AN AUSTRALIAN LOOKS AT GERMAN 'PROPORTIONALITY'

Patrick Quirk*

This article describes the proportionality doctrine in German constitutional law and makes some comparisons with the Australian phenomenon of the same name. The author's prime purpose is not exhaustive comparison, rather it is hoped that a clear and adequate description of German proportionality will open a dialogue between Australian and German constitutional orders. Of all European countries, it is typical of German jurisprudence to have the most refined and thoroughly reasoned proportionality doctrine and this alone makes the topic worthy of Australian interest since "proportionality" is in its relative infancy in this country. If Australian "fundamental rights" jurisprudence develops, it is submitted that Australian courts can learn valuable lessons from the depth of German experience in this area.

INTRODUCTION

This article is in three parts. In the first part, the doctrine called 'proportionality' which has operated over many years in the Federal Republic of Germany will be outlined in some detail. Secondly, the Australian 'doctrine', also known by the same name, will be discussed briefly in the context of Constitutional characterisation. Finally, some comparisons will be drawn between Australian and German use of the term and the meanings behind it.

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* BA LLB (Qld) LLM (Tübingen), Assistant Professor, Bond University Law School. My thanks to Professor Mary Hiscock, Dr KW Ryan, Professor Jim Corkery, Dr Christoph Palme, Associate Professor Gerard Carney, Associate Professor Brian Fitzgerald and Associate Professor Kay Lauchland for their comments and suggestions. Special thanks also to the Australian-German Association for providing research funding under the auspices of their Educational Development Fellowship. Also to Graham Johnson of Bond University library for assistance with materials. Mistakes and omissions remain entirely my own.

PROPORTIONALITY IN GERMAN LAW

Leading text writer Professor Ekkehart Stein, in his introduction to German constitutional law,[1] maintains that proportionality (*Verhältnismäßigkeit*) is to be observed in all cases where there is an interference with basic rights. The principle has great practical meaning both in administrative and constitutional law. In administrative law, it is the most important legal brake on discretion. In constitutional law, it plays a central role in the examination of any interference with 'fundamental rights' (*Freiheitsrechte*) According to Professor Stein, most decisions of the German Federal Constitutional Court in which an interference with a fundamental right has been found, are based upon a breach of the principle of proportionality Legislators must observe the principle in formulating legislation and so too must administrators in exercising their discretion

Professor Stein notes that in its simplest form, the principle is based upon the relationship between means (*Mittel*) and desired ends/goals (*Zweck*), that is, on the question of whether or not the legislation or administrative act in question is in appropriate relationship with the desired objects In application of the principle, it is always necessary to clarify the exact goal that the State is aiming for and the exact means by which a particular result is sought to be achieved According to Stein, if the desired goal is named then the task is to measure the (constitutional) appropriateness of the measure against this goal. If the goal is not named, then appropriateness is to be measured against each and every possible constitutional goal towards which the measure might be directed.

The principle of proportionality, in its most expanded sense, encompasses the following sub-principles: appropriateness, necessity and balancing/reasonableness [2] These will be discussed more fully below.

The German Federal Constitutional Court has consistently reaffirmed the principle's prestige and wide application as illustrated in the *Arrested Admiral* case.[3] That case applied proportionality to the law of arrest. After World War II, a 76 year old admiral was accused of murder. It was alleged that while acting as naval attache to the German Embassy in Tokyo in 1944, he ordered prisoners on ships leaving Tokyo harbour be left to die if the ship came under attack. His arrest, which came in 1965, was an 'arrest for investigation' and the Federal Constitutional Court held that since guilt was not yet established the arrest was, in all

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1 E Stein, *Staatsrecht* (14th ed 1993) 240–3

2 Ibid 240 Paragraph 29 V.

3 BVerfGE 19 342 (*Entscheidungen des Bundesverfassungsgerichts*: Decisions of the Federal Constitutional Court Vol *19 342)*

the circumstances, not justified. An arrest was out of proportion considering, *inter alia*, that he was unlikely to flee and not a danger to the community. The Court stated:

> In the Federal Republic of Germany, the principle of proportionality has constitutional law status. It arises out of the principle of the constitutional State, in principle even from the nature of the Basic Rights themselves, which as an expression of the citizen's general claim to freedom as against the State, may be limited at any time by public authority only so far as this is imperative for the protection of public interests.[4]

The 'principle of the constitutional State' referred to above is part of a central tenet of German constitutional jurisprudence known as the *Rechtsstaatsprinzip*. This principle corresponds most closely with our 'rule of law' and the idea that State power over the individual is not absolute (*legibus absolutus*) but is limited by law. The Basic Rights (fundamental freedoms) referred to by the Court are contained in the first chapter of the German Constitution (*Grundgesetz*) and include, *inter alia*, rights of personal liberty, equality before the law, freedom of faith, freedom of expression, association assembly and movement.[5]

German proportionality in the context of fundamental rights

The German constitutional framework has undergone radical change this century. To understand this, one needs to appreciate the aims of German constitutionalism as demonstrated in the case law of the Federal Constitutional Court. In a recent historical display, 'Questions on German History', in the Berlin Reichstag, there appeared a summary of the role of fundamental rights in the German Constitution:

> The Basic Law makes the freedoms and inviolable rights guaranteed in Articles 1-17 binding on the legislature, the executive and the judiciary as directly enforceable law. Although it is possible to restrict basic rights this may only be done in accordance with certain constitutional principles or, in other words by a law which expressly amends or supplements the provisions in question.[6]

One of these primary 'constitutional principles' is the principle of proportionality. In the *Investment Aid Act* case,[7] the German Federal Constitutional Court explains why a balancing mechanism like proportionality is so necessary in the process of setting off individual claims against the requirements of the collective good:

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4 Youngs, *Sourcebook on German Law* (1994) 117

5 See: Nigel G Foster, *German Law & Legal System* (1993) 119-25 for a concise discussion of all the rights contained in articles 1-19 of the German Constitution.

6 *Questions on German History*, (4th English ed 1992) 373

7 BVerfGE 4, 7.

> The picture of the human being in the basic law is not that of an isolated sovereign individual The Basic Law has resolved the tension of the individual much more in the sense of relations to society and ties of a person to society at the same time without infringing his own worth That follows in particular from looking at Arts 1, 2, 12 14 15 19 and 20 of the Basic Law together But this means: the individual must put up with those limitations on his freedom of action which the legislator draws for the care and advancement of communal social life within the boundaries of what is generally reasonable in the given circumstances, provided that the independence of the person is preserved at the same time.[8]

It is in this context that the principle of proportionality operates to balance the exercise of rights guaranteed in the Basic Law, to curb administrative excess, and to determine legislative validity.

Proportionality in German law — three elements in one principle

There are three separate yet, overlapping elements which make up German proportionality. One, two or all three of its elements may be applied in a given case. This Holy Trinity-like 'three-in-oneness' can best be appreciated by first considering each element individually.

First element: Appropriateness / Suitability

According to this principle, only *suitable* or *appropriate* means are to be used in bringing about desired ends. Appropriateness does not concern itself with the situation where legislative measures have been taken too far. That is left for the concept of necessity, which will be dealt with below. Rather, its operation lies in circumstances where the legislator has simply chosen the *wrong* legislative tool for the job at hand. In this sense, the appropriateness requirement strikes at a lack of *causal connection* between chosen means and the desired end. For example, one could take the *Falconer's* case[9] where the German Federal Constitutional Court decided it was inappropriate for the law to require a falconer to have technical knowledge about *inter alia*, weapons (including hand guns) and weapons law as well as certificated proof of proficiency on a firing range. The Court recognised that it was implicit in the very nature of falconry that no such weapons be used and thus no such knowledge be required.[10] The Court held that the limitations on the sport, which were far removed from the actual practice of falconry, could not be justified and so infringed the right

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8 Youngs, *Sourcebook on German Law* (1994) 183

9 BVerfGE 55, 159

10 There was evidence that the use of such weapons would have in fact frightened the falcon away.

contained in the Constitution to the 'free development of the personality'[11] The legislator had thus not overstepped the mark by over-regulating the falconer's weapons: the falconer has no weapons; the Court concluded the legislator was off the mark entirely in the search for a way of ensuring that falconry is conducted in a manner safe to the public.

Stein[12] illustrates the principle with the case of the 1957 Law Relating to Individual Traders,[13] which was challenged by the owner of a cigarette vending machine. The law provided for the licensing of individual traders on the basis of an examination of general knowledge about trade in goods (*Nachweis der Sachkunde*).[14] It was held to be invalid as infringing Article 12 of the Basic Law,[15] which guarantees the citizen's right to choose their trade, profession, or occupation. The aim of the regulation was the protection of consumers from damage to health or other forms of economic loss, but the court found the law to be unsuited to this end. Public health suffered no threat from the general trade in goods, but rather only from the trade in certain types of goods — for example, foodstuffs or pharmaceuticals. There were already protective regulations in force over the trade in these goods. The additional licensing requirements (which governed *all* types of trade in goods) were inappropriate, especially when applied to such a small-time trader as the owner of a vending machine who was selling a sealed product. Again, the legislator had missed the mark. The Court did not deny the possibility of pecuniary loss to consumers from negligent or incompetent trade[16] in *specific* types of goods, and conceded that appropriate training might avoid such loss, but it was this very training which the proposed regulations failed to mandate.

Another example taken from German administrative law concerned street signs erected outside the Ministry of Justice in Stuttgart. The

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11 German Basic Law, Article 2 (Rights of liberty) (1) provides:
Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.

