Proportionality and Protracted Emergencies: Australia's COVID-19 Restrictions on Repatriation Rights Compared

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Abstract

The COVID-19 pandemic plunged governments into a world of 'tragic choices'. With minimal forewarning and limited available infrastructure to enable freedoms in an alternative way, governments were required to restrict rights to meet the more urgent, 'existential' need to control threats to life. The nature of the emergency limited the role of courts in assessing challenges that raised rights and proportionality arguments against restrictions. In this article I argue that rights-based proportionality reasoning can nonetheless retain a meaningful role in emergency settings. To do so, I compare how courts in Israel, New Zealand and elsewhere applied proportionality reasoning in public law challenges to restrictions on repatriation rights during the pandemic. I argue that judicial scrutiny of a restriction's proportionality can intervene in 'executive path dependency' — the failure of executive emergency governance to invest in infrastructure over time to render restrictions less necessary. Such scrutiny can also provide for more principled systems of allocating scarce resources. I then demonstrate how various Australian mechanisms — constitutional, administrative and political — failed to supply the same protection in challenges to restrictions on repatriation rights. I trace this to the faith that the Australian system places in popular, majoritarian accountability mechanisms, whose operation is altered in emergency settings.

Please cite this article as: Elizabeth Hicks, 'Proportionality and Protracted Emergencies: Australia's COVID-19 Restrictions on Repatriation Rights Compared' (2023) 45(1) *Sydney Law Review* 77.

 ISSN: 1444–9528

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I Introduction

The COVID-19 pandemic plunged governments into a world of 'tragic choices'. With minimal forewarning and limited available infrastructure to enable freedoms in an alternative way, governments were required to restrict rights to meet the more urgent, 'existential' need to control threats to life. These restrictions led to numerous court challenges as affected parties sought to test the proportionality of restrictions by reference to rights frameworks. How courts decided these challenges varied across legal systems and legal cultures and — as I argue in this article — over time as the pandemic evolved into a protracted problem.

Guido Calabresi and Philip Bobbitt described a societal 'tragic choice' as one involving the allocation of scarce resources. Their account considered how societies approach the allocation of scarce resources in a principled way.[1] Calabresi and Bobbitt distinguished between first-order choices — how a society determines the quantity of a resource to produce — and second-order choices, which relate to the allocation of scarce resources. Although used to a different end in their theory, the distinction is a useful way of conceptualising some of the problems that attend proportionality analysis in emergency settings. One justification for proportionality analysis in non-emergency settings is that it protects discrete groups against unnecessary restrictions of their rights where that group is too small to meaningfully influence electoral processes. Where a fundamental right is engaged, a court can intervene to inquire whether a restriction is truly necessary or whether alternative means — albeit ones that are less convenient or popular — could achieve the same ends. Yet crises and emergency settings can involve unstable factual circumstances and evidence, uncertain science and limited forewarning. It becomes more difficult for courts to assess whether a restriction is necessary and alternative means may not be available. Trade-offs — 'tragic choices' regarding the allocation of limited resources — are made by governments confronted with a lack of infrastructure or time to invest and plan. On one view, then, there is a limited role for courts to consider the proportionality of restrictions on rights during an emergency.

In this article I consider the example of restrictions on citizens returning to their country during the pandemic and assess the extent to which rights-based proportionality analyses retained a meaningful role in some of those cases. I then compare how proportionality analysis was applied in those cases with how Australian courts responded to challenges to restrictions on repatriation rights during the pandemic. The focus on repatriation rights is deliberately narrow. While the problem of 'tragic choices' affected other forms of governmental response during the pandemic, restrictions on repatriation rights draw attention to that problem in heightened detail. Restrictions on repatriation rights tended to affect a smaller group of people — citizens abroad or resident citizens with time-sensitive reasons to travel abroad — as part of measures enacted for the benefit of the collective. Jurisdictions that limited the rights of citizens to return often did so by limiting the numbers of those that could return to manage demand for quarantine and monitoring systems. Such restrictions engage questions of resource allocation and a related question of

[1] Guido Calabresi and Philip Bobbit, *Tragic Choices* (Norton, 1978) 18.

'state capacity'[2] — the ability of states to achieve policy goals such as the protection of repatriation rights — that go to the heart of the problems proportionality analysis faces in emergency settings. The rights of citizens to return to their country is also a lens through which to explore how a legal system conceives of the relationship between individual citizens and the state and the relationship between majorities and minorities.

In focusing on restrictions on repatriation rights, I engage with a deeper question regarding the effect of emergencies upon proportionality assessments generally. I argue that the nature of proportionality testing — particularly the 'necessity' sub-test which considers whether less burdensome alternative means may achieve the same ends — involves an inquiry into government choices over time. The construction of an emergency as a short-term problem, with limited existing infrastructure or state capacity available to manage that emergency, provides a greater justification for measures that restrict rights temporarily. However, over time, as that emergency morphs into a protracted societal and political problem, it begins to more closely resemble the circumstances with which proportionality assessments contend in non-emergency settings. In the case of restrictions on international movement, governments can choose to invest in systems that render restrictions on rights less necessary or facilitate movement via alternative means. At the same time, the conditions in which political will forms and politics is practised have not yet returned to a 'non-emergency' state. The emergency response can acquire a 'path dependency', where governments do not invest in systems that become feasible alternatives to the status quo with the passage of time. As I argue in this article, the COVID-19 pandemic demonstrated the complexity of the concept of emergency. The failure to facilitate repatriation rights over time resulted from what I describe as a 'protraction problem', giving rise to executive path dependency.

Proportionality arguments were raised throughout the pandemic in many jurisdictions to challenge an array of COVID-19 restrictions on rights and freedoms. Not all of these restrictions implicated the same questions of executive path dependency or government choice over time; nor did they necessarily engage the same issue of rapidly constituted minorities 'caught under the wheels' of collective-benefiting measures. I confine my analysis to challenges to restrictions that did involve this dynamic. Proportionality analysis may provide other benefits in emergency settings. The application of proportionality principles to questions of resource allocation over time is but one among several uses. These other uses remain, however, outside the scope of this article.[3]

The first part of the article considers how proportionality assessments in two jurisdictions — Israel and New Zealand — dealt with the problem of proportionality

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[2] I thank Scott Stephenson and Maxim Bönnemann for this insight. See Madhav Khosla and Mark Tushnet, 'Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry' (2022) 70(1) *American Journal of Comparative Law* 95.

[3] Proportionality arguments were also raised unsuccessfully in Australia to challenge restrictions implemented at the state level. This included challenges to a curfew during Melbourne's 'second wave' (*Loielo v Giles* (2020) 63 VR 1) and challenges to vaccine mandates in New South Wales (*Kassam v Hazzard* (2021) 106 NSWLR 520; *Larter v Hazzard [No 2]* [2021] NSWSC 1451; *Knowles v Commonwealth* [2022] FCA 741). These cases did not raise the problem of state capacity and resource allocation over time that I analyse in this article.

analysis in assessing restrictions on repatriation rights in an emergency. These jurisdictions are useful case studies for a comparative study of how proportionality reasoning can engage with restrictions on repatriation rights in an emergency setting. Restrictions on repatriation rights were successfully challenged in these jurisdictions, but for different reasons. Israel and New Zealand also reflect different cultures of proportionality reasoning, with that of New Zealand marked by a greater degree of deference. The comparison highlights how proportionality analysis can intervene in the problem of executive path dependency and resource allocation regardless of the culture of deference. I also make occasional reference to the approaches of courts in other jurisdictions — Germany, India and Canada — where this further illustrates how courts responded to questions of executive path dependency and resource allocation as the emergency became a protracted problem. The primary focus of my analysis remains, however, restrictions on repatriation rights.

In the second half of the article I assess how proportionality mechanisms fare in protracted emergency settings in the absence of rights catalogues to underwrite them. To this end I consider how 'tragic choices' were realised in Australia's pandemic restrictions on international movement. Australia is a laboratory to investigate more generalisable questions. Australia lacks an entrenched constitutional or federal legislative bill of rights. This absence, coupled with the legal culture to which it has given rise, backs 'ordinary politics' to ensure government actions are proportionate. I assess how proportionality considerations incorporated by legislation and constitutional structures, as well as political mechanisms, performed in a protracted emergency setting over time. I argue that emergency settings alter the conditions within which political pressure on executive government forms. They create an atmosphere of urgency and fear that focuses the public on collective goals and directs attention away from rapidly constituted minorities 'caught under the wheels' of measures directed toward those goals. Key questions that go to proportionality in protracted emergencies — whether government is investing in resources over time to limit restrictions on rights and whether scarce resources are allocated in a principled way — attract less public concern where they only affect small groups defined by discrete circumstances. The nature of the emergency may even encourage hostility toward discrete groups whose circumstances differ from those comprising the majority. I demonstrate how Australia's various legal mechanisms — constitutional and administrative — failed to incorporate the same proportionality considerations in these settings as mechanisms underwritten by rights frameworks elsewhere. I then consider how political mechanisms in which the Australian system places its faith — public pressure and federalism — failed in a similar way.

Before beginning, it is worth noting that the underlying factual matrices that gave rise to court challenges varied across jurisdictions. Until the Delta outbreak in Sydney in July 2021, Australian jurisdictions maintained elimination as a goal. In this goal, Australia — like New Zealand, Singapore and a handful of other 'COVID zero' jurisdictions — departed from the express aim of governments elsewhere to manage and suppress some community transmission. On one view, an elimination objective involves different proportionality considerations when compared with an objective that tolerates some community transmission: I explore this in my

discussion of the stages of proportionality testing — particularly 'necessity' and 'proportionality in the strict sense' — in Part II(A) below. Notwithstanding those factual differences, a comparison of how different legal systems have received challenges to pandemic restrictions yields insights into the different factors that those systems consider in a proportionality assessment. It reveals the standards against which a legal system assesses the proportionality of a restriction. Significantly for my argument, comparing court challenges across different legal cultures reveals how courts engage with evidence and practise deference in the face of uncertainty, urgency and unstable factual circumstances.

II Proportionality and Protracted Emergencies: The Post-1945 Paradigm

A *Proportionality and the Post-War Paradigm: The Limits of Majoritarianism*

Proportionality emerged as a favoured tool of courts negotiating rights catalogues that proliferated across the globe after 1945. The literature has dealt extensively with the nature of its commitments.[4] Those commitments can also serve to correct structural biases of the political process.[5] Proportionality testing — where applied within a constitutional system and associated legal culture that support a greater degree of judicial oversight of legislative and executive decision-making — can ensure that the restriction of rights isn't excessively driven by expediency or political convenience. Legislatures or executives may limit the rights of the few even where less restrictive alternatives are available, because that group is too small to meaningfully influence electoral processes.

Each stage of structured proportionality testing (see Figure 1) lends itself to an explanation of correcting problems in the political process' ability to safeguard the position of minorities. Considering the 'legitimacy' of an end can 'check' goals that are openly discriminatory or oppressive to a minority group with less representation in democratic structures. Determining whether the means of achieving that end are 'suitable' and 'necessary' addresses what I described in Part I above as the 'political expedience' problem of majoritarianism. The least restrictive means of achieving a particular goal will not always be the most practically or politically convenient. Achieving the least restrictive means may require an expansion of state capacity or the investment of resources. The least restrictive means may not be the most popular. The 'necessity' stage of proportionality testing requires the state to justify its choice of means on its own terms — with the support of evidence — with lesser weight given to questions of convenience or cost. In this way, the 'necessity' stage of proportionality testing is perhaps the most crucial to mitigating the risk that majorities will neglect to agitate for the interests of minorities.

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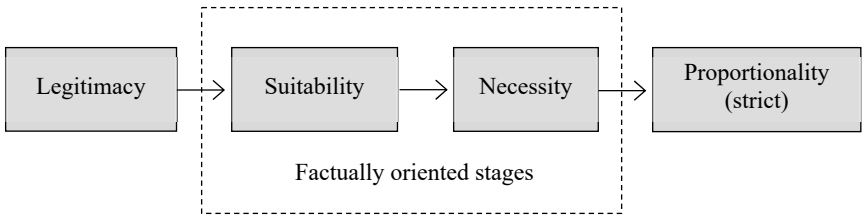
[4] See, eg, Robert Alexy, *Theorie der Grundrechte* [A Theory of Constitutional Rights] (Suhrkamp Verlag, 1986); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

[5] See, eg, Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press, 2017) 9.

The final, 'strict proportionality' stage of testing addresses the power imbalance between the majorities capable of commanding electoral processes and minorities whose rights may be disproportionately impacted relative to the benefit the end confers upon the majority. This stage requires analysis of the concrete benefits of a particular measure relative to its concrete impact upon rights. This avoids 'balancing' incommensurable values against each other in a way that would supplant the legislature's priorities for that of the court, while serving to correct excessive imbalances of power in realising electoral goals.

Figure 1: Four stages of structured proportionality testing



The use of proportionality testing by courts serves to create what is described as a 'culture of justification': that is, the state must justify the rationality of its choices restricting rights beyond their pure popularity with the electorate.[6] Arguably, the strength of proportionality testing lies in its secondary impact on state choices before they are challenged in courts. The knowledge that a restriction on a right may be tested forces the state to explain and consider its choices in a way that pure electoral mechanisms may not.[7]

How courts use and apply structured proportionality reasoning varies across constitutional systems and legal cultures.[8] It accommodates variations in cultures of deference and the institutional self-perception of courts. Specialised constitutional courts interpreting constitutionally entrenched bills of rights often find restrictions lack proportionality because they are not 'proportionate in the strict sense' — the final stage. This preference flows from the challenges specialised courts face in applying the 'factually' oriented stages of proportionality testing — 'necessity' and 'suitability'.[9] In Germany, the Federal Constitutional Court leans more heavily into the final stage as it understands this stage to be more aligned with its institutional competence, which is normative questions.[10] But preferring an analysis at this final

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6 See, eg, Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013).

7 See, eg, Anne Peters, 'A Plea for Proportionality: A Reply to Yun-Chien Chang and Xin Dai' (2021) 19(3) *International Journal of Constitutional Law* 1135.

8 Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meaning of Postwar Legal Discourse* (Cambridge University Press, 2013).

9 Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57(2) *University of Toronto Law Journal* 383. See also Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart, 2022).

10 Oliver Lepsius, 'Die Maßstabsetzende Gewalt' [The Standard Setting Power] in *Das Entgrenzte Gericht. Eine kritische Bilanz nach Sechzig Jahren Bundesverfassungsgericht* [The Court without

stage has attracted controversy in other jurisdictions.[11] In Canada, for instance, the Supreme Court is more likely to invalidate restrictions on rights at the 'necessity' stage.[12] The application of proportionality analysis also allows for different understandings of deference.

Finally, proportionality analysis has been adopted by some courts in the Commonwealth world.[13] Courts in Commonwealth states — such as Canada and New Zealand — share legal traditions that colour how bills of rights, introduced later in their histories, operate and are applied by courts. They tend towards a greater level of deference. The NZ example of the Commonwealth model features an ordinary statutory bill of rights[14] that does not empower courts to invalidate legislation for inconsistency. Rights do, however, bind the executive. Legislation must also be assessed for compatibility with the bill of rights before being introduced into Parliament.[15] In this way, the NZ system's relationship to majoritarian political processes can be better described as facilitative rather than corrective: rights may still be restricted through political processes underwritten by majorities (parliaments), but in a way that requires open debate and dialogue. A test similar to the structured proportionality model I explored above is used to assess whether executive acts justifiably restrict rights. Restrictions must instead be prescribed by law, serve a purpose sufficiently important to justify curtailment of the right, be rationally connected with the purpose and be in due proportion to the importance of the objective.[16] The NZ courts apply this test with more deference than Israeli or German courts, as I explore further in Part II(B) below.

B *Proportionality Analysis during Crises and Emergencies*

1 *Executive Path Dependency in Protracted Emergencies*

Proportionality analysis faces particular challenges in crisis and emergency settings. Emergencies often require restrictions on rights to pursue legitimate goals — the management of a crisis. The nature of an emergency often involves urgency and a need to respond within a short time frame. The factual circumstances underpinning the emergency are often unstable and quickly changing. Information and data on the emergency may also be unsettled or lend itself to multiple interpretations, with no clear expert consensus emerging.

Limits: A Critical Reflection of Sixty Years of the Federal Constitutional Court] (Suhrkamp Verlag, 2011) 159, 206–7. For an alternative argument see Peters (n 7).

11 See, eg, the extensive literature critiquing the problem of balancing: Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10(3) *International Journal of Constitutional Law* 709.

12 Grimm (n 9).

13 For a fuller discussion see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013). See also Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016).

14 *New Zealand Bill of Rights Act 1990* (NZ).

15 See discussion in Gardbaum (n 13) 129–55.

16 *Hansen v The Queen* [2007] 3 NZLR 1, 40–1 ('*Hansen*'). See also Matthew Palmer and Dean Knight, *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, 2022) 189–207.

The experiences of courts exercising constitutional and administrative jurisdiction across the world during the COVID-19 pandemic illustrate some of these problems. In the initial stages of the pandemic, information about the transmissibility of the virus, as well as its mode of transmission, was still unsettled. The time frame of the pandemic — as a crisis that morphed into a protracted societal and political problem — also posed challenges for proportionality testing, particularly for courts assessing whether restrictions were 'necessary' or whether alternative, less burdensome means were available that achieved the same ends. In the short term, a lack of available infrastructure and forewarning may justify restrictions that would be less defensible in non-crisis settings. For this reason some courts tended to err in favour of allowing greater discretion to the executive during the earlier stages of the pandemic.[17] Anna-Bettina Kaiser notes that German courts tended to defer to the executive's justification for a measure's necessity and find restrictions proportionate, particularly during the first wave in Germany in March and April 2020.[18] Kaiser argues that proportionality testing will prove a weak standard of control during 'existential' crisis situations.[19] In Israel, courts similarly preferred to focus on procedural and parliamentary safeguards during the early stages of the pandemic. Courts avoided deciding on proportionality challenges to the restrictions themselves.[20]

Over many months, however, states acquired knowledge, experience and the opportunity to invest in systems that could have rendered restrictions upon rights less necessary.[21] Courts in Israel and Germany were notably more willing to find restrictions disproportionate as more time passed and the distribution of effective vaccination allowed for risks to be tailored to individual vaccination status. The beginning of 2021 in Israel witnessed a discernible shift in the Supreme Court's

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17 See, eg, Hans-Heinrich Trute, 'Ungewissheit in der Pandemie als Herausforderung' [Uncertainty in the Pandemic as Challenge] [2020] *Zeitschrift für das gesamte Sicherheitsrecht* [Journal of Comprehensive Security Law] 93; Katrin Kappler, 'Dealing with Uncertainties in the Pandemic: A German Perspective' [2021] 2 *eucrim* 127 <https://eucrim.eu/articles/dealing-with-uncertainties-in-the-pandemic>. Kappler notes that courts were 'faced with the same knowledge deficits that the legislator had to cope with. In the COVID-19 pandemic, this became a crucial issue before German courts. Case law shows that, in particular, the necessity of the protective measures has been subject to critical judicial examination. This is not surprising, as the authorities were extremely challenged during the first few months of the pandemic and, when in doubt, opted for more far-reaching and blanket measures rather than finely tuned and differentiated measures': at 131.

18 See, eg, Anna-Bettina Kaiser, 'The State of Exception under German Law and the Current Pandemic: Comparative Models and Constitutional Rights' (2020) 7(3) *Revista Electrónica de Direito Público* [Electronic Journal of Public Law] 55.

19 Anna-Bettina Kaiser, *Ausnahmeverfassungsrecht* [Constitutional Law of the Exception] (Mohr Siebeck, 2020) 234.

20 Einat Albin et al note that in Israel, during the first year of the pandemic, the Supreme Court 'generally placed less emphasis on activist substantive judicial oversight of the government's measures themselves, and more emphasis on protecting procedural safeguards and parliament's ability to control the government's measures': Einat Albin, Ittai Bar-Siman-Tov, Aeyal Gross and Tamar Hostovsky-Brandes, 'Israel: Legal Response to Covid-19' in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press, 2021) [52] (online, 9 November 2021) <https://oxcon.ouplaw.com/home/occ19>.

21 Liz Hicks and Sangeetha Pillai, 'Proportionality, Rights and Australia's COVID-19 Response: Insights from the India Travel Ban', *auspublaw* (Blog Post, 16 August 2021) <https://auspublaw.org/2021/08/proportionality-rights-and-australias-covid-19-response-insights-from-the-india-travel-ban>.

approach to proportionality testing, 'with the Court demonstrating greater willingness to strike down Covid-19 measures on substantive grounds'.[22]

Courts in Germany similarly demonstrated a greater readiness to intervene in restrictions and find them disproportionate as time passed and the acute phases of the emergency lessened.[23] Judicial deference in administrative courts corresponded inversely to the 'waves' of the pandemic: courts were reluctant to find restrictions were disproportionate during the initial wave (March and April 2020) and during the peak of the second wave (December 2020 until April 2021).[24] In Germany the Federal Constitutional Court recognised the legislator's discretion to assess unstable evidence in a challenge to the April 2021 'federal emergency brake'.[25] This federal legislation was introduced at the height of the third Alpha wave and provided for certain restrictions — including contact restrictions and a curfew — once certain case numbers were reached. The Court stated that, where the legislature only has a limited ability to accurately assess an emergency situation because of 'factual uncertainty', the Court can only consider the 'suitability' of a measure in terms of how tenable the legislator's justification for it is.[26] German administrative courts nonetheless began to question 'blanket' restrictions when vaccination initially emerged as a means of mitigating individual risk. A number of German administrative court decisions emerged in the latter half of 2021 invalidating restrictions to the extent that they applied to fully vaccinated or recovered patrons.[27] In these cases, courts relied upon evidence at the time that fully vaccinated or recovered individuals contributed to the case burden in only a minor way. Restrictions therefore lacked proportionality in the strict sense.

