THE UNDER-DEVELOPMENT IN AUSTRALIA OF THE DOCTRINE IN *KRUSE V JOHNSON*

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ABSTRACT

THIS PAPER EXAMINES THE STATUS IN AUSTRALIAN ADMINISTRATIVE LAW OF THE RULE IN *Kruse v Johnson*, which has long been used in England to determine whether delegated legislation is invalid on grounds of unreasonableness. The paper discusses the narrow approach adopted by Australian courts to challenges based on unreasonableness, most recently in the case of *Attorney-General (SA) v Corporation of the City of Adelaide*, and contrasts how the doctrine in *Kruse v Johnson* was used by courts in South Africa to overturn delegated legislation which unreasonably interfered with fundamental rights. The paper ends with a proposal that Australian courts adopt a broader approach to unreasonableness than they do at present.

I. INTRODUCTION

This paper examines the status in Australian administrative law of the rule in *Kruse v Johnson*.[1] Part II explains how the case is used in England to review delegated legislation on grounds of unreasonableness. Part III discusses the narrow approach adopted by Australian courts to *Kruse v Johnson*, focusing on the recent decision of the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide*.[2] This part also questions the validity of the distinction between 'unreasonableness' and 'lack of proportionality' as grounds for review in Australian law. Part IV examines the application of *Kruse v Johnson* in South Africa during the apartheid era, where it provided litigants with some success in challenging racially discriminatory subordinate legislation. Part V argues that courts in Australia ought to adopt the approach taken in England and South Africa to the review of delegated legislation, argues that proportionality should be seen as a criterion for testing unreasonableness rather than as a separate ground for review, and also argues for the adoption of a new uniform test for proportionality which would offer greater protection for individual rights.

II. THE RULE IN *KRUSE V JOHNSON* IN ENGