APPENDIX

Note 47: Citations supporting the additional factors informing the application of the second stage of the *Lange* test:

i. the extent and directness of the burden on expression;[1]
ii. whether a law imposes a total or partial prohibition on the relevant expression (i.e., is a time, manner or place restriction, or potentially a civil as opposed to criminal prohibition);[2]
iii. the nature of the place or location in which expression occurs, or is regulated;[3]
iv. whether a law leaves open *adequate*, alternative channels of communication;[4]
v. whether the law is content or non-content-based;[5]

---

[1] *See, eg, Levy v Victoria* (1997) 189 CLR 579, 610 (Toohey and Gummow JJ) (noting 'no significant….curtailment' of expression); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [40]; *Wotton v Queensland* (2012) 285 ALR 1, [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, [40], [112], [120] (Keane J); *Unions NSW v New South Wales [No 2]* [2019] HCA 1, [150] (Gordon J); *Tajjour v New South Wales* (2014) 254 CLR 508, [27]-[38] (French CJ), [105]-[106], [133] (Crennan, Kiefel & Bell JJ), [151] (Gageler J); *Monis v The Queen* (2013) 249 CLR 92, [64] (French CJ), [92]-[124] (Hayne J) (noting the relevance of this as a consideration, but cautioning against its misapplication); *Brown v Tasmania* (2017) 261 CLR 328, [117]-[118] (Kiefel CJ, Bell and Keane JJ), [325] (Gordon J); *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448, [100] (Kiefel CJ, Bell and Keane JJ). For broader discussion of the relevance of this as a consideration in applying a test of structured proportionality, see also Susan Kiefel, 'Standards of Review in the Constitutional Review of Legislation' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 472, 505.

[2] *See, .g, Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 173 (Deane and Toohey JJ); *Levy v Victoria* (1997) 189 CLR 579, 610 (Toohey and Gummow JJ) (noting 'no general prohibition'); *Unions NSW v New South Wales* (2013) 252 CLR 530, [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Brown v Tasmania* (2017) 261 CLR 328, [402] (on criminal sanctions), [419], [424] (on limited and place-based nature of the prohibition) (Gordon J); *Unions NSW v New South Wales [No 2]* [2019] HCA 1, [150] (Gordon J); *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448, [75] (Kiefel CJ, Bell and Keane JJ), [168]-[169] (Gageler J); *Comcare v Banerji* [2019] HCA 23, [39] (Kiefel CJ, Bell, Beane and Nettle JJ), [195] (Edelman J). For cases emphasizing the significance of criminal liability, see also *Monis v The Queen* (2013) 249 CLR 92, [71] (French CJ). For discussion of this as a relevant factor, see, eg, Elisa Arcioni, 'Politics, Police and Proportionality: An Opportunity to Explore the *Lange* Test: *Coleman v Power*' (2003) 25 *Sydney Law Review* 379.

[3] See, eg, *Brown v Tasmania* (2017) 261 CLR 328, [193] (Gageler J); *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448, [75], [80], [100]-[102] (Kiefel CJ, Bell and Keane JJ).

[4] See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 146 (Mason CJ) (rejecting the adequacy of non-broadcast-media as an effective alternative, and suggesting that reliance on this argument thus supported the case for invalidity); *Levy v Victoria* (1997) 189 CLR 579, 609 (Dawson J) (noting that the impact of the law was on 'maximum publicity' for the relevant protests, not on all scope for such protests), *Brown v Tasmania* (2017) 261 CLR 328, [117] (Kiefel CJ, Bell and Keane JJ), [416] (Gordon J) (repeating the 'maximum publicity' argument in *Levy*); *Tajjour v New South Wales* (2014) 254 CLR 508, [39] (French CJ); *Monis v The Queen* (2013) 249 CLR 92, at [352] (Crennan, Kiefel and Bell JJ); *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448, [101] (Kiefel CJ, Bell and Keane JJ) (noting that the law in question imposed no restriction outside safe-access zones).

[5] See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ), 218, 220 (Gaudron J); *Levy v Victoria* (1997) 189 CLR 579, 618-19 (Gaudron J) (Kirby J) [near fn 153]; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [40] (Gleeson CJ); *Tajjour v New South Wales* (2014) 254 CLR 508, [37] (French CJ), [91] (Hayne J); *Brown v Tasmania* (2017) 261 CLR 328, [62]-[63], [122] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448, [181] (Gageler J); *Hogan v Hinch* (2011) 243 CLR 506, [95]-[99].

vi. the nexus between regulated expression and 'political' matters;[6]
vii. the nexus between regulated expression and electoral politics; [7]
viii. whether the law is clear in scope and effect, or is vague in operation;[8]
ix. whether the law is selective in scope, or discriminates based on viewpoint;[9]
x. whether a law discriminates against a class of speaker, or sub-set of political actors.[10]

Note 59: Some critics might argue that it in fact invites the *making* of additional value judgments, see, eg, Richard Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' (2001) 5 *European Human Rights Law Review* 504; Francisco J Urbina, 'A Critique of Proportionality' (2012) 57 *American Journal of Jurisprudence* 49/ In Australia, specifically see also Brian F Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12 *University of Tasmania Law Review* 263, 272-3; Jeremy Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 34 (suggesting that the 3rd stage of a *McCloy*-type approach would be 'largely new' in Australia, relative to existing approaches); Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36 *University of Queensland Law Journal* 375. Compare *Coleman v Power* (2004) 220 CLR 1, (McHugh J).

Note 71: In *Unions I*, Keane J suggested the need for 'calibrated balancing' under the second limb of the Lange test,[11] yet in *Brown* and *Preston*, his Honour joined the plurality in applying a test of structured proportionality.[12] In *Brown*, Kiefel CJ, Bell and Keane JJ further suggested that the application of a structured proportionality test *might* vary based on the extent of the burden on political communication, suggesting that ordinarily 'a heavy burden' on political communication would require 'a

---

[6] See, eg, *McCloy v NSW* (2015) 257 CLR 178, (Gageler J); *Monis v The Queen* (2013) 249 CLR 92, [37], [63] (French CJ), [229] (Hayne J), [351] (Crennan, Kiefel and Bell JJ).
[7] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 145 (Mason CJ), 218, 221 (Gaudron J).
[8] *Brown v Tasmania* (2017) 261 CLR 328, [67], [74-77], [97], [145]-51] (Kiefel CJ, Bell and Keane JJ), [269], [293]-[94], [443]-[447] (Nettle J). But see also at [307], [405] (Gordon J); [509]-[609] (Edelman J) (rejecting vagueness or uncertainty in the application of a law as relevant to the Australian constitutional context). Compare also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Roberts v Bass* (2002) 194 ALR 161; *Brown v Tasmania* (2017) 261 CLR 328, note 115 (referring to 'chilling effects'). For the distinction between deterrent and chilling effects in this context, see below notes 152-7.
[9] See, eg, *Unions NSW v New South Wales* (2013) 252 CLR 530, [53] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (on 'selectivity'); *Brown v Tasmania* (2017) 261 CLR 328, [199] (emphasizing discrimination in practice against 'political communication expressive of a particular viewpoint'), [222] (Gageler J) (emphasizing selectivity in the form of under-inclusiveness); *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448, [124] (Kiefel CJ, Bell and Keane JJ), [170] (Gageler J); *Comcare v Banerji* [2019] HCA 23, [34] (Kiefel CJ, Bell, Keane and Nettle JJ).
[10] See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 146 (Mason CJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, [136]-[137], [147], [167] (Keane J); *Brown v Tasmania* (2017) 261 CLR 328, [93]-[94] (Kiefel CJ, Bell and Keane JJ), [198] (Gageler J) (emphasising the 'discriminatory operation' of the law, in so far as 'protesters, and protesters alone, are alone put twice in jeopardy'). Note, however, that it is important to consider formal versus substantive notions of equality in this context, or the extent to which differences in treatment correspond to relevant differences: see, eg, *McCloy v NSW* (2015) 257 CLR 178, 251 [197]; *Brown v Tasmania* (2017) 261 CLR 328, [422] (Gordon J).
[11] *Unions NSW v New South Wales* (2013) 252 CLR 530, [141] (Keane J).
[12] *Brown v Tasmania* (2017) 261 CLR 328 (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448 (Kiefel CJ, Bell and Keane JJ).

significant justification' and that it was 'possible that a slight burden on the freedom might requi re a commensurate justification'.[13] This echoed statements by Nettle J that, under the third stage of the *McCloy* test, 'the level of justification must rise to meet the extent of [the] burden' on the IFPC.[14]

The Chief Justice, Bell and Keane JJ likewise suggested that considerations identified by Mason CJ in *ACTV*, as pointing toward strict or close scrutiny of legislation, 'might be thought to require more by way of justification … at the balancing stage of proportionality analysis', though only at that stage , and not at the outset of any application of the second limb of the *Lange* test.[15]

Similarly, in *Preston*, Edelman J suggested that 'incremental development within each stage of proportionality testing has occurred and will continue to occur', and that it w as appropriate for the Court at each stage to consider 'constitutional facts and circumstances' as they were at the time a law was enacted.[16] And Gageler J showed a willingness to explain his conclusions in terms of a test of structured proportionality, suggesting that 'if [he] were pressed to re-cast [his[opinion in the language of structured proportionality', he would have found that 'proscription of all protests in relation to abortion in the proximity of an abortion clinic… would not be 'adequate in the balance''.[17]

Note 112: It is important to note that Stone makes this argument in the context of a criticism of decisions such as *Lange*, and their claim to apply a 'strict and complete legalist' method, not as a freestanding argument against realist or functionalist constitutional approaches. Indeed, as her recent work shows, she does necessarily oppose more realist/functionalist approach to the Constitution, or the use of proportionality discourse, if understood in an appropriately autochthonous Australian way: see Stone, 'Proportionality', above n 1.

Note 122: Human rights charters, of course, have a different focus and operate in a different constitutional context to an entrenched guarantee of freedom of political communication: see *Momcilovic v The Queen* (2011) 245 CLR 1; *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448 Gordon J. But while the proportionality doctrine may have special salience in human rights or constitutional rights cases, it also has potentially broader application: see *McCloy v NSW* (2015) 257 CLR 178, [73]. It can usefully guide the application of a range of structural constitutional guarantees, including norms of free trade (in goods and services) and free movement of persons, and the construction of 'purposive' legislative powers. And in each case, the basic contours of the doctrine will be the same: see, eg, Barak, above n 8; Cohen-Eliya and Porat, above n 112; Jackson, above n 6. Failure to appreciate the potential parallels can also give rise to dangers. In *Momcilovic*, for example, three members of the Court adopted an approach to s 7 of the Victorian Charter that did not sit easily with the later endorsement of proportionality analysis by the same members of the Court in *McCloy*.

---

[13] *Brown v Tasmania* (2017) 261 CLR 328, [128] (suggesting that such an approach would not be 'inconsistent' with *Lange*). Compare Susan Kiefel, 'Standards of Review in the Constitutional Review of Legislation' in Ch eryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 472, 505. See also discussion in Douek, above n 1, 28.

[14] *McCloy v NSW* (2015) 257 CLR 178, 291.

[15] *Brown v Tasmania* (2017) 261 CLR 328, [121].

[16] *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448, [470].

[17] Ibid [210].