A successful challenge to 'caps' on the number of international arrivals in Israel in March 2021 provides an example of the Israeli courts' 'shift' in approach

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22 Albin et al (n 20) [53].

23 Anna-Bettina Kaiser and Roman Hensel, 'Federal Republic of Germany: Legal Response to Covid-19' in Jeff King and Octávio LM Ferraz (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press, 2021) [46] (online, 23 October 2021) <https://oxcon.ouplaw.com/home/occ19> ('[W]ith increasing knowledge on the pandemic, judicial review of state action became more robust, sometimes considerably restricting the margin of appreciation of the Länder's governments'). See also Kappler (n 17) 131 ('With increasing experience and growing knowledge of the mechanisms of the spread of the virus, some measures have proven to be too excessive and [been] corrected by the courts').

24 I thank Roman Hensel for this observation. For an empirical analysis of decisions on the proportionality of restrictions, see Anika Klafki, 'Kontingenz des Rechts in der Krise: Rechtsempirische Analyse gerichtlicher Argumentationsmuster in der Corona-Pandemie' [Contingency of Law in the Crisis: Legal-Empirical Analysis of Court Argumentation Frameworks during the COVID Pandemic] (2021) 69 *Jahrbuch des öffentlichen Rechts* [Yearbook of Public Law] 583, 592–9. Klafki's analysis must be read with the caveat that published decisions do not represent a complete dataset of all decisions in Germany connected with pandemic restrictions. German administrative courts are not required to publish all decisions, with judges deciding which decisions should be published based on perceived importance. Judges may have deemed decisions that upheld restrictions over time to be of less interest, therefore not warranting publication.

25 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 781/21, 19 November 2021 <https://www.bundesverfassungsgericht.de/e/rs20211119_1bvr078121.html>.

26 Ibid [185].

27 See, eg, Verwaltungsgericht Frankfurt/Main [VG] [Administrative Court of Frankfurt am Main], 5 L 2709/21.F, 29 September 2021 reported in openJur 2021, 31207 <https://openjur.de/u/2360691.html>; Verwaltungsgericht Berlin [Berlin Administrative Court], VG 14 L 467/121, 20 August 2021 reported in openJur 2021, 24607 <https://openjur.de/u/2349428.html>.

to assessing the proportionality of restrictions. From February 2020 until January 2021, Israel required international arrivals to complete 14 days of home quarantine. Only citizens and residents, or those with a relationship to an Israeli citizen, were permitted to enter Israel.[28] A mass vaccination program was launched in December 2020. Case numbers nonetheless rose in December with the emergence of the Alpha variant.[29] On 5 February 2021 Israel issued regulations restricting its citizens and permanent residents from leaving Israel unless they lived regularly outside Israel, or met set criteria for an exception, to be approved by a committee. Individuals similarly needed to apply to an exceptions committee for permission to enter Israel.[30] Those who left Israel on an exemption were permitted to re-enter automatically. Exceptions applied to those with compelling reasons.[31] On 12 February 2021 the Israeli government introduced a cap of 2,000 people per day for entry into Israel and departure from Israel. On 7 March 2021 the regulations were amended to allow fully vaccinated citizens and permanent residents to leave without an exemption and the cap was raised to 3,000 people per day.[32] In *Shemesh v Prime Minister* applicants brought a challenge against the initial regime that prohibited entry to and departure from Israel without an exemption. This petition was later amended to a challenge to the cap on daily arrivals.[33]

The High Court of Justice found that the daily cap burdened the right of citizens to enter and exit Israel freely in art 6 of the Basic Law of Human Dignity and Liberty[34] in a way that was not proportionate. An associated finding was that the caps also burdened the right to vote, as elections were soon to be held.[35] All three Justices who heard the challenge found that the cap lacked proportionality at the 'necessity' stage of proportionality testing, as a less restrictive alternative was available. The Israeli government had defended the restrictions due to non-compliance with self-isolation directives among those returning. Its submissions focused on the operational difficulties associated with enforcing compliance[36] as well as the need to adopt the precautionary principle due to the spread of the Alpha variant.[37] Supreme Court President Hayut noted that the government had failed to

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28 Albin et al (n 20) [81]–[90].

29 Ibid.

30 *Special Authorities Regulations to Combat the Novel Coronavirus (Temporary Provision) (Limitations of Exit and Entry from Israel) 2021* (5 February 2021) (Israel). See discussion in Albin et al (n 20) [88].

31 Albin et al (n 20) [89].

32 *Special Authorities Regulations to Combat the Novel Coronavirus (Temporary Provision) (Restrictions on Operation of Airports and Flights) (Amendment No 13) 2020* (18 February 2021) (Israel); *Special Authorities Regulations to Combat the Novel Coronavirus (Temporary Provision) (Limitations of Exit and Entry from Israel) (Amendment No 4) 2020* (6 March 2021) (Israel). See ibid.

33 *Shemesh v Prime Minister* (2021) HCJ 1107/21 High Court of Justice (Israel) (17 March 2021) ('*Shemesh*'). The Supreme Court sits as the High Court of Justice conducting judicial review of executive action and legislation: see Albin et al (n 20).

34 Basic Law of 1992, Human Dignity and Liberty (Israel) [tr Israel Ministry of Foreign Affairs] art 6 ('Leaving and entering Israel') provides: 'All persons are free to leave Israel. Every Israel national has the right of entry into Israel from abroad.'

35 *Shemesh* (n 33) [21] (Hayut P) <https://he.afiklaw.com/caselaw/12122>. It is worth noting that Israel does not allow for overseas voting outside very narrow circumstances.

36 Ibid [27].

37 Ibid [30].

adequately explain why enforcement of home isolation could not be strengthened or greater penalties imposed to encourage compliance.[38]

Hayut P also observed that the government's explanation justified the caps on the basis of convenience and simplicity, rather than necessity.[39] Amit J accepted the need to apply the precautionary principle with respect to the risk of new variants entering Israel against which a vaccine may not be effective.[40] However, Amit J's judgment similarly noted that alternative, less restrictive measures — including the introduction of electronic bracelets and monitoring — could respond to that risk.[41] Hayut P also noted that, given the government's lack of data regarding those who were affected by the arrival caps, the caps also lacked proportionality in the narrow sense. While the Court should have regard to the precautionary principle, the benefits conferred by the caps were outweighed by the harms they inflicted. This is because the benefit they conferred was abstract and uncertain.[42] In this way the Court was prepared to analyse risk and harm beyond that to health alone.

The Court in *Shemesh* expressly raised themes of resource allocation and proportionality over time. It began with a description of restrictions on international movement since the beginning of the pandemic, locating the challenged restrictions in that context.[43] When discussing the lack of governmental data on the number of citizens stranded abroad, Hayut P drew attention to the length of time available to the government to procure that data.[44] Hayut P also noted that the virus was 'not expected to disappear' in the foreseeable future notwithstanding vaccination. This called for a greater scrutiny of the balance between fundamental rights and control of the virus over time.[45] In assessing the 'necessity' of flight caps, Amit J's judgment questioned why alternative measures such as electronic bracelets had not been introduced earlier.[46] The Court's reasoning in *Shemesh* accordingly addressed the problem of executive path dependence. It took the time period over which the emergency had extended into account when scrutinising the proportionality of a restriction.

Increasing the intensity of proportionality review over time mirrors how courts approached scrutinising the executive during the pandemic elsewhere. In India, the Supreme Court was prepared to openly articulate how its role 'transformed' as time passed in the pandemic, during which it adopted a 'dialogic jurisdiction'.[47] Dialogic review requires that the executive justify the basis of its decisions about the management of the pandemic, allowing the Court the ability in

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38 Ibid [28].
39 Ibid [29].
40 Ibid [13].
41 Ibid [14]–[17].
42 Ibid [30] (Hayut P).
43 Ibid [1] (Hayut P).
44 Ibid [31].
45 Ibid [33].
46 Ibid [14].
47 *Re Distribution of Essential Supplies and Services during the Pandemic* (Supreme Court of India) Suo Moto Writ Petition (Civil) No 3 of 2021 determined 31 May 2021. I am grateful to Gautam Bhatia for this observation. See Gautam Bhatia, 'Coronavirus and the Constitution — XXXVII: Dialogic Review and the Supreme Court (2)', *Indian Constitutional Law and Philosophy* (Blog Post, 3 June 2021) <https://indconlawphil.wordpress.com/tag/dialogic-review>.

scrutinise them for constitutional compliance without invalidating them. Should the executive fail to modify the policy to ensure its compliance, the Court will then move to invalidate those aspects of a policy.[48] In taking *suo motu* cognisance of aspects of the federal executive's management of the pandemic during India's 'second wave', including the distribution of oxygen and vaccines, the Indian Supreme Court articulated a description of its role in a protracted emergency. It noted that judicial scrutiny is 'transformed' during public health emergencies, 'where the executive functions in rapid consultation with scientists and other experts'.[49] It referred approvingly, however, to Alito J's dissenting opinion in a United States Supreme Court decision that denied an emergency application to hold religious services during the pandemic. Alito J stated that a public health emergency does not provide the executive with

> *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.[50]

Some courts, then, were more willing to intervene in executive restrictions as the COVID-19 pandemic crystallised into a protracted societal and political problem. This demonstrates one strength of proportionality testing during a protracted crisis: it interrupts the risk of executive 'path dependency' establishing itself, where executives do not invest in systems or deploy resources to adapt to a 'new normal' because they continue to experience less, or different, public pressure than in non-emergency settings. This benefit of proportionality testing is particularly relevant where a public is not agitating for the interests of discrete groups of people affected by restrictions — such as those with compelling reasons to return to a country over the medium term during a pandemic. The successful challenge to arrival caps in Israel demonstrates how this can force the executive to invest in systems as a problem establishes itself as a new status quo, rather than continuing to choose 'short-term' measures because of their convenience or simplicity.