12 E Stein, *Staatsrecht* (14th ed, 1993) 240–1

13 BVerfGE 19 330, 338f.

14 *Sachkunde* refers to expert knowledge in a particular field. Thus in administrative law, the right to exercise a particular trade is sometimes made dependant upon the trader passing certain examinations and undertaking a period of practical training. The knowledge required in this case was of a general nature applicable to most types of retail trade and did not relate specifically to pharmaceutical products, foodstuffs, or tobacco.

15 German Basic Law, Article 12 (1) provides:
All Germans shall have the right to freely choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations and professions may be regulated by or pursuant to a law.

16 Eg: faulty products or misrepresentations

ubiquitous '*Parken verboten!*' (parking prohibited) signs had on this occasion been afforded a specific exception: for service vehicles. The purpose of this regulation was to provide for safe and easy set down of visitors to the Ministry. The exception of service vehicles was found to thwart this purpose and thus rendered the chosen means unsuitable/inappropriate.[17]

The suitability requirement is not, however, an invitation to the courts to invalidate laws at will. Grabitz[18] identifies two distinct limitations on a German court which is adjudicating legislative power on the basis of its 'appropriateness.' First, a law which is inherently incapable of achieving the desired legislative end in its entirety will not automatically be deemed inappropriate: a part-fulfilment of the legislative objective will often suffice. Second, it is not a requirement of appropriateness that the means chosen to effect the desired end is operative at the precise time the legislation is formulated or brought into force. The court is thus asked to adjudicate *ex ante* and ask whether the law in question is in accord with what the legislator could have foreseen as necessary at the time to achieve the desired end. This gives legislators a margin of error in relation to the unfolding of future events which they cannot foresee. It follows, that to infringe the appropriateness requirement, legislators must 'from the beginning' adopt means which are inappropriate to achieve the desired legislative goal.

The appropriateness/suitability aspect of the proportionality principle (in the wide sense) has been compared to a 'coarse sieve' through which most legislative acts will pass uninterrupted.[19] The Necessity element poses a much finer test.

Second element: Necessity

Once the *appropriate* legislative means have been found, the question as to whether such means are *necessary* arises for consideration. This principle has been expressed in many different ways:[20] 'principle of necessity'; 'principle of the lightest means' (that is, the least intrusive); 'principle of the smallest possible interference'; and 'the prohibition on excess'.[21] All of these require that, when the legislator has several

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17 BVerwG 27, 181,187f (*Entscheidungen des Bundesverwaltungsgerichts* Decisions of the Federal Supreme Administrative Court) referred to in E Stein, *Staatsrecht* (14th ed 1993) 241

18 E Grabitz, Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts (1973) 98 *Archiv des Öffentlichen Rechts* 568, 572

19 Hirschberg, 'Der Grundsatz der Verhältnismässigkeit (1981) 106 *Göttinger Rechtswissenschaftlicher Studien* 54

20 See: E Stein, *Staatsrecht* (14th ed, 1993) 241

21 In German these are rendered '*Grundsatz der Erforderlichkeit*' *des leichtesten Mittels*', *des geringstmöglichen Eingriffs* and *Übermaßverbot*

equally suitable or appropriate means available, the least intrusive is to be chosen

The *Census Law* case of 1982 offers an example.[22] According to the Census Law, details of individuals (without name) obtained in a census were to be passed on to the appropriate State and Federal authorities so far as this data was necessary for them in carrying out their legitimate functions. Although names were not included, it would have been easy to discover respondents' identities by collating data such as birth dates and addresses. This would jeopardise the census' anonymity. The court held that any transmission of this information to other Federal and State administrative bodies overstepped the legitimate aims of the census and breached rights of dignity and liberty guaranteed in the Basic Law. The court's solution lay in the adoption of the alternative 'lightest means' whereby the legislator opened only particular portions of data to particular ministries, and then only for specific purposes

Grabitz[23] argues that whether the particular legislative measure under review is 'ultimately' or 'in any event' necessary, is not the issue. The legislator is at liberty to follow any or all constitutionally legitimate ends. The question is only whether the measure proposed is 'necessary'. This means that where there is an equally effective but milder measure which can be taken, then this is to be preferred. The German Federal Constitutional Court will apply this test '*in concreto*' and allows argument on the differing points of view as to what is strictly necessary. Where a class of persons is affected, such class must be defined prior to the application of the principle.[24]

Furthermore, the legislature is not confined to exercising a solitary means of achieving a particular end. The principle of necessity does not proscribe the employment of several measures, so long as none of them infringes the principle. This qualification flows naturally from the *ex ante* judgement and 'margin of error' afforded the legislator which was discussed above.[25]

