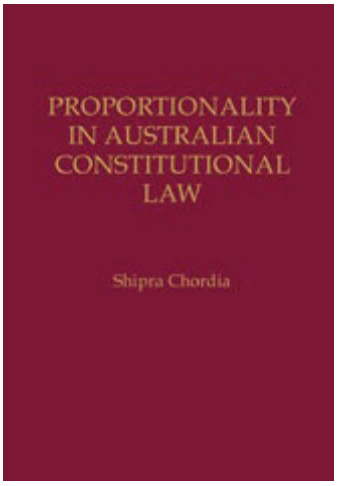
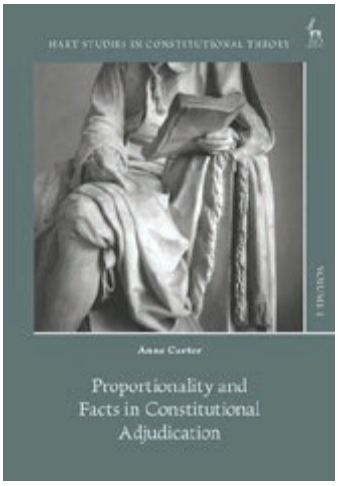
BOOK



Proportionality in Australian Constitutional Law

By Shipra Chordia
(Federation Press, 2020)



Proportionality and Facts in Constitutional Adjudication

By Anne Carter
(Hart, 2021)

The High Court's current approach to structured proportionality may be traced back to the decision of Kiefel J in *Rowe v Electoral Commissioner* (2010) 243 CLR 1 in which her Honour, in dissent and drawing heavily upon German and European law, applied structured proportionality in the context of the implied freedom of political communication. Despite earlier opposition to the translation of European proportionality jurisprudence into the Australian constitutional context (see Gleeson CJ in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [17]) her Honour's vision gradually found favour with other members of the High Court, eventually commanding a majority in *McCloy v New South Wales* (2015) 257 CLR 178 (Kiefel, Bell and Keane JJ, together with French CJ).

However, given the changing composition of the High Court the continuing role of structured proportionality remains unsettled. By January 2024, the doctrine's chief proponent will have retired, and none of the majority in *McCloy* will be on the High Court. The next most senior judges, Gageler J and Gordon J, remain sceptical of the role of structured proportionality, while Edelman J, Steward J and Gleeson J have all concurred in judgments in which structured proportionality has been applied as an analytical tool, and the position of those who will replace Kiefel CJ and Keane J is of course unknown.

It is in that state of flux that Dr Shipra Chordia and Dr Anne Carter have provided two valuable contributions to the literature considering the role of structured proportionality in the Australian constitutional context.

Dr Chordia's book begins with a survey of proportionality in western legal traditions, culminating in the development of structured proportionality in the German Constitutional Court and its adoption in a variety of jurisdictions, before also discussing various alternatives, in particular the formalism, ad hoc balancing and tiered scrutiny applied in the US Supreme Court. Dr Chordia then proceeds to discuss the application of proportionality in three different constitutional contexts: the characterisation of laws (in particular the so-called 'purposive powers'); freedom of interstate trade and commerce; and the implied freedom of communication.

Dr Chordia provides a theoretical framework for the use of structured proportionality where a 'balancing problem' arises. A balancing problem exists where there is a conflict between two sets of rights or interests, each of which has the same prima facie normative force (constitutional), neither of which is absolute, and at least one of which is incapable of being defined in the abstract. This explains why, in Dr Chordia's view, structured proportionality is not an appropriate analytical tool in solving problems of characterisation (where the conflict is between constitutional purpose and non-constitutional rights). Nor, according to Dr Chordia, is it an appropriate analytical tool for determining validity under the trade and commerce limb of s 92 (because following *Cole v Whitfield's* determination that 'absolutely free' means 'free from discriminatory burdens of a protectionist kind' the s 92 freedom has a fixed definition in the abstract, and a definition in which the underlying balancing of interests is 'baked in'). While the majority in *Palmer v State of Western Australia* [2021] HCA 3 expressed the view that structured proportionality was the appropriate form of analysis for both the trade and commerce and the intercourse limbs of s 92, Dr Chordia's theoretical framework explains why structured proportionality may properly be applied to the intercourse limb (because interstate intercourse must be absolutely free from discriminatory burdens of any kind, the balance of competing interests is not 'baked into' the definition).

When it comes to determining whether or not a law impermissibly infringes upon the implied freedom of political communication, Dr Chordia endorses structured proportionality not merely as a useful tool, but as the preferable form of analysis. The analysis is not an uncritical acceptance of the approach adopted by the High Court in *McCloy* (and others). Dr Chordia accepts some of the criticisms levelled at structured proportionality, including by Gageler J and Gordon J that it can be too 'algorithmic', but proposes that structured proportionality should retain a degree of flexibility in its application to each stage of the analysis (the current Australian approach, particularly at the 'necessity' stage with its insistence that alternatives be 'obvious and compelling' is antithetical to such flexibility), and should be firmly conditioned by appropriate notions of judicial restraint (a subject discussed in more detail in Chapter 4) having regard to the constitutional role of parliament and

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the courts, and the capacity of parliaments (more so than courts) to evaluate whether alternative means that have a less restrictive effect on freedom might not achieve the legislative purpose as effectively).

