traditional German model. Both follow a similar three-pronged structure that is framed in terms of “suitability, “necessity” and (some form of) “balancing”. Although some scholars had previously suggested that the “reasonably appropriate and adapted” test was “conceptually equivalent” to a test of proportionality,⁴⁸ this has now been made explicit. The revised approach also represents a change in that it clearly requires the consideration of three distinct stages, to be applied sequentially. In addition, with the emergence of the “adequate in its balance” sub-test, we see a more open reliance on the notion of balancing and value judgements. Both in terms of language and substance, therefore, the revised approach reflects more closely the “formal argumentation structure” of the German model.⁴⁹

There are, however, some signs of divergence, and the joint judgement emphasised that its approach did not involve “acceptance of the application of proportionality analysis by other courts as methodologically correct”.⁵⁰ One potential difference lies in the third stage. The High Court has de-

⁴⁸ A. Stone, *Constitutional Orthodoxy in the United Kingdom and Australia: The Deepening Divide*, *Melbourne University Law Review* 38 (2014), 836, 842 (fn. 26). See also A. Stone, *The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication*, *Melbourne University Law Review* 23 (1999), 668; A. Stone, *The Limits of Constitutional Text and Structure Revisited*, *UNSWLJ* 29 (2006), 842; J. Kirk (note 19).

⁴⁹ N. Petersen (note 18), 52.

⁵⁰ *McCloy* (note 1), 863 (4).

scribed this as “adequate in its balance”, again preferring not to follow precisely the formula used elsewhere.⁵¹ In particular, the joint judgement sought to differentiate its approach from what it termed the “basic” rule of balancing that is applied in other jurisdictions. The approach in Australia, it stressed,

“... must proceed upon an acceptance of the importance of the freedom and the reason for its existence. This stands in contrast to the basic rule of balancing as applied to human rights, which has been subject to criticism for failing to explain the reasons underlying the creation of the right in order to put the reasons for its protection, or which justify its limitation, in perspective.”⁵²

Despite this recognition of the different constitutional contexts, it is not yet clear how this difference will play out in practice. In *McCloy* itself, although the joint judgement spent some time espousing benefits of the new approach, when it came to applying the relevant test it noted that “this aspect of proportionality does not assume particular significance”.⁵³ Even though the Court has acknowledged the role of value judgements in applying the revised test, it may be that in practice there is some reluctance to embrace an explicitly value-laden approach. For a start, the Australian Constitution, unlike many others, does not contain an express statement of values.⁵⁴ In addition, an open recognition of values presents challenges for the “legalism” that has dominated the Court’s approach to constitutional interpretation.⁵⁵

Another potential difference may emerge in terms of levels of scrutiny. In Germany the Constitutional Court has developed three distinct levels of scrutiny when applying proportionality reasoning. These are the “control of evidence” standard (the lowest level of scrutiny), the “control of reasonableness” standard (intermediate level), and the “strict control” standard (highest level of scrutiny). The appropriate level of scrutiny is determined by reference to the type of right in question.⁵⁶ In Australia the question of

⁵¹ *McCloy* (note 1), 863 (2). See also *M. Wesson*, *Crafting a Concept of Deference for the Implied Freedom of Political Communication*, *PLR* 27 (2016), 101, 105 et seq.

⁵² *McCloy* (note 1), 877 (88).

⁵³ *McCloy* (note 1), 877 (88).

⁵⁴ *C. Saunders/M. Donaldson*, *Values in Australian Constitutionalism*, in: D. Davis/A. Richter/C. Saunders (eds.), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law*, 2015, 15.

⁵⁵ *C. Saunders/A. Stone*, *Reference to Foreign Precedents by the Australian High Court: A Matter of Method*, in: T. Groppi/M.-C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, 2013, 13, 21.

⁵⁶ For an explanation of the three levels of scrutiny, see *C. Koch*, *The Sky Is Falling If Judges Decide Religious Controversies! — Or Is It? The German Experience of Religious*

scrutiny – that is, the intensity of review – appears to be unsettled. There are signs in *McCloy* and the cases that preceded it that this is likely to be a source of division amongst the Court. In *McCloy*, for instance, *Gageler J* rejected a “template of standardised proportionality analysis”⁵⁷ and instead held that in this case the standard of scrutiny was that of “compelling justification”.⁵⁸ The joint judgement did not resolve the question of scrutiny in *McCloy*, but in the earlier case of *Tajjour Crennan, Kiefel and Bell JJ* were of the view that the test in *Lange* “does not involve differing levels of scrutiny”.⁵⁹ It remains to be seen whether over time we will see the development of different categories of scrutiny, similar to the German approach, or whether a flexible approach will be adopted.⁶⁰

2. Transnational Influences?

A second aspect of transnationalism is the extent to which we can discern comparative influences in the Court’s adoption of a sequential proportionality test. Although proportionality is often held up as a model of constitutional “migration”, as *Margit Cohn* has pointed out, such borrowing is not always explicit or celebrated:

“... the transplant of a formula may be more discrete. ... Migration is not always openly celebrated; doctrines and formulae may be imported without open declaration. Alternatively, even when foreign sources are cited to support a new doctrine or formula, it may be in fact transformed without such transformation being acknowledged.”⁶¹

While the genealogy of proportionality in Australia deserves closer attention, it seems clear that the Court has been influenced by the widespread

Freedom Under a Bill of Rights, in: P. Babie/N. Rochow (eds.), *Freedom of Religion under Bills of Rights*, 2013, 194; *E. Benda*, The Position and Function of the *Bundesverfassungsgericht* (Federal Constitutional Court) in a Reunited Germany, in: E. McWhinney/J. Zaslove/W. Wolf (eds.), *Federalism-in-the-Making: Contemporary Canadian and German Constitutionalism, National and Transnational*, 1992, 29, 30 et seq.

⁵⁷ *McCloy* (note 1), 878 (98).

⁵⁸ *McCloy* (note 1), 888 (153).

⁵⁹ *Tajjour* (note 32), 575 (132) (*Crennan, Kiefel and Bell JJ*), see 580-581 (151) (*Gageler J*).

⁶⁰ In Canada, for instance, the Supreme Court has insisted that s 1 provides a single standard of review: *Thomson Newspapers Co v. Canada (Attorney General)*, (1998) 1 SCR 877 (90) (*Bastarache J*); *R. J. Sharpe/K. Roach*, *The Charter of Rights and Freedoms*, 5th ed. 2013, 79.

⁶¹ *M. Cohn* (note 14), 189, 197. Note that *Cohn* has traced the genealogy of proportionality in various jurisdictions, pointing out that the actual source of inspiration is not always acknowledged.

use of proportionality abroad. The first use of proportionality in Australian constitutional law is often attributed to *Deane J* in the *Tasmanian Dams Case*,⁶² and is thought to derive from the jurisprudence of the European Court of Human Rights and the European Court of Justice.⁶³ In *McCloy* itself the joint judgement clearly recognised the foreign pedigree of proportionality analysis, but at the same time sought to emphasise that its own approach would not necessarily conform to that taken elsewhere. In particular, the joint judgement drew attention to the Court's development, "over many years", of a "class of criteria to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done".⁶⁴ The joint judgement acknowledged that "[a]nalogous criteria" were used in other jurisdictions, particularly in Europe, but it preferred to draw upon common law authorities.⁶⁵ The joint judgement stressed that its approach would be tailored to the Australian constitutional setting, and it expressly disavowed the applicability of the "margin of appreciation" in the Australian context.⁶⁶

VI. Conclusion: Implications of Convergence?

So far this essay has sought to tease out the ways in which the revised approach to proportionality in *McCloy* might be seen to represent a growing transnational convergence, suggesting that by adopting a sequential, three-staged test the Court's approach has shifted closer to the traditional German model, and that this development reflects the widespread use of proportionality abroad. The final section addresses some of the implications of this trend towards transnationalism. It is suggested that these implications can be loosely grouped into two broad categories. First, there are substantive implications of a move towards a global or generic model of proportionality. Secondly, and relatedly, there are repercussions in terms of constitutional

⁶² *Commonwealth v. Tasmania*, (1983) 158 CLR 1, 259 et seq.

⁶³ See *J. Kirk* (note 19), 2.

⁶⁴ *McCloy* (note 1), 863 (3).

⁶⁵ Note, however, that the joint judgement distinguished the implied freedom from the First Amendment in the United States. The joint judgement also makes reference to the wealth of literature that has emerged on proportionality, but relies predominantly on the work of Professor *Aharon Barak* (*A. Barak*, *Proportionality: Constitutional Rights and Their Limitations*, 2012. Note that *Barak's* book is also referred to by *Gageler J: McCloy* (note 1), 887 (146).

⁶⁶ *McCloy* (note 1), 877 (92).

method. Both of these warrant more detailed consideration, but the hope here is to identify some potential avenues of further inquiry.

1. A Global Formula?

To the extent that proportionality is, or is becoming, a generic analytical tool, how does this align with the Australian constitutional setting? This encompasses both questions of legitimacy and also of detail. First, there is the issue of whether such a test is appropriate or justified in the Australian context. In many of the other jurisdictions where proportionality has taken root, its introduction has been precipitated by a change in constitutional circumstances. In Canada, for instance, the introduction of the *Charter of Rights and Freedoms* mandated that the newly-protected rights could be limited if “demonstrably justified”.⁶⁷ In Australia, where the Constitution provides for few express rights,⁶⁸ such textual cues are lacking. The division in *McCloy* reveals differing views about the significance of such differences in constitutional context. The joint judgement, although acknowledging the distinctive nature of the implied freedom, considered that proportionality reasoning could still legitimately and usefully be employed in this context. In contrast, *Gageler J* considered it “imperative that the entirety of the *Lange* analysis is undertaken in a manner which cleaves to the reasons for the implication of the constitutional freedom”.⁶⁹ For *Gageler J* this involved calibrating the standard of justification to the degree of risk to the system of representative and responsible government.⁷⁰ This difference of view raises broader questions about the legitimacy and extent of constitutional borrowing,⁷¹ but it also suggests there is more work to be done in terms of situating the new approach in its constitutional setting. Although the joint judgement attempts to do this, it has – so far at least – failed to convince the rest of the Court.

⁶⁷ Similarly, in the UK the advent of the *Human Rights Act 1998* (UK) represented a major change: *M. Cohn* (note 14), 189, 199.

⁶⁸ Australia’s “exceptionalism” in relation to explicit rights-protection has been well-noted: see, e.g., *B. Galligan/F. L. Morton*, Australian Exceptionalism: Rights Protection Without a Bill of Rights, in: T. Campbell/J. Goldsworthy/A. Stone (eds.), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia*, 2006, 17.

⁶⁹ *McCloy* (note 1), 887 (150).

⁷⁰ *McCloy* (note 1), 887 (150).

⁷¹ In this regard, see *J. Goldsworthy*, Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence, in: S. Choudhry (ed.), *The Migration of Constitutional Ideas*, 2006, 115; *V. C. Jackson*, Constitutional Law in an Age of Globalization, in: G. Sapir/D. Barak-Erez/A. Barak (note 14), 205, 221 et seq.

This issue of legitimacy is linked to the issue of detail, and there remain questions about exactly how a generic model of proportionality will be translated in the Australian context. It is not yet clear whether the new approach will be extended to other constitutional settings. In addition, as has been discussed above, it is also uncertain how the Australian approach, particularly in relation to balancing, will in practice differ from that adopted elsewhere. Two issues that remain to be clarified are whether the revised approach will incorporate varying levels of scrutiny, and whether it will in fact prompt a more open reliance on, and development of, values.

2. Constitutional Method

The revised *McCloy* approach may also have important implications in terms of constitutional method. The nature of the judgements that proportionality reasoning compels courts to make challenges the traditional approach of “legalism” that has dominated constitutional interpretation in Australia.⁷² Even prior to *McCloy* conversations were emerging in the Australian context about the development of a more “explicitly functionalist” approach to constitutional interpretation.⁷³ There are hints of such an approach in the joint judgement’s reasons in *McCloy*, and it may be that the adoption of proportionality pushes the Court further in this direction.

Another consequence of the introduction of a more overt test of proportionality might be an increasingly reliance on comparative constitutional materials. As a concept essentially derived from foreign sources, it is perhaps natural that the Court will look abroad when developing the details of its new test. Indeed, there are already signs that when considering issues such as the level of scrutiny and judicial deference the Court will at least consider the approaches adopted elsewhere. In addition, there is the possibility that foreign jurisprudence may be used as a form of “empirical fact”.⁷⁴ Judicial assessments of proportionality often raise complex empirical problems for which there is little or no evidence available, and foreign experience may provide a means of filling this evidentiary gap.

⁷² *C. Saunders/A. Stone* (note 55), 21.

⁷³ *R. Dixon*, *The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term*, *F. L. Rev.* 43 (2015), 455; *G. Appleby*, *Functionalism in Constitutional Interpretation: Factual and Participatory Challenges: Comment on Dixon*, *F. L. Rev.* 28 (2015), 493. Note that *Dixon*’s article was originally a paper presented at the 2015 Gilbert and Tobin Constitutional Law Conference in February 2015.

⁷⁴ *C. McCrudden*, *Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, *Oxford J. Legal Stud.* 20 (2000), 499, 525 et seq.

The use of foreign sources raises questions about comparative constitutional method.⁷⁵ Although the Australian High Court has long been willing to refer to the jurisprudence of other courts,⁷⁶ differences in constitutional context have sometimes been thought to limit or even preclude the reliance on foreign materials.⁷⁷ Echoes of this resistance are clearly evident in *Gage-ler J's* judgement in *McCloy*, where he cautions against the

“wholesale importation into our constitutional jurisprudence, under the rubric of proportionality, of a particular and prescriptive form of proportionality analysis drawn from that which has come to be applied in relation to the *Canadian Charter of Rights and Freedoms* and the European Convention on Human Rights”.⁷⁸

The resolution of these questions – both in terms of the substance of the proportionality test and changes to constitutional method – will largely depend on the Court's next steps. In line with the common law's incremental approach, *McCloy* does not provide a definitive account of proportionality. While we can discern in the majority's approach a shift towards a common analytical framework of proportionality, exactly how that is adapted in the Australian context remains to be worked out. In addition, there remains some resistance to this transnational turn amongst the other members of the Court.

⁷⁵ A. Stone, *Comparativism in Constitutional Interpretation*, *New Zealand Law Review* (2009), 45, 61 et seq.

⁷⁶ See, e.g., *C. Saunders/A. Stone* (note 55).

⁷⁷ See, e.g., *Roach v. Electoral Commissioner*, (2007) 233 CLR 162, 225 (Heydon J). See also *M. Kirby*, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, *Melbourne Journal of International Law* 9 (2008), 171.

⁷⁸ *McCloy* (note 1), 885 (140).