Finally, alternative measures may indeed in some cases be 'milder' than those proposed[26] and yet still not be seen by a German court as

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22 BVerfGE 65, 1 65f

23 E Grabitz, 'Der Grundsatz der Verhaltnismassigkeit in der Rechtsprechung des Bundesverfassunggericht' (1973) 98 *Archiv des Offentlichen Rechts* 586, 573

24 See: Hirschberg: 'Der Grundsatz der Verhaltnismassigkeit' (1981) 106 *Gottinger Rechtswissenshaftlicher Studien* 54, 75

25 E Grabitz, 'Der Grundsatz der Verhaltnismassigkeit in der Rechtsprechung des Bundsverfassungsgerichts' (1973) 98 *Archiv des Offentlichen Rechts* 586, 574

26 In the sense that the Basic Right which is threatened by the proposed legislative measure may be infringed to a lesser degree

possible alternatives because they have an additional negative 'side effect' outside the realm of infringement of Basic Rights.[27]

Third element: Balancing / Reasonableness

This aspect of proportionality has been called 'the principle of narrow proportionality', 'proportionality in the strict sense,' or in German, '*Proportionalität*.' Balancing/reasonableness demands a balancing between (i) the seriousness of the interference with the rights concerned and (ii) the urgency or necessity of the justification for such interference. In simpler terms, purpose and method must be weighed against each other[28] and be found not to be 'out of proportion.' This aspect of the principle of proportionality (in the wide sense) differs from the necessity requirement in that there is no comparison of different means, but rather a strict comparison of *the* particular means with *the* particular and desired end. It is an ultimate or paramount test of 'proportionality' and is arguably the final, and finest sieve through which a law must pass.

Professor Stein[29] provides the example of the *Amtsrichter*[30] who breached this principle in a case in which the general manager of a *GmbH* (a corporation not unlike an Australian proprietary company limited by shares), who was also the company's majority shareholder, had repeatedly defaced questionnaires sent by the Chamber of Commerce with 'cynical, unsatisfactory and often totally senseless remarks.' As a result, the court twice fined the company 500DM. The fines were never paid because of insolvency. Nevertheless it was alleged that the general manager had caused damage to the company and an action was taken against him on the basis of *Organuntreue*,[31] a cause of action arising when a particular organ of a company acts outside its competence or ultra vires. In the course of these proceedings, the judge arranged for a medical examination of the defendant to ascertain whether he was of sound mind. In a fit of thoroughness, the court doctor recommended the removal of spinal cord and brain fluid to ascertain with more certainty whether the defendant was in fact mentally afflicted. On appeal, the German Federal Constitutional Court judged such a procedure to be not insignificant, and whilst it would normally be seen to be a safe procedure, it might in particular cases lead to severe complications. The intrusion on the defendant's rights were out of all

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27 E Grabitz, Der Grundsatz der Verhaltnismassigkeit in der Rechtsprechung des Bundsverfassungsgerichts (1973) 98 *Archiv des Offentlichen Rechts* 568 574

28 Youngs, *Sourcebook on German law* (1994) 105

29 E Stein, *Staatsrecht* (14th ed, 1993) 243

30 Roughly equivalent to a county court judge in the United Kingdom

31 In accordance with the Law Relating to Proprietary Companies (*GmbH Gesetz*) [81a] as it was then.

proportion to the gravity of the offence and the intrusive medical procedures were prohibited.

In determining 'narrow proportionality' the German Federal Constitutional Court does not seek to make positive judgements about whether legislative measures are 'balanced' or 'in proportion' to the desired end; rather, it appears the court will only make a judgement about whether measures are *disproportionate*.[32] Again, this preserves the legislature's sovereignty and freedom to formulate laws as it sees fit and prevents the Court from being compelled to ask whether proposed legislative means are 'optimal' or 'the best possible' for achieving the desired result. Judges are not democratically elected law makers.

The role of proportionality in German private law

The influence of the fundamental rights guaranteed in the German Basic Law has extended beyond public law into the realm of private and quasi-private law.[33] The principle of proportionality affects such diverse areas as taxation, employment and company law.[34] The principle has even been raised by Professor Bleckmann[35] in relation to *Liestungsgesetzen* (literally, 'performance statutes'), that is, those laws which flow from the fundamental freedoms when read in conjunction with the principle of the social/welfare state.[36] Bleckmann argues for proportionality to be applied in balancing the interests of taxpayers who fund the welfare state with those who are its beneficiaries. As with much of the case law, the launch pad for this argument is the fundamental right to the 'free development of the personality'.[37]

Despite this diversity of application, the principle's basic form remains the same in whatever area of law it operates. Consideration of its constitutional implications opens only a small window on the doctrine's wide application in Germany.

AUSTRALIAN 'PROPORTIONALITY' — *CUNLIFFE AND LEASK*

Leask v Commonwealth of Australia[38] was decided in 1996. Until then, the Australian doctrine of 'proportionality' had begun to feature more in

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32 E Grabitz. Der Grundsatz der Verhaltnismassigkeit in der Rechtsprechung des Bundesverfassungsgericht' (1973) 98 *Archiv des Offentlichen Rechts* 586, 576.

33 J Schwarze, *European Administrative Law* (1992) 689–90.

34 Ibid.

35 Bleckmann, Begründung und Anwendungsbereich des Verhältnismäßigkeitsprinzips (1994) 3 *Juristische Schulung* 179.

36 See: German Basic Law, Articles 20(1) and 28 (1) (the Welfare-State clauses).

37 German Basic Law, Article 2 (1).

38 (1996) 187 CLR 579.

the Court's decisions (for example, in *Nationwide News v Wills*[39]) and was also beginning to appear in various commentaries.[40] It seemed not beyond contemplation that the doctrine could become a paradigm of constitutional interpretation — at least after the 1994 case of *Cunliffe v Commonwealth*[41] in which Chief Justice Mason gave the idea much prominence. However, *Leask's* case placed heavy curbs on the doctrine and clarified its position in the Court's characterisation of jurisprudence.

Background and *Cunliffe's* case

The Australian Parliament derives its legislative power, in the main, from s 51 of the *Australian Constitution*[42] which gives power to make laws 'with respect to' a long list of subject matters ranging from external affairs and taxation to lighthouses, lightships, beacons and buoys. As final arbiter of the *Constitution*, the High Court of Australia must go through the process known as 'characterisation' and decide when an impugned federal law is 'with respect to' an alleged subject matter. Very early this century, the Court adopted[43] a famous passage from the United States case of *McCulloch v Maryland*,[44] which allows for a liberal interpretation of the document as a Constitution 'intended to apply to the varying conditions which the development of our community must involve.' As a counterbalance to this, the need to curtail over-lavish interpretations led to a requirement that laws be 'appropriate' or 'adapted' to their purpose and that the Court adhere to a 'value free' interpretation of Commonwealth statutes.[45] The term 'proportionate" also frequently appeared alongside 'appropriate' and 'adapted' and it is this term which was discussed at length in *Cunliffe v Commonwealth*.[46]

The relevant issue in *Cunliffe's* case was whether Part 2A of the *Migration Act 1958* (Cth) imposed a disproportionate restriction on the implied guarantee of freedom of speech in the Commonwealth *Constitution*. Broadly speaking, the impugned provisions required the registration of persons seeking to give immigration advice to aliens and would have required qualified lawyers to register as agents in certain circumstances. Did such a law go further than was reasonably required

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39 (1992) 177 CLR 1.

40 See eg: Tony Blackshield, George Williams and Brian Fitzgerald. *Australian Constitutional Law and Theory: Commentary and Materials* (1996) 365-74.

41 (1994) 182 CLR 272.

42 *Commonwealth of Australia Constitution Act 1900* (63 and 64 Victoria, Ch 12). The Commonwealth Constitution appears in the *United Kingdom Act* s 9.

43 See: *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309.

44 17 US (4 Wheat) 316, 421.

45 See: *Burton v Honan* (1952) 86 CLR 169, 179 per Dixon CJ.

46 *Cunliffe v Commonwealth* (1994) 182 CLR 272.

to achieve its purpose? Was this additional burden justifiable? Moreover, was this an attempt to abrogate some fundamental right inherent in the *Constitution*? The majority of the Court held the legislation to be valid, and all judges confronted the 'proportionality doctrine' to some degree In the course of his minority judgment, Mason CJ asked whether the legislation could be 'reasonably considered to be appropriate and adapted'[47] to achieving the purpose or object to which it was directed His honour held that:

> because legal practitioners already satisfy certain standards to gain admission and because the scope and extent of the mischief which the Part is designed to remedy in its additional requirements of competence and integrity imposed on legal practitioners have not been identified or established, those requirements are, in their application to lawyers admitted to practise, disproportionate to the legitimate end sought to be achieved and in my view are not reasonably appropriate and adapted to that end and are therefore invalid.[48]

Mason CJ regarded the test of 'reasonable proportionality' as having:

> an important role to play when the validity of a law hinges upon the proposition that it seeks to protect or enhance a subject matter or legitimate end within power[49]

At the other end of the spectrum Dawson J is far more cautious of the doctrine, finding as he does that it has 'no ready application (in Australia) as it does in Europe'[50]

Previous cases such as *Nationwide News Pty Ltd v Wills,*[51] *Castlemaine Tooheys Ltd v South Australia,*[52] *Davis v The Commonwealth,*[53] *Richardson v Forestry Commission*[54] and the *Tasmanian Dam* case[55] also feature a discussion of the concept, although it has not yet taken a homogeneous form amongst even those members of the Court who appeared to be its supporters