Dr Carter's contribution addresses a more practical question of how courts are to go about undertaking the intensely fact-dependent inquiries involved in assessing proportionality. As Dr Carter notes in the introduction, 'in applying tests of proportionality, judges must necessarily proceed on the basis of certain factual claims or assumptions about the world, and these often concern complex and contested social, political or economic issues.'

In Australia there has been a long-standing recognition that there are different categories of facts that require different approaches to fact-finding. In particular, there has been a distinction drawn between 'ordinary questions of fact' being those facts that 'arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law' and so-called 'constitutional facts' or 'legislative facts' being those matters of fact upon which the constitutional validity of a law falls to be determined.

As Dr Carter explains, in a world of structured proportionality, that traditional dichotomy is incomplete, because the facts relevant to the various stages of the structured proportionality analysis will often exhibit different characteristics. Recognising those different characteristics has implications for identifying the types of evidentiary material available, the level of satisfaction required, and the limits of the court's capacity to evaluate the evidence.

In particular, as Dr Carter emphasises in Chapter 7, that recognition of the different characteristics of the facts relevant at different stages of the inquiry has procedural implications for how the High Court (in particular) finds facts. The frustrations expressed by the High Court about the special case procedures in *Mineralogy Pty Ltd v Western Australia* [2021] HCA 30 at [51] to [61] and again by Gageler J in *Hornsby Shire Council v Commonwealth of Australia* [2022] HCATrans 105 may in part be a result of insufficient attention by parties and their advisers to identifying the facts that need to be found and addressing how they are to be proved if they cannot be agreed.

Dr Carter's work provides an invaluable framework within which to consider those questions in the context of constitutional litigation applying structured proportionality.

Reviewed by Dominic Villa SC

VOLUME

Australian Bar Review – Vol 50(3) – Indigenous Special Edition

In October 2021 the *Australian Bar Review* published a special edition in honour of the journal's 50th volume. The special edition focuses on First Nations voices and issues, and reflects on the developments and failures of the Australian legal system, to acknowledge and reform Indigenous issues over the past fifty years.

In the Foreword, Chief Justice Allsop notes that despite years of investment, reports, and enquiries into the injustice faced by First Nations peoples, a transformation is still needed to ensure real justice for First Nations people, and to create an Australian society that represents a just reality of Reconciliation. His Honour suggests that non-Indigenous Australians need to develop a whole appreciation and conceptualisation of the past, the present and the future from the perspective of First Nations peoples, in an acknowledgement that such an understanding informs both legal principles and practical approaches to the human and social reality in which we are situated.

The volume contains seven papers which explore the varied and complex legacies of systemic discrimination and violent impositions of power over First Nations people within the Australian legal system.

In a paper entitled *Indigenous over-incarceration and individualised justice in the light of Bugmy v The Queen*, Guy C Charlton comments on the High Court's analysis of Indigenous sentencing in *Bugmy v The Queen*, arguing that it was a lost opportunity to address the problems of Aboriginal over-incarceration and the failures of current sentencing regimes to address the needs of Aboriginal offenders.

The next paper arises out of the fact that seventy per cent of burial disputes filed in Australian courts are brought by Aboriginal Australians. Louise Goodchild and Lucy-Ann Kelley consider the unique cultural and spiritual beliefs and practices surrounding the disposal of a body and provide a guide to Aboriginal burial dispute hearings in New South Wales, examining the nature of burial rights and evaluating the increasing willingness of Australian courts to take a flexible and culturally appropriate approach.

Paul Gray discusses the landmark *Bringing them Home* report but notes that the over-representation of First Nations children removed from their families has only worsened since the report's publication in 1997. Gray advocates for a 're-imagination' of the system of child protection, not merely a 'tinker[ing]' with the façade. Without transformational change, Gray argues, the policies and approaches that established and entrenched the disproportionate removal of First Nations children will continue to pervade child protection systems and the outcomes for First Nations children are unlikely to improve.

Peter Kilduff and Asmi Wood consider Australia's determination of sovereignty following the rejection of the European doctrine of discovery. The authors argue that a claim of sovereignty not adverse to the Crown, despite never having been pursued in Australian courts, is arguable and contestable as a justiciable issue. The authors consider the relevant case law and suggest amendments to the Australian Constitution that would recognise and protects Indigenous peoples' rights and title to land.

2021 marked 30 years since the handing down of the final report of the Royal Commission into Aboriginal Deaths in Custody. Irene Lawson considers the operation of the County Koori Court in Victoria, created to implement the inaugural Victorian Aboriginal Justice Agreement that emerged from the Commission's report. Koori courts aim to increase Koori engagement with, participation in, and ownership of, the law.

Helen Milroy, Marshall Watson, Shradda Kashyap and Pat Dudgeon discuss the historical and contemporary contexts which contribute to the over-representation of young First Nations people in the justice system as both victims and offenders. The authors argue that the offending behaviours 'lie at the end of a continuum of risk' that includes exposure to intergenerational and current trauma, generational poverty, social disadvantage and discrimination. Their article recommends measures for prevention and healing from a First Nations perspective and proposes comprehensive models of care to assist with an understanding of the many factors that impact the development, social and emotional wellbeing, health and mental health of First Nations peoples, families and communities.

Finally, Prue Vines explores the civil law inheritance needs of First Nations peoples, and the belated incorporation of 'customary law' into the *New South Wales Succession Act 2006*, in 2009. Vines argues that there is a clear need to bring Indigenous customary law into the common law space, despite concerns that this approach continues to be a form of a 'colonisation' of Indigenous communities.

Reviewed by Dominic Villa SC