An increasing willingness of courts to intervene as the pandemic became a protracted problem reveals itself in how courts approached evidence to 'give the benefit of the doubt' to governments defending restrictions. The initial deference that courts were willing to give when the pandemic began was connected to uncertainty, urgency and instability — settings involving an immediate, 'existential' threat as I described above. And yet the Israeli High Court approached evidence and uncertainty in *Shemesh* in favour of those challenging the arrival restrictions. It found the harm to those affected by flight caps outweighed the abstract and uncertain benefits that the flight caps conferred, given community transmission was already established in Israel and alternative means of quarantine enforcement were available. In light of the certainty surrounding the harms the caps inflicted, the Court adopted

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48 Bhatia (n 47).

49 *Re Distribution of Essential Supplies and Services during the Pandemic* (Supreme Court of India) Suo Moto Writ Petition (Civil) No 3 of 2021 determined 31 May 2021. The Court further noted: 'Any over-zealous judicial intervention, though well-meaning, in the absence of expert advice or administrative experience may lead to unintended circumstances where the executive is left with little room to explore innovative solutions.'

50 *Calvary Chapel Dayton Valley v Sisolak* (US, No 19A1070, 24 July 2020) slip op 1, 3.

a more critical stance to the government's invocation of the precautionary principle. How courts apply proportionality testing in crisis settings may vary according to the urgency of that crisis. *Shemesh* demonstrates that in less urgent settings, some courts have been more willing to interrogate a paucity of evidence.

2 *Allocation of Scarce Resources*

As earlier explained in Part II(A), the NZ model of proportionality analysis is less sceptical of majoritarian political processes. It places its faith in Parliament rather than the executive. It is also associated with a legal culture that supports a greater degree of deference. This is reflected in the decision in *Grounded Kiwis Group Inc v Ministry of Health*.[51]

In pursuit of its elimination strategy, New Zealand required arrivals to isolate in government-run managed isolation and quarantine facilities ('MIQFs'). This policy remained in place from April 2020 until February 2022. For periods in late 2020 and much of 2021, demand for places in MIQFs exceeded supply. From November 2020, the NZ government began to issue vouchers to passengers for quarantine facilities on a 'first come, first served' basis via an online booking system. A separate allocation was retained for emergency cases. During this period the online system for applying for vouchers was not regulated. Media reports noted that 'tech-savvy New Zealanders' were using computer codes to acquire places, new vouchers were released in the middle of the night, there was no queue and others were paying for 'freelance computer programmers' to monitor the site for them to acquire vouchers. Vouchers were reportedly allocated within 'seconds'.[52] These events were compounded by a community outbreak of the Delta variant in Auckland in August 2021, which required that MIQF places be used to quarantine some community cases.

On 20 September 2021, the NZ government introduced a 'virtual lobby system' to allocate vouchers for MIQF places on a randomised basis. The virtual lobby system did not take into account how long citizens had been waiting outside New Zealand. From 12 October the Minister for the COVID-19 Response sought to further reduce demand by allowing low-risk close contacts and asymptomatic cases to quarantine at home. From 19 October, large numbers of people with COVID-19 were being allowed to quarantine at home. From 14 November, quarantine in MIQF was reduced to seven days. The criteria to qualify for an emergency place in MIQF was also expanded.

A network of NZ citizens — 'Grounded Kiwis' — sought to challenge aspects of the managed isolation and quarantine system in place during the period between 1 September 2021 and 17 December 2021 (the 'relevant period'). They argued that aspects breached the right to return. The status of the *New Zealand Bill of Rights Act 1990* (NZ) as ordinary legislation means that it binds the executive — in this case, decisions made by the Minister of Health about managed isolation and quarantine. Section 18(2) provides that '[e]very New Zealand citizen has the right

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51 *Grounded Kiwis Group Inc v Ministry of Health* [2022] 3 NZLR 19 ('*Grounded Kiwis*').
52 Ibid 44 [80].

to enter New Zealand'. This right is subject to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[53] As also explained above in Part II(A), this has been clarified to include a variety of structured proportionality testing.[54] Grounded Kiwis argued that, during the relevant period, those who had contracted the virus in the community as well as their close contacts were permitted to self-isolate. Even though the period of quarantine in MIQF was reduced to seven days during the relevant period, Grounded Kiwis argued that this was expedient because of increased demand by community cases, which therefore didn't increase capacity for international arrivals. It argued that a move to home quarantine or reduction of the period of quarantine in MIQF to seven days should have occurred earlier, including before the Delta variant established itself in the NZ community. In this way, Grounded Kiwis' argument addressed questions of timing that go to the problem of 'executive path dependency' I described in Part II(B)(1). It challenged the government's choices regarding infrastructure because the prolonged nature of the emergency made other choices available.

Grounded Kiwis also challenged the randomised way that the 'virtual lobby system' allocated places in MIQF. The group argued that the failure of this system to factor in how long citizens had been waiting to return breached the right to return, as did a failure to prioritise NZ citizens over other applicants for vouchers. Finally, Grounded Kiwis argued that the allocation of places for groups such as international sporting teams unjustifiably infringed the right of citizens to return because it reduced available places for them.

Mallon J rejected the argument that the government should have implemented self-isolation for low-risk arrivals prior to the Delta outbreak. Her Honour noted that there was a higher risk involved with self-isolation, including of low-risk arrivals from Australia, and concluded that the Minister and the NZ government were 'entitled to adopt a precautionary response'.[55] In this way Mallon J's approach to the precautionary principle contrasts with that of the Israeli High Court of Justice in *Shemesh*, where it questioned the government's argument regarding the precautionary principle. In *Shemesh* the Court accepted that alternative measures such as greater enforcement and penalties could mitigate that greater risk. In *Grounded Kiwis*, Mallon J deferred more to the government's evidence on the availability of those alternatives. With respect to alternatives that were potentially higher risk, her Honour stated that it was appropriate for the Court 'to give leeway to the Minister, and the expert advice he was receiving in this area, in decisions about this'.[56] Grounded Kiwis had also accepted that 'the Court is not equipped to determine disputed issues of scientific or technical opinion'.[57]

Mallon J also rejected the argument that the requirement to hold a voucher for managed isolation and quarantine during the relevant period was an unjustified infringement on the right of New Zealanders to enter their country *after* the Delta outbreak had established itself in the community, including for returning those

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53 *New Zealand Bill of Rights Act 1990* (NZ) s 5.
54 *Hansen* (n 16) 40–1.
55 *Grounded Kiwis* (n 51) 91 [302].
56 Ibid.
57 Ibid 94–5 [317].

citizens who had been vaccinated. Mallon J accepted that the number of community cases surpassed the number of positive cases among international arrivals within days of the outbreak. Nonetheless, her Honour accepted expert evidence that international arrivals could risk seeding new clusters in areas without cases, particularly outside Auckland. There was also the risk that a new variant could be introduced. Mallon J therefore concluded that the continued use of MIQFs for international arrivals was proportionate notwithstanding the differential treatment of community cases. Mallon J took the view that the Court 'should appropriately defer to the evidence of the experts' with respect to how to assess risk.[58] Her Honour noted that a 'more proportionate alternative' could have been to allow self-isolation on a case-by-case basis, but there was already scope for this after a previous court decision.[59] This approach to evidence and deference was similar to that taken by the Canadian Federal Court in an unsuccessful challenge to the requirement that arrivals by air, but not land, quarantine in hotels. In *Spencer v Canada*,[60] the Court referred to the precautionary principle and noted that it did not have access to the resources and specialised expertise necessary to 'second-guess' the Chief Medical Officer's decision. The reasoning in the NZ and Canadian courts once more contrasts with the approach taken in *Shemesh*, where the Court rejected the Israeli government's argument that restrictions were justified to prevent further outbreaks and contain the threat of further variants. This difference can arguably be explained by the approach to evidence and deference taken by the 'Commonwealth model' of constitutionalism that I explored in Part II(A) above. Contrasting these cases, then, suggests that courts adhering to the Commonwealth model maintained a reluctance to interrogate the executive's reliance on public health evidence or its approach to risk even as the pandemic became a protracted problem.

Mallon J did, however, find that the Minister and the NZ government had failed to properly allocate places in hotel quarantine in a way that was consistent with the right of NZ citizens to return to their country. Her Honour agreed with Grounded Kiwis' argument that a technical solution could have allowed for a priority system that allocated places to those who had already experienced unreasonable delay.[61] The 'virtual lobby' system did not provide for such prioritisation. Other aspects of the system — such as a failure to limit places to those with a legal right to enter — also meant places were not efficiently allocated.[62] Mallon J concluded that it was a 'flawed system for giving effect to the right of New Zealanders to enter their country' because some applicants had a greater call on that right than others. Her Honour concluded that 'alternatives should have been pursued'.[63] The failure to implement a prioritising system 'disproportionately gave weight to public health risks over an individual's right to return. The system needed to be able to cater for individuals that were experiencing undue delay.'[64] The mechanism for allocating emergency places did not do so because it lacked sufficient resources to applications

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58 *Grounded Kiwis* (n 51) 104 [361].
59 *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment* [2021] 3 NZLR 425.
60 *Spencer v Canada* [2021] FC 361.
61 *Grounded Kiwis* (n 51) 96–7 [328].
62 Ibid 99 [340]–[341].
63 Ibid 99–100 [343].
64 Ibid 105 [364].

made within the timeframes it set[65] and some of the categories for which it provided were too narrow.[66]

Grounded Kiwis, like *Spencer v Canada*, suggests that some courts in the Commonwealth world applied more deference to executive decisions during the pandemic than courts elsewhere, notwithstanding the passage of time. The Court in *Grounded Kiwis* was not receptive to arguments regarding what I have described as 'executive path dependency' — a failure to invest in, or organise, infrastructure over time in a way that rendered restrictions on rights less necessary. But *Grounded Kiwis* does demonstrate that, even in more deferential courts, proportionality analysis can retain a function in scrutinising how scarce resources are allocated. This provides other benefits in protracted emergency settings.

III Australia's Proportionality Protections in Protracted Emergencies

A *Australia's Constitutional Protections of Proportionality*

1 *Faith in Majoritarianism*

Australia is a case study to produce generalisable insights into how proportionality considerations function in protracted emergency settings where those considerations aren't underwritten by entrenched constitutional or statutory bills of rights. Australia lacks a constitutionally entrenched or federal statutory bill of rights. While it protects some individual interests, those interests are largely connected with the focus of the constitutional document: federalism and trade.[67] A patchwork of proportionality considerations nonetheless extends across the Australian public law landscape. The stance of those considerations toward majoritarian political processes is, however, distinct from that of other proportionality models I explored in Part II(A) above. This can be explained by the political context and concerns that animated the *Australian Constitution*. The new federation emerged from a society that inherited rather than rejected British intellectual tradition. This included the British tradition's faith in political institutions and responsible and representative government.[68] That context predated a distrust of majoritarianism. To the extent that federalism was intended to moderate majoritarianism, it would do so through institutions — majorities and minorities defined by state and Commonwealth populaces.