D F Jackson QC noted in 1995 that the Court had pronounced rather diverse views on the topic and saw proportionality in part as 'a reaction to the very broad approaches taken in the past to Commonwealth legislative powers'[56] Some other Australian commentators even argued

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47 Ibid 296.
48 Ibid 304.
49 Ibid 297 (emphasis added)
50 Ibid 356
51 (1992) 177 CLR 1
52 (1990) 169 CLR 436.
53 (1988) 166 CLR 79
54 (1988) 164 CLR 261
55 *The Commonwealth v Tasmania* (1983) 158 CLR 1
56 The 'Implications' of the Constitution' (Paper presented at the Australian Legal Convention Brisbane, 1995) 360

for a wholesale adoption of the principle of proportionality and welcomed its arrival 'to invigorate the Australian constitutional landscape'[57]

Discussions in the United Kingdom are also not without influence in Australia,[58] and the English discussions of themselves must in part be due to the fact that proportionality is widely accepted and applied in the European Court of Justice and the European Court of Human Rights [59] Interestingly, in the early 1990s, at least one member of the English Court of Appeal recommended 'a modest investment in proportionality as a growth stock'[60]

Leask

Leask's case came after a number of changes on the High Court bench and has been described as confirming a 'low level' proportionality test[61] which operates mainly in the area of purposive powers and limitations on power, and sometimes at the margins of the so-called incidental power.[62] It is the writer's view that if high hopes were held for the doctrine before this case, its application after *Leask* will certainly be much more limited

Leask concerned the interpretation of s 51(ii) and (xii) of the Commonwealth *Constitution* which gives the federal government power over taxation and 'currency, coinage, and legal tender'

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57 B Fitzgerald, Proportionality and Australian Constitutionalism (1993) 12 *University of Tasmania Law Review* 263, 321; See also I Zines, *Cole v Whitfield* — Most Significant Case of the Mason High Court (1995) 30(5) *Australian Lawyer* 18; R Smyth, The Principle of Proportionality Ten Years after GCHQ (1995) 2 *Australian Journal of Administrative Law* 189 See also: Discussion of proportionality in Geradin and Stewardson Trade and Environment: Some Lessons from *Castlemaine Toobeys* (Australia) and *Danish Bottles* (European Community) (1995) 44 *International and Comparative Law Quarterly* 41, 66–70.

58 See: The insightful comments on the European doctrines of proportionality and legitimate expectation in Levitsky, 'The Europeanization of the British Legal Style (1994) 42 *American Journal of Comparative Law* 347 374–80. See also: J Jowell, R Austin, H Reece and S Hall, Fundamental Human Rights – Proportionality (1995) 48 *Current Legal Problems* 187, in which the authors base their discussion on the case of *R v Secretary of State for the Home Department, ex parte Leech (No 2)* [1994] QB 198. See also: M Herdegen, The Relation between the Principles of Equality and Proportionality (1985) 22 *Common Market Law Review* 683 and C Schmitthoff, 'The Doctrines of Proportionality and Non-Discrimination' (1977) 2 *European Law Review* 329.

59 See generally: J Schwarze, *European Administrative Law* (1992)

60 Lord Justice T H Bingham, '"There is a changing world elsewhere": The changing perspectives of English law (1992) 41 *International and Comparative Law Quarterly* 524

61 Selway QC, The Rise and Rise of the Reasonable Proportionality Test in Public Law (1996) 7 *Public Law Review* 212

62 Ibid

respectively[63] The Court held that the *Financial Transaction Reports Act 1988* (Cth) was within Commonwealth power The minutiae of the decision have been dealt with elsewhere,[64] but it is instructive to note Chief Justice Brennan's declaration that 'proportionality' in its primary sense is simply 'another expression for "appropriate and adapted."'[65]

From this more conservative approach in *Leask* we might conclude that a three tiered 'proportionality' with wide application is unlikely to eventuate in Australia

PROPORTIONALITY IN AUSTRALIA AND GERMANY — SOME COMPARISONS

Comparative law — Inherent Dangers

Comparative law scholars have often warned of the difficulties inherent in accurately portraying the rules, principles and doctrines of another legal system. This difficulty is magnified by a temptation to draw easy parallels when the practical legal result on a given set of facts appears the same in both countries. Stone reminds us that:

> anyone who works in any field involving comparisons is aware of these dangers and temptations, and anyone who works in legal materials is aware of the amount of his time and effort devoted to restoring to positions of inequality concepts which have been too easily labelled equal[66]

The difficulties faced by the British common law in 'borrowing' proportionality from the French legal system have been explored by Boyron[67] and referred to by Justice Dawson in *Cunliffe's* case[68] Such warnings are also appropriate in Australia, especially since the Australian common law system is far removed from the German civil law system and also because, unlike the UK, Australia is not part of the European Union's supranational legal order in which proportionality is recognised and applied. Thus, from the outset, great caution must be exercised in assessing concepts which have grown up in foreign legal soil and may be unsuitable for Australian conditions.