The convention debates reflect concerns that judicial review of rights could obstruct majority will. South Australian delegate John Gordon, for instance, stated that it would be 'monstrous' were 'any individual' allowed to impugn 'a law

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65 Ibid 108 [385].

66 Ibid 111 [404].

67 See, eg, Lisa Burton Crawford and Jeffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018, Oxford University Press) 357, 367.

68 Ibid 368. See also Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 173.

expressing the will of the majority of the people'. Instead, the test of whether a law is 'righteous' is whether it is 'required in the interests of the whole'.[69] Similar sentiments emerged during debate as to whether the *Constitution* should include an equal protection clause. That debate had implications for the constitutionalising of citizenship, ultimately leading to a decision to leave such concerns to legislatures. The delegates were concerned that recognising citizenship could potentially extend to all British subjects — including those 'coloured aliens' who were members of colonies in the British Empire. Antecedent legislation of the White Australia policy[70] was already in place in the Western Australian colony.

The framers endorsed a framework of political mechanisms that would limit the power of governments by counterbalancing the will of differently constituted majorities against one another. This is not to say that the Australian model was designed in ignorance of the risks to which later models of proportionality advert — that legislatures or executives may pursue policies for their expediency or convenience at the expense of the rights of smaller groups. The convention debates make it clear the framers intended to allow legislatures and executives the flexibility to determine, or override, such rights. Proportionality was a framework that could only connect with structures and values for which the *Constitution* did provide, such as federalism and freedom of trade and commerce between the states. In other matters — such as the relationship between individual citizens and the state or majorities and minorities — proportionality was a political question addressed through electoral mechanisms.

Proportionality therefore features in Australian constitutional law as a means of regulating the operation of constitutional structures and institutions. It is not grounded in a sceptical stance toward majoritarianism. Federal legislative power, for instance, must fall within the scope of an enumerated head of power in the *Constitution*; proportionality has been used to test whether legislation falls within the scope of certain federal legislative powers.[71] Proportionality has also been used to determine the circumstances in which legislatures can burden a freedom of trade, commerce and intercourse — a limit on federal and state legislative power entrenched in s 92.[72] More recently, structured proportionality analysis has emerged as a means of assessing whether legislation can permissibly burden a freedom of political communication implied from the constitutionally entrenched system of the representative government.[73]

In two instances challenges were brought to COVID-19 restrictions that argued those restrictions infringed principles that were implied in the *Constitution*. Both were unsuccessful. *Gerner v Victoria*[74] considered the existence of a 'freedom of [intrastate] movement' that was claimed to be 'implied from the text and

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69 *Official Report of the National Australasian Convention Debates*, Melbourne, 1 March 1898, 1,681. See also Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (1997) 25 *Federal Law Review* 295.

70 *Immigration Restriction Act 1901* (Cth).

71 See Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 100–30.

72 Ibid 131–49. See also *Palmer v Western Australia* (2021) 272 CLR 505 ('*Palmer*').

73 See, eg, *McCloy v New South Wales* (2015) 257 CLR 178.

74 *Gerner v Victoria* (2020) 270 CLR 412.

structure' of the *Constitution*.[75] The High Court rejected this argument due to a lack of authority. The Court noted that the constitutional framers were concerned with 'movement between the States' and not motivated to deny state legislatures authority over intrastate movement.[76] In *Athavle v New South Wales*[77] members of a religious community argued that state public health orders issued in New South Wales infringed a right of religious freedom implied by s 116 of the *Constitution*. The Federal Court dismissed this argument, finding that its relationship to the principles that gave rise to the implied freedom of political communication was tenuous.[78] Both *Gerner* and *Athavle* demonstrate the difficulty of relying on constitutional implication to establish constitutional standards against which the proportionality of a restriction can be measured.

2 Palmer v Western Australia

The proportionality considerations that arise from Australian constitutional structures and freedoms can indirectly protect individuals affected by majoritarian political processes. However, the indirect nature of that protection — coupled with the culture of legalism that Australia's system of political constitutionalism has supported — means that Australian courts tend to apply those proportionality considerations with a great degree of deference. An unsuccessful s 92 challenge to restrictions on entry into Western Australia early in the pandemic arguably demonstrates this tendency. *Palmer v Western Australia* concerned a challenge by an Australian businessman to restrictions on entry into the state of Western Australia unless individuals fell within a limited number of exempt categories.[79] The *Quarantine (Closing the Border) Directions* (WA) ('*Directions*'), which the WA government implemented on 16 March 2020, prevented Palmer from entering Western Australia to pursue his business interests. His application for an exemption had been refused. Palmer argued that the *Emergency Management Act 2005* (WA) which authorised the *Directions* and/or the *Directions* themselves breached the freedom of trade, commerce and intercourse among the states guaranteed in s 92 of the *Constitution*. Western Australia argued in its defence that the purpose of the legislation was to protect the WA populace against the pandemic and that there was no other, equally effective means available to achieve that purpose that imposed a lesser burden on the freedom of intercourse.

The Court unanimously upheld the *Directions* and the Act that empowered them, though the judges differed in their reasoning. Two caveats are required in comparing their reasoning to proportionality elsewhere. The most obvious of these is that the challenge did not concern restrictions on citizens returning to their country but instead restrictions on internal movement. It provides, however, a case study of the extent to which structures and freedoms in the *Australian Constitution* can indirectly protect a discrete group — those outside Western Australia with time-sensitive reasons to return — affected by measures that protect a larger majority.

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75 Ibid 419.
76 Ibid 425.
77 *Athavle v New South Wales* (2021) 290 FCR 406.
78 Ibid 426 [89].
79 *Palmer* (n 72).

State border closures aimed at limiting the incursion of the virus created periods of time where residents were 'stranded' outside their states. A second, arguably more fundamental caveat connects with the timing of the challenged restrictions in the lifespan of the pandemic. The restrictions that were challenged in *Palmer* were implemented in March 2020, when the longer term structure of the emergency had not yet crystallised. At the time the arguments were heard in late 2020, WA authorities had announced that a new system for exemptions would be implemented. The Federal Court, to which factual questions were remitted for findings of fact, noted the absence of a vaccine, uncertainty around testing, and lack of treatment as relevant to the proceedings. The date when *Palmer* was heard also precludes analysis of the approach of the Court over time. The absence of quarantine systems at the beginning of the pandemic similarly limits discussion of how resource allocation questions could have featured.

The Court's reasoning in *Palmer*, however, does reveal how it understood its role in relation to the legislature and executive in the emergency. The Court directed its analysis toward whether the *Emergency Management Act 2005* and the way it could be applied, rather than the *Directions* themselves, breached the freedom. With the exception of Edelman J, who nonetheless also found that the Act was valid, the Justices directed much of their attention toward methodological questions — especially the ongoing academic debate in Australian constitutional law as to whether the structured proportionality test that I explored in Part II(A) above should be incorporated within the existing approach to s 92 of the *Constitution*. There was limited discussion of how the structure or nature of an emergency could affect proportionality assessments or what the Court's role should be in such cases, despite this question being more crucial to the outcome than the incorporation of structured proportionality. All of the judgments assumed the question of how proportionality reasoning should interact with emergencies to be straightforward. Kiefel CJ and Keane J noted that the Act provided relevant safeguards — the emergency needed to be regularly renewed — and referred to the findings of fact in the Federal Court.[80] They addressed Palmer's arguments that a less burdensome alternative could have allowed persons from states with lesser risk to enter. Their Honours concluded that, were the Court to accept this argument, it would be to find that 'there is a level of risk which may be regarded as acceptable'. Because of the factual uncertainty that the Federal Court's findings had established, 'a precautionary approach should be adopted'.[81] While these factual findings were made at the beginning of the pandemic, the manner in which Kiefel CJ and Keane J treated the nature of risk assessments in emergencies — as a straightforward question warranting brief treatment — contrasts with the approach I have explored in the Israeli and NZ cases. Gageler J's judgment approached the question similarly, directing attention toward the structured proportionality question and dealing with the nature of the emergency briefly. Like Kiefel CJ and Keane J, Gageler J noted the constraints on the power to restrict movement built into the Act, including the requirement that the Minister for Emergency Services consider the advice of the State Emergency Coordinator.[82]

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80 *Palmer* (n 72) 533–4 [77]–[78].
81 Ibid 534 [79].
82 Ibid 557–8 [157].

Gordon J and Edelman J reasoned similarly in separate judgments:[83] Gordon J referred to the 'extraordinary' nature of the emergency[84] while Edelman J noted the 'extreme nature of the circumstances'.[85]

This tendency of the Court's approach — directing analysis to the empowering Act for executively determined restrictions rather than the restrictions themselves — meant that analysis of proportionality remained at a higher level of generality than the more granular analyses in *Shemesh* and *Grounded Kiwis*.[86] This affords a greater degree of discretion in specific cases to the executive, provided that legislatures have conferred that discretion in a way that is 'open-textured'[87] and where an emergency can be described as 'extreme'. Such an approach arguably forecloses the more nuanced approach to proportionality in protracted emergency settings that was evident in *Shemesh* and *Grounded Kiwis*, where the court could consider questions of state capacity and resource allocation. The Australian approach means that the court must address the nature of an emergency in binary terms: either an emergency is sufficiently serious to allow the executive a broad discretion to manage it, or it is not an emergency. *Palmer* suggests that the indirect protection afforded by s 92 — especially when combined with the legal culture that has grown around Australia's constitutional system — provides less space for judicial intervention into the proportionality questions that protracted emergencies can raise.

B *Administrative Law Protections*

1 *Limits of Legislative Proportionality Requirements*

Legislation can require that members of the executive take proportionality considerations into account when making decisions in an emergency setting. The nature of those requirements, however, allows less space for judicial scrutiny of a measure's proportionality. Challenges brought to determinations made under s 477 of the *Biosecurity Act 2015* (Cth) ('*Biosecurity Act*') during the pandemic reveal that lack of space.

Section 477 permits the Minister for Health and Aged Care ('Health Minister') to make certain determinations when a biosecurity emergency has been declared. Before a determination may be issued under s 477, the Health Minister must be satisfied that the requirement they impose is appropriate and adapted to — and likely to play an effective part in achieving — its purpose;[88] that both the requirement and the manner in which it is pursued are no more restrictive or intrusive

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83 Ibid 561–4 [172]–[177] (Gordon J), 604–5 [283]–[286] (Edelman J).
84 Ibid 534 [78].
85 Ibid 505 [286].
86 See Tom Manousaridis, '*Palmer v Western Australia*: A Critique of the High Court of Australia's Approach to Constitutional Review of Executive Exercises of Power' (2022) 44(2) *Sydney Law Review* 295.
87 Edelman J employs this description in *Palmer* (n 72) 578 [219].
88 *Biosecurity Act 2015* (Cth) ss 477(4)(a), (b).

than required in the circumstances;[89] and that the requirement does not apply for longer than necessary.[90] These criteria broadly map onto the 'suitability' and 'necessity' elements of structured proportionality. They are, however, legislative standards incorporated by Parliament rather than constitutional standards against which legislative and executive acts may be measured. Legislative standards are comparatively weaker, particularly when framed in the terms employed by s 477 of the *Biosecurity Act*. Section 477 merely requires that the Minister be subjectively satisfied that a measure meets the proportionality considerations that it details. That the power is conferred upon the Health Minister personally structures it as one where personal 'experience, understanding, knowledge and resources' may colour the value judgment reached.[91]

In this way, a s 477 proportionality assessment asks *different questions* to those prompted by models underpinned by rights. What matters is not whether a right has been restricted in a way that is proportionate, but whether the legislative requirements that s 477 imposes — a process that the Health Minister must follow before they can be satisfied that a restriction is proportionate — have been met. This difference turns on matters of evidence and reasoning. The rights-based model of proportionality asks substantive questions. It purports to interrogate the objective reality that underpins the suitability, the necessity and the strict proportionality of a restriction. *Shemesh* demonstrates that this can involve robust questioning of the evidence and justification for a restriction. While deference still operates within this model — particularly in the emergency settings that I discussed in Part II(B) above — courts are more empowered and willing to critically appraise the quality of evidence underpinning the state's reasoning. In contrast, the terms in which s 477 is phrased confers power on the Health Minister personally to reach a subjective judgment. This confines the court to an evidential inquiry parsed along very different lines of merit and legality to the inquiry conducted by the rights-based proportionality model. What matters is whether the Health Minister was *capable* of being satisfied of a particular matter, not whether it was the most compelling conclusion on the facts. In Australian administrative law this latter question is considered the domain of the executive. Such questions do not go to the 'legality' of the decision — matters that can be judicially reviewed — because no rights catalogue supplies a standard against which to measure them and bring them into the legal domain.

The logic of these two notions of proportionality lends itself to comparison in terms of the political process. Rights-based proportionality models are grounded in scepticism of the extent to which a popularly elected branch of government will have regard to the rights of smaller groups unable to meaningfully influence political processes. Legislative proportionality considerations, in contrast, reflect greater institutional trust in those popularly elected branches than in courts. In settings that involve unstable factual circumstances with multiple risk factors and considerations in play, decisions cannot be easily programmed by a legally determinate standard. Conferring the power of that decision on a Minister — accountable to Cabinet, to

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89 Ibid ss 477(4)(c), (d).
90 Ibid s 477(4)(e).
91 *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409, 428.

Parliament and to the electorate — recognises the complex character of decision-making in a crisis response. In such circumstances, choices are 'tragic choices' where the optimal outcome is not clear. If 'tragic choices' must be made, they are better made as the prerogative of elected representatives than of courts.[92]

At the beginning of the pandemic the Health Minister relied upon s 477 to ban Australian citizens and residents from leaving Australia unless they fell into certain exempted categories or received an exemption for exceptional circumstances ('Outward Travel Ban').[93] In April 2021 the Health Minister also relied upon s 477 to ban any person who had been in India during the previous 14 days from entering Australia ('India Travel Ban').[94] Criminal penalties attach to a breach of a s 477 determination: a potential custodial sentence of up to five years, a fine of up to $66,000, or both.[95] This was intended to close the 'loophole' that would allow Australians who had been in India during the previous 14 days to return via third countries.[96]

2 *India Travel Ban*

The limitations of legislative proportionality requirements are reflected in *Newman v Minister for Health and Aged Care*,[97] an unsuccessful Federal Court challenge to the India Travel Ban. Newman argued grounds in both administrative law and constitutional law, though only the former were ultimately heard. Among other arguments, Newman claimed that the Minister had failed to consider whether there were less restrictive measures that could have managed the public health risk other than criminalising re-entry into Australia. He noted that the health advice from the Chief Medical Officer, upon which the Health Minister had relied, did not advise on alternative means or the appropriateness of imposing a criminal penalty.[98]

The Court rejected Newman's proportionality argument, finding that the Health Minister was capable of being satisfied of the 'proportionality considerations' delineated in s 477 of the *Biosecurity Act*. Thawley J noted that the requirements in s 477 do not require the Minister to consider 'every single fact which might be thought of as being potentially relevant' before being satisfied of the matters it lists.[99] His Honour accepted that the Health Minister had considered the Chief Medical Officer's advice and concluded that the Minister had considered whether less restrictive alternatives were available because the India Travel Ban carved out

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92 See, eg, discussion of decision-making in crises as 'polycentric' in HP Lee, Michael WR Adams, Colin Campbell and Patrick Emerton, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 235.

93 *Biosecurity Act (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth).

94 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — High Risk Country Travel Pause) Determination 2021* (Cth).

95 *Biosecurity Act 2015* (Cth) s 479.

96 See, eg, Michelle Grattan, 'India Travel Ban Falls as Morrison Tries to Escape the Branding of His Government as a Moral Pariah', *The Conversation* (online, 6 May 2021) <https://www.abc.net.au/news/2021-05-07/coronavirus-india-light-ban-lifted/100120932>.

97 *Newman v Minister for Health and Aged Care* (2021) 173 ALD 88 ('*Newman*').

98 Ibid 100–1 [47].

99 Ibid 102 [52].

exceptions: it permitted arrivals on government-facilitated flights and emergency medical evacuation flights.

The Court's rejection of Newman's argument flowed from how the s 477 proportionality analysis interacts with evidence. As the Chief Medical Officer's advice supported the introduction of those restrictions, the quality of that evidence — the Chief Medical Officer's advice — was not tested. Thawley J noted that the Chief Medical Officer provided a clear opinion that 'further relief would come to the Australian quarantine system' by taking the further step of criminalising transit to Australia via third countries in addition to the existing suspension of flights from India.[100] That advice noted that the number of positive cases in hotel quarantine programs had sharply increased during the previous week to 1.8% of cases, and over half of those were arrivals from India. The advice then adverted to the risk that positive cases in hotel quarantine could 'leak' into the Australian community. It cited recent examples of 'leaks' in New South Wales and Western Australia.[101] The Chief Medical Officer elsewhere stated that the Australian Health Protection Principal Committee ('AHPPC') had provided advice that positive cases in hotel quarantine programs would reach a 'benchmark of concern' at 2%.[102] It was clear that the Health Minister had read the Chief Medical Officer's advice and had therefore turned his mind to the considerations set out in s 477. There was also evidence available on which the Minister *could* be satisfied of those considerations even if it were not the most compelling view.

Because it condenses the inquiry of proportionality and alternative means into narrower questions — whether it was open to the Minister to reach a particular conclusion — s 477 bypasses questions regarding the approach of governments over time. It was only open to the Court to ask whether the Minister had considered whether less restrictive means were available. It could not interrogate underlying assumptions and government choices that supported that state of satisfaction and assess their proportionality. For instance, the WA example of 'leakage' from a hotel quarantine program that the Chief Medical Officer noted in his advice was connected with a state government error. Despite warnings in March 2021 that the Mercure hotel in Perth was at 'high risk' of positive cases spreading into the community due to inadequate ventilation, the hotel continued to be used.[103] The 2% threshold that the AHPPC cited as a 'benchmark' before positive cases in hotel quarantine became unsafe similarly embeds certain assumptions about government behaviour and choices that the Court could not analyse. The benchmark assumes that a degree of leakage is inevitable and cannot be mitigated by alternative means. This contrasts starkly with the approach that could be taken in *Shemesh*, where the Israeli High Court rejected the state's arguments regarding non-compliance as arguments of

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100 Ibid 103–4 [61].

101 Letter from Paul Kelly to Greg Hunt, 30 April 2021, available in 'Affidavit of Michael David Bradley', Submission in *Newman v Minister for Health and Aged Care* (Federal Court of Australia, NSD388/2021, 10 May 2021) <https://www.fedcourt.gov.au/__data/assets/pdf_file/0004/84496/NSD388of2021-Affidavit-20210505.pdf> 12–15.

102 Interview with Paul Kelly (Laura Jayes, Sky News, 3 May 2021).

103 Rhiannon Shine, 'WA Hotel Quarantine Report Warned of "High-Risk" COVID-19 Dangers a Month before Perth Lockdown', *ABC News* (online, 27 April 2021) <https://www.abc.net.au/news/2021-04-27/wa-hotel-quarantine-report-warned-of-dangers-a-month-ago/100098824>.

'convenience' rather than 'necessity'; alternative means were available to mitigate that risk, albeit ones that required government investment.

The Court similarly rejected Newman's principle of legality argument. Both parties accepted — and the Court affirmed — that Australian citizens have a fundamental common law right to re-enter Australia. Nonetheless, the Court found that Parliament had expressed a sufficiently clear intention that the India Travel Ban apply to Australian citizens. This displaced the common law right to re-enter Australia. Thawley J inferred this intention from the deliberate breadth of the terms in which s 477 is phrased and the references in that section to limits on people moving in and out of Australia. His Honour therefore concluded that the utility of s 477 would be undermined should it be interpreted to only apply to limiting the movement of non-citizens.[104] That s 477 also incorporates legislative proportionality considerations also indicated Parliament had contemplated that rights would be restricted.[105]

3 *Outward Travel Ban*

The case *LibertyWorks Inc v Commonwealth*[106] concerned a September 2021 challenge to the outbound restrictions on international movement made under s 477 of the *Biosecurity Act*. While the Outward Travel Ban did not directly involve repatriation rights, it reflected a similar logic to repatriation restrictions. Restrictions on leaving Australia were intended to limit the numbers of those who would need to return. In this way those restrictions also connected with limiting demand on quarantine systems and resource allocation over time. That restriction remained in place from 25 March 2020 until 1 November 2021, when a 'blanket' exemption was provided to fully vaccinated citizens and residents. To the extent that the Outward Travel Ban affected those with time-sensitive reasons to leave Australia who were not eligible for an exemption, it also involved the problem of a smaller group whose rights were affected for the benefit of a larger collective.