Bearing these difficulties in mind, we now might attempt a limited comparison of Australian and German proportionality It is submitted

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63 The full text of s 51(ii) confers power over 'Taxation; but so as not to discriminate between States or parts of States'.

64 Selway QC, The Rise and Rise of the Reasonable Proportionality Test in Public Law (1996) 7 *Public Law Review* 212

65 (1996) 187 CLR 579, 587.

66 Ferdinand F Stone, 'The End to be Served by Comparative Law' (1955) 25 *Tulane Law Review* 303.

67 S Boyron, Proportionality in English Administrative Law: A Faulty Translation? (1992) 12 *Oxford Journal of Legal Studies* 237

68 *Cunliffe v Commonwealth* (1994) 182 CLR 272

that the following brief examples will show that despite some resemblance, the two objects are essentially of a different order.

Appropriateness

The German requirement of 'appropriateness' and the Australian 'reasonably ... appropriate and adapted'[69] test look rather similar. Within this aspect, the similarities between the 'margin of error' allowed the German legislator and the 'margin of appreciation' discussed by Justice Brennan in *Cunliffe's* case are easily identified. Like the German Federal Constitutional Court, Justice Brennan states that he would:

> adhere to the view that it is essential that this Court, in applying the test of proportionality, allows to the Parliament what the European Court of Human Rights calls 'a margin of appreciation' in choosing the means which are appropriate and adapted (to achieving a purpose or object).[70]

Of further interest is the passage quoted above from Mason CJ's dissenting judgment in *Cunliffe* where his Honour strikes down the additional requirements of competence and integrity imposed on legal practitioners in part because they 'have not been identified or established' and are, in their application to admitted lawyers, 'disproportionate to the legitimate end sought to be achieved'.[71] Here the practical results in both *Cunliffe* and in the case of the 1957 Law Relating to Individual Traders begin to converge. In the latter case, the court held that the licensing requirements were 'inappropriate' when applied to the owner of a vending machine and breached the principle of proportionality. Chief Justice Mason seems to be applying similar reasoning to an (arguably) equally over-regulated group[72] who are subjected to additional registration requirements under the *Migration Act 1958* (Cth).

Necessity

Cunliffe's case again provides us with an object of comparison. Not unlike the German Federal Constitutional Court, Mason CJ in *Cunliffe* warns against 'adverse consequences ... unrelated to the achievement of (the) object or purpose'.[73]

Justice Deane also warned against unnecessary measures in the *Tasmanian Dam* case.[74] There, his Honour supposed a law made by the Commonwealth in implementing an international convention for

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69 Ibid 296.
70 Ibid 325.
71 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 304.
72 That is, qualified lawyers.
73 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 297.
74 (1983) 158 CLR 1, 260-1.

preventing the spread of an obscure sheep disease. This hypothetical law required that all sheep in Australia be slaughtered. His Honour stated that such a law would lack any 'reasonable proportionality between the law and the purpose of discharging the obligation under the convention' and that the 'peculiar' or 'drastic' nature of a law which pursued such an 'extreme course' would be relevant to characterisation.[75] If Justice Deane were in Germany, it is submitted he might just as easily frame this example in terms of the 'prohibition on excess' or 'principle of the lightest means' discussed above.

Similarly, in *Davis v The Commonwealth*,[76] Mason CJ, Deane and Gaudron JJ held that the regime of protection afforded expressions such as '200 years' under the *Australian Bicentennial Authority Act 1980* (Cth) reached 'far beyond the legitimate objects sought to be achieved . . . the provisions in question reach too far . . . [and are] not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.'[77]

Balancing / Narrow Proportionality

This aspect of proportionality could be regarded as the most controversial for it is here that a court must be most careful to avoid usurping legislative power. Differing views have emerged in Australia as to how far the High Court might go in this respect. For example, the more conservative approach of Justice Brennan who states:

> The question whether the means adopted to achieve the end are . . . desirable . . . cannot be decided by a court. The questions which a court can decide are these: what is the purpose (or end or object) of the law as disclosed by its provisions?; and the converse question: given a purpose within power, are the provisions of the law appropriate and adapted to the achieving of the purpose (or end or object)? It is in answering the second question — a question of the law's effect and operation — that the notion of proportionality is relevant.[78]

Contrast this approach with that of Mason CJ who appears to be more ready to take public policy issues into account when he states that:

> In determining whether a particular burden or restriction is reasonably appropriate and adapted, it is relevant to ascertain whether the burden or restriction is disproportionate to the attainment of that objective. That determination calls for a weighing of the public interest in free communication as to political matters and the competing public interest sought to be protected and enhanced.[79]

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75 Ibid 261.
76 *Davis v The Commonwealth* (1988) 166 CLR 79.
77 Ibid 100.
78 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 320–1.
79 Ibid 300.