LibertyWorks, a libertarian think-tank, argued that the Outward Travel Ban was not authorised by s 477. Its argument relied upon principles of statutory construction that raised proportionality considerations indirectly. Section 477(6) prohibits the Minister from making a human biosecurity control order under s 477(1). A separate part of the Act regulates human biosecurity control orders over individuals and is subject to a different set of controls, including the requirement that the individual have symptoms or have been exposed to a listed human disease. LibertyWorks argued that, because a restriction on leaving Australia was similar to that provided for in a human biosecurity control order, the Outward Travel Ban was not authorised under s 477(1).[107] In doing so, it relied upon a similar principle of legality argument to that raised in *Newman*. It also raised Australia's international obligations regarding freedom of movement.[108]

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104 *Newman* (n 97) 111 [95].
105 Ibid 110–11 [94].
106 *LibertyWorks Inc v Commonwealth* (2021) 286 FCR 131.
107 Ibid 137.
108 Ibid 146–7.

Katzmann, Wigney and Thawley JJ rejected LibertyWorks' argument. Like the Court in *Newman*, the Court in *LibertyWorks* found that proportionality requirements incorporated in s 477(4) effectively displaced common law rights to re-enter Australia.[109] This satisfied the principle of legality. The brevity of the Court's analysis in this regard again reflects the limitations of legislative proportionality requirements. It noted that international obligations regarding freedom of movement are not absolute. It then noted that the proportionality considerations incorporated in s 477(4) had been examined in a Human Rights Compatibility Statement when the Bill was proposed.[110] For the reasons explained in Part III(B)(1) above, such an inquiry could not test the quality of evidence and justification informing the Minister's proportionality assessment.[111]

C *Political Accountability: Public Pressure, Quarantine Capacity and Quarantine Federalism*

1 *Public Pressure and Quarantine Capacity*

I have explained the Australian system's preference for political, rather than legal, mechanisms to 'check' the proportionality of the executive's response to a crisis. I have also explored how Australian constitutional structures embed a certain concept of political accountability. Australia's system trusts the voting public to hold the legislature and executive government to account when they fail to act in the interests of smaller groups. We can think of this as a form of 'electoral proportionality reasoning': how public will forms and exerts influence to ensure that legislative and executive action does not restrict rights unnecessarily and that the benefit conferred by any restriction of rights outweighs the burden it imposes.

Crisis settings and emergencies further alter the conditions in which public opinion and political pressure on executive government forms. Crises orient decision-making toward utilitarianism and the collective (majorities) — toward which Australia's system is already tilted. They create an atmosphere of urgency and fear that deflects concern away from rapidly constituted minorities 'caught under the wheels' of collective-benefitting measures.[112] This undermines dispassionate analysis of whether alternative, less restrictive measures could achieve the same ends. As I argued earlier in Part II(B), whether a restriction is necessary to resolve a protracted problem cannot be separated from the question of governmental choices over time. Alternative means become available through governmental choices to expand capacity. As the crisis crystallises into a new status quo, the proportionality of a restriction depends on whether the state is deploying the resources at its disposal

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109 Ibid.

110 Ibid.

111 For a critique of the Court's approach to the principle of legality in this case see Bruce Chen, 'No Way Out? Australia's Overseas Travel Ban and "Rights-Based" Interpretation' (2022) 10(1) *Griffith Journal of Law & Human Dignity* 53.

112 See, eg, Julie Anne Lee, Anat Bardi, Ella Daniel, Maya Benish-Weisman and Ronald Fischer, 'Our Research Shows COVID Has Made Australians More Conservative and Care Less about Others', *The Conversation* (online, 21 June 2021) <https://theconversation.com/our-research-shows-covid-has-made-australians-more-conservative-and-care-less-about-others-161500>.

to expand state capacity. Competitive electoral politics, especially as practised in those 'protracted crisis' settings, may fail to generate the conditions necessary for public deliberation of such nuanced, complex questions about state capacity and investment.

The failure of both Australian federal and state governments to expand quarantine capacity during the first 20 months of the pandemic reveals this effect. Restrictive border and repatriation policies were among the most popular restrictions during the first 20 months of the pandemic. In December 2020 market research company Ipsos reported that 83% of Australians supported sealing the international border completely, with no exceptions for entry or departure.[113] In May 2021 the Lowy Institute reported that 59% of Australians polled believed the federal government was sufficiently supporting the tens of thousands of Australian citizens stranded abroad.[114] This meant that there was limited pressure upon governments to expand quarantine capacity despite the passage of time. Absent this pressure, Australian governments routinely responded to 'leaks' from hotel quarantine programs — onward community transmission stemming from infection protocol failures in those programs — by reducing the places available in those programs as a measure of first resort. Victoria suspended its hotel quarantine program for the duration of its second wave.[115] It suspended it again for two months following a 'leak' from hotel quarantine in February 2021. Western Australia, Queensland and New South Wales also halved their intake of international arrivals at various points in 2021 in response to 'leaks' from hotel quarantine programs.[116] All hotel quarantine programs halved available places following an outbreak of the Delta variant in Sydney in July 2021.[117] Variability in arrival numbers therefore meant a booking system — as used in New Zealand's managed isolation and quarantine system — was not possible, further frustrating the ability of stranded citizens to plan their affairs. In August 2021 the federal government removed the automatic

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113 Ipsos, 'Majority (83%) of Australians Support Closing of Their International Borders as Few (21%) Believe COVID-19 Is Contained — Ipsos Poll' (Press Release, 4 December 2020) <https://www.ipsos.com/sites/default/files/ct/news/documents/2020-12/halifax_press_release.pdf>.

114 Daniel Hurst, 'One-Third of Australians Believe Coalition Must Do More to Help 36,000 Citizens Stranded Overseas: Poll', *The Guardian Australia* (online, 3 May 2021) <https://www.theguardian.com/world/2021/may/03/one-third-of-australians-believe-coalition-must-do-more-to-help-36000-citizens-stranded-overseas-poll>.

115 'Victoria Records No New Coronavirus Cases, Will Resume Hotel Quarantine Program in December', *ABC News* (online, 20 November 2020) <https://www.abc.net.au/news/2020-11-20/victoria-0-coronavirus-cases-international-flights-to-resume-dec/12903074>.

116 Bridget Judd, 'Cap on International Arrivals to Australia Has Been Slashed. So What Does It Mean for Those Still Overseas?', *ABC News* (online, 11 January 2021) <https://www.abc.net.au/news/2021-01-11/australia-international-arrival-caps-covid-19-flight-booked/13046728>.

117 Nick Evershed, 'Data Reveals Australia's New International Arrivals Cap Is Harshest Yet', *The Guardian Australia* (online, 7 July 2021) <https://www.theguardian.com/news/datablog/2021/jul/07/australias-travel-restrictions-how-the-cap-on-international-arrivals-has-changed>; Jane McAdam and Regina Jefferies, 'Why the Latest Travel Caps Look like an Arbitrary Restriction on Australians' Right to Come Home', *The Conversation* (online, 5 July 2021) <https://theconversation.com/why-the-latest-travel-caps-look-like-an-arbitrary-restriction-on-australians-right-to-come-home-161882>.

exemption of citizens ordinarily resident abroad from the Outward Travel Ban to further limit demand for quarantine places.[118]

On the one hand, the explanation for cap reductions was logistical. Some of these leaks resulted from failures in the design of hotel quarantine programs, while others flowed from failures in infection control protocols by personnel and during the transportation of international arrivals. Emerging science regarding the aerosol mechanism for disease transmission did not crystallise until after hotel quarantine programs had been established. This meant those programs were not optimised to control transmission in confined quarters. Reducing places in hotel quarantine programs provided less opportunity for failures in the design and administration of hotel quarantine programs to be realised. This response, however, was also informed by its convenience, simplicity and popularity — the risks that I identified earlier in Part III(A)(1) when the proportionality of a restriction on a discrete group is determined through purely electoral mechanisms. That restrictive approaches to quarantine capacity were so popular meant there was little pressure on governments or opposition parties to introduce complexity to debate about repatriation programs even when circumstances changed. The clearest example of this was the failure to increase arrival caps or pilot home quarantine programs after community transmission of the Delta variant became established in Sydney and Melbourne. Despite both jurisdictions accepting by the beginning of September 2021 that a return to zero transmission would not be possible,[119] arrival caps were maintained at the lowest level yet reached in the pandemic. Separate caps were not extended to vaccinated arrivals, despite statistical indications that positive cases among that cohort would be extremely low.[120] During the same period, thousands of Australian residents — vaccinated and unvaccinated — were permitted to self-isolate in homes as close contacts.[121] Citizens exposed to COVID-19 locally as 'close contacts' therefore received different treatment to those potentially exposed outside Australia's borders.

2 *Partisan Framing*

Public debate about the arrival caps' proportionality was similarly refracted through electoral politics and competition between political parties. In many respects this conformed to the premises of the Australian constitutional system explored in

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[118] Liz Hicks, Jane McAdam and Regina Jefferies, 'The Federal Government Just Made It Even Harder for Australians Overseas to Come Home. Is This Legal? Or Reasonable?', *The Conversation* (online, 9 August 2021) <https://theconversation.com/the-federal-government-just-made-it-even-harder-for-australians-overseas-to-come-home-is-this-legal-or-reasonable-165744>.

[119] Patrick Durkin and Tom Burton, 'Victoria Abandons COVID Zero but National Plan in Doubt', *Financial Review* (online, 31 August 2021) <https://www.afr.com/policy/health-and-education/victoria-abandons-covid-zero-but-national-plan-in-doubt-20210831-p58ngs>; Jennifer Hewett, 'NSW Charts a Radically Different COVID-19 Course', *Financial Review* (online, 11 August 2021) <https://www.afr.com/policy/health-and-education/nsw-charts-a-radically-different-covid-course-20210811-p58hwh>.

[120] Gregory Dore, 'Home Quarantine for Vaccinated Returned Travellers Is Extremely Low Risk, and Won't Damage Their Mental Health', *The Conversation* (online, 16 June 2021) <https://theconversation.com/home-quarantine-for-vaccinated-returned-travellers-is-extremely-low-risk-and-wont-damage-their-mental-health-162436>.

[121] Ibid.

Part III(A)(1) above. In trusting the voting public to hold the legislature and executive to account for restricting the rights of the few at the ballot, Australia's system presupposes that the government of the day and the opposition will present alternative policies and compete for support from the voting public. This meant, however, that complex, bipartisan strategies that could have repatriated more citizens featured in a limited way in public debate. The crisis settings that I explored earlier in Part II(B)(1) created political conditions where parties competed in terms of public safety rhetoric. A 2020 parliamentary inquiry into the Victorian hotel quarantine program and a 2020 national audit of Australia's hotel quarantine programs both noted the need to move away from a 'one size fits all' approach to quarantine[122] and consider alternatives such as monitored home-based quarantine for low-risk arrivals as used in Taiwan and Singapore[123] combined with dedicated quarantine facilities.[124] However, public safety framing and competitive political conditions invested a move away from 'a one size fits all' approach to quarantine with political risk.[125] Public discussion of alternatives also lacked nuance. Limited, if any, media and political attention addressed the capacity and outlay of infrastructure that would have been required to quarantine all international arrivals in dedicated facilities without the continued use of arrivals caps or an outward travel ban to limit demand.[126] Leakages also resulted that were not connected to the use of hotels as such or the return of Australian citizens, leaving an open question as to whether dedicated quarantine facilities would have reduced the rate of outbreaks without further improvement to infection control procedures.[127] The June 2021 Sydney outbreak that led to community transmission establishing itself on the eastern seaboard notably stemmed from the private transportation of freight crew.[128]

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122 Jennifer Coate AO, *COVID-19 Hotel Quarantine Inquiry Final Report and Recommendations. Volume I* (Parliamentary Paper No 191, Victorian Parliament, 21 December 2020) 102; Jane Halton AO, *National Review of Hotel Quarantine* (Report, Department of Health and Aged Care, 23 October 2020) 30–1.

123 Halton (n 122) 36–7. See also Coate (n 122) 111. Coate concluded that '[g]iven the physical limitations of hotels as quarantine facilities … a major risk of the hotel model is the daily movement of personnel in and out of the facility and then into the communities in which they live … Minimising the number of people working in such environments, by only having those unable to quarantine safely at home, in the facility, reduces this risk of transmission to the broader community': at 111 [67]–[68].

124 Halton (n 122) 31.

125 See, eg, David Crowe, 'One-Third of Voters Back Cuts in Overseas Arrivals to Ease Quarantine Pressure', *The Sydney Morning Herald* (online, 19 June 2021) <https://www.smh.com.au/politics/federal/one-third-of-voters-back-cuts-in-overseas-arrivals-to-ease-quarantine-pressure-20210618-p5826w.html>.

126 See, eg, Australian Bureau of Statistics, 'Overseas Travel Statistics, June 2021', *Australian Bureau of Statistics* (14 July 2021) <https://www.abs.gov.au/statistics/industry/tourism-and-transport/overseas-travel-statistics-provisional/latest-release>. Dedicated facilities that were proposed notably provided for less capacity than hotel quarantine programs then operating. See, eg, 'Melbourne COVID-19 Quarantine Facility Approved as Commonwealth, Victoria Agree on Site', *ABC News* (online, 25 June 2021) <https://www.abc.net.au/news/2021-06-25/melbourne-mickleham-covid-quarantine-facility-to-be-built/100243456>.

127 Anthony Macali, 'COVID Live Quarantine Breaches', *COVID Live* (Web Page, 29 June 2022) <https://docs.google.com/spreadsheets/d/15kdyqFGfJdFi0KaTbZp-UDw8WwoKu6OPRs5V5ZzO1c0>.

128 Michael McGowan, 'Police Probe into Sydney Limousine Driver Expanded as Health Minister Seeks Tougher Mask Rules', *The Guardian Australia* (online, 24 June 2021) <https://www.theguardian.com/australia-news/2021/jun/24/police-probe-into-sydney-limousine-driver-expanded-as-health-minister-seeks-tougher-mask-rules>.

3 *Quarantine Federalism*

'Quarantine federalism' — the constitutional organisation of legislative power over quarantine — complicated rather than assisted public deliberation about the proportionality of repatriation restrictions. Quarantine is a concurrent legislative power, like other powers within s 51 of the Australian Constitution. The convention debates indicate that the drafters framed quarantine as a concurrent power so as not to interfere with the states' power over public health. It was perceived as desirable that the Commonwealth have the ability to legislate to prevent the spread of both animal and human disease from outside the Commonwealth's borders; an exclusive power over quarantine was nonetheless deliberately rejected. While the Commonwealth gradually took over most state quarantine stations during the first decades of the 20th century, this tendency reversed as immunisation became widespread, particularly after smallpox was eradicated. Commonwealth quarantine infrastructure was therefore progressively dismantled[129] and not operational at the time the COVID-19 pandemic began. National Cabinet — a forum of state and federal heads of government — agreed that hotels would be used to quarantine international arrivals. The 2020 Victorian parliamentary inquiry noted that '[h]otels were chosen because they were available, could be stood up quickly, would accommodate large numbers of returned travellers and would provide economic benefits.'[130] Further decisions reached in National Cabinet about the reduction of arrival caps remained confidential.[131] It was therefore difficult for voters to determine which level of government — and which government — proposed, or was responsible for, decisions about the use of hotels to quarantine international arrivals, decisions to reduce arrival 'caps', or failures to expand quarantine capacity or innovate alternative quarantine programs.

The opacity surrounding National Cabinet decisions was further aggravated by electoral competition between political parties in power at different levels of government. Tension between the states and the Commonwealth over responsibility for quarantine became a politically partisan issue. The federal Liberal–National Coalition government insisted that the primary responsibility for repatriating citizens and residents rested with the states, as they had assumed responsibility for hotel quarantine programs when supervised quarantine facilities were initially proposed at National Cabinet.[132] The states' reasoning for that decision, or accession to it, was not transparent because it was a decision of National Cabinet. The federal Labor opposition and some Labor state governments in turn argued that the Commonwealth was 'constitutionally responsible' for quarantine and had a

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[129] Australian Bureau of Statistics, 'Human Quarantine: The Australian Approach to a World Problem', *Year Book Australia, 1988* (Catalogue No 1301.0, 1 January 1988).

[130] Coate (n 122) 25.

[131] See, eg, Paul Karp, 'Human Rights Commission Says National Cabinet Should Not Be Covered by Secrecy Laws', *The Guardian Australia* (online, 17 September 2021) <https://www.theguardian.com/australia-news/2021/sep/17/human-rights-commission-says-national-cabinet-should-not-be-covered-by-secrecy-laws>.

[132] David Crowe and Anthony Galloway, '"We're Not Running It": PM Says He Won't Take over Hotel Quarantine', *The Sydney Morning Herald* (online, 12 February 2021) <https://www.smh.com.au/politics/federal/we-re-not-running-it-pm-says-he-won-t-take-over-hotel-quarantine-20210212-p5721w.html>.

'constitutional duty' to establish dedicated, national facilities.[133] In this way different levels of government were able to benefit from the 'cover' that opaque National Cabinet proceedings provided for decisions about restrictions on repatriation rights and a failure to expand and apply state capacity. They also benefited from gaps in voter literacy regarding the nature of concurrent legislative powers. For instance, when the Mercure Hotel in Perth 'leaked' and caused onward community transmission in April 2021, WA Premier Mark McGowan insisted that the responsibility for failings within that program lay with the Commonwealth, as it had declined to use and develop dedicated facilities. The WA government relied on this as a justification to lower Western Australia's 'cap' for international arrivals.[134]

Federalism provided a structure through which states could 'compete' in their pandemic response and realise principles of 'competitive federalism'. To a certain extent this benefit was felt in quarantine programs. The Victorian hotel quarantine program, for instance, experimented and pioneered the use of negatively pressured hotel rooms to reduce the risk of outbreaks,[135] providing a prototype that other state programs could have adopted. In this way the federal structure of power over quarantine created avenues for dialogue concerning how best to protect the rights of discrete groups.[136] In the particular context of repatriating 'stranded Aussies', a lack of bipartisanship and electoral competition nonetheless compromised lines of accountability. It was not clear to voters which level of government was responsible for expanding quarantine capacity. Electorates at the state and federal levels also remained defined by the 'majority' of those Australians who were not physically outside Australia. Governments at both state and federal levels were accordingly incentivised to 'compete' for support from that majority rather than the minority of those stranded abroad. This in turn attracted the problems of 'electoral proportionality reasoning', underwritten by majoritarianism, that I explored in Part III(A)(1) above.

IV Conclusion

Proportionality reasoning confronts certain challenges in emergency settings. The COVID-19 pandemic exposed those challenges. Facts were often uncertain and executives were required to make decisions quickly, with limited infrastructure and resources available to facilitate alternatives. For this reason, some courts were reluctant to intervene in executive decision-making in the way they may have in non-emergency settings. Proportionality — particularly the assessment of whether alternative, less burdensome means are available — involves assumptions about

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133 Rachel Withers, 'It's the Constitution: Labor Pushes Federal Responsibility', *The Monthly* (online, 5 February 2021) <https://www.themonthly.com.au/today/rachel-withers/2021/05/2021/1612496805/it-s-constitution>.

134 'Western Australia Reduces Its Hotel Quarantine Intake', *9 News* (online, 7 May 2021) <https://www.9news.com.au/national/western-australia-reduce-its-hotel-quarantine-intake/8ad62748-ecea-40d1-ae81-b0259c32f9d9>.

135 'VIDEO: How Negative Pressure Rooms Will Solve Victoria's Quarantine Woes', *ABC News* (online, 7 April 2021) <https://www.abc.net.au/news/2021-04-07/negative-pressure-rooms-victorias-covid-hotel-quarantine/13292290>.

136 See, eg, Scott Stephenson, 'The Relationship between Federalism and Rights during COVID-19' (2021) 32(3) *Public Law Review* 222.

state capacity that do not hold in acute emergency settings, where executive decision-making is analysed over discrete periods of time. Over time, however, the protracted nature of the COVID-19 pandemic introduced complexity to how some courts were prepared to approach proportionality reasoning when adjudicating rights complaints. This was evident in *Shemesh*, a successful Israeli High Court challenge to flight caps decided in March 2021. Commentary suggests a similar approach was adopted in German administrative courts. Similar to 'non-emergency times', applications of proportionality varied across constitutional systems and legal cultures during the pandemic. The Court in *Grounded Kiwis*, an NZ decision, applied a greater degree of deference to the executive than that shown by the Court in *Shemesh* notwithstanding that the challenge concerned a period later in the pandemic. Nonetheless, the NZ High Court was willing to criticise executive decisions about the allocation of scarce resources. This demonstrates a second advantage of rights-based proportionality reasoning in protracted emergencies that also holds in legal cultures with traditions of legislative supremacy.

Lacking either a constitutional or federal statutory bill of rights, the protection that Australia's proportionality frameworks provided during the pandemic produces more generalisable insights as to how such frameworks perform in emergency settings. The Australian experience suggests that constitutional, administrative and political mechanisms designed to guide proportionality reasoning did not encourage the same treatment of the emergency in its protracted stage as some proportionality mechanisms elsewhere that were underwritten by rights frameworks. Australian safeguards tend to place greater faith in electoral mechanisms to hold the executive to account, including in emergency settings. In emergency settings, however, the ordinary operation of politics is unsettled. Even as time passes, public anxiety and hostility toward discrete groups constituted by circumstances — such as those perceived to be introducing risks to the collective from outside it — may complicate public debate and deliberation about the need for certain restrictions and investment in infrastructure that benefits only a smaller group.