This last comment also provides some clue as to why proportionality, at the end of the century, is suddenly on the Australian agenda: the advent of implied constitutional rights

Proportionality in Australia — Why now?

Many of the recent decisions of the High Court of Australia which apply the concept of proportionality do so in an attempt to decide whether certain implied constitutional rights have been breached or weakened by Commonwealth legislation The principal right, discussed and analysed at length elsewhere[80] is the so-called 'implied freedom of political discussion.'

It is not here suggested that the advent of 'implied free speech' is the only reason for the increased attention to proportionality Nonetheless, development of some form of proportionality doctrine, it may be argued, occurs as a matter of course once 'fundamental rights' are recognised in constitutional case law This is because such rights are never absolute and require constant balancing and weighing up, one against another, 'your right against mine' The State may even choose to restrict some "fundamental rights" in the interests of the community as a whole; the limits of its powers to do so must then be tested before the courts Such recourse to proportionality is easily recognised in Mason CJ's judgment in *Cunliffe* and yet his Honour emphasises that:

> the test of reasonable proportionality is by no means confined in its application to cases in which there is a need to resolve a tension between conflicting or inconsistent concepts, for example, the impact of the exercise of a legislative power on matters which might be thought to fall within the subject matter of an express or implied guarantee [81]

On the Mason view, the doctrine thus appears to have a potentially wide application in solving problems which define the real limits of constitutional power, not only in the context of fundamental freedoms but also, as discussed above, as an important element of characterisation As mentioned, the Court seems to have retreated from the Mason view in cases after *Cunliffe*

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80 See, eg: A Twomey, *'Theophanous v Herald & Weekly Times Ltd; Stephens v West Australian Newspapers Ltd'* (1994) 19 *Melbourne University Law Review* 1104; P Bailey, Righting the Constitution without a Bill of Rights (1995) 23 *Federal Law Review* 1; F A Trindade, 'Political discussion' and the law of defamation (1995) 111 *Law Quarterly Review* 199; I H Jones Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia? (1994) 22 *Federal Law Review* 57 See also: *Nationwide News Pty Itd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v The Herald & Weekly Times Limited* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211

81 *Cunliffe v Commonwealth* (1994) 182 CLR 272 297

CONCLUSION

The following observations may be made:

First, Australian fundamental rights, implied on the basis of entrenched constitutional text, are at an early stage of development; in Germany such rights are express, and have been far more refined by the courts. This is a crucial difference in the two legal systems and will colour any comparative work in this area.

Second, the German constitution was drafted in the shadows of totalitarianism, circumstances which are very different from those under which the Australian constitution was conceived. This has an effect on the type, scope and range of rights protected and even on the intensity of that protection. Fundamental rights protected under the *Australian Constitution* are becoming an admixture of specific rights (for example, that found in s 92: freedom of interstate trade, commerce and intercourse) and implied rights (for example, the recently developed freedom of political discussion). The list of articulated Australian rights, both specific and implied, is very short. The German list is far more comprehensive and this contributes to the applied scope of the doctrine in that country.

Third, the German Basic Law protects not only civil and political rights but also a number of economic rights,[82] for example the right to free choice of one's profession. Such explicit economic rights are not known in Australia, further limiting the need for a broad proportionality doctrine.

Fourth, proportionality is already very active in the case law of the European Union and exerts influence on the domestic law of all member states, including Germany and the UK. This has no parallel in Australia.

Finally, despite these marked differences in genesis, history, scope and circumstance, the German and Australian proportionality doctrines do share, as the case law illustrates, some similarities in wording and application in particular contexts. If 'fundamental rights' work their way further into the Australian constitutional case law, proportionality may need to be developed and refined. Australian courts can learn valuable lessons from the depth of German experience in this area.

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82 See: Tony Blackshield, George Williams and Brian Fitzgerald, *Australian Constitutional Law and Theory: Commentary and Materials* (1996). For a useful discussion of the Pharmacy Case, in which the constitutional right to choose one's profession was weighed against the interest of established pharmacies in limiting competition, see Scharpf, 'Judicial review and the political question: A functional analysis' (1966) 75 *Yale Law Journal* 517, 525. In the end, the court overruled the anti-competitive Bavarian statute. See also: Struve, 'The less-restrictive-alternative principle and economic due process' (1967) 80 *Harvard Law Review* 1463, 1482. In an Australian context, economic rights feature in part 5 of the recent draft *Australian Charter of Rights* (March 1995) released in the form of a Commonwealth Statute and explanatory memorandum by the Law Council of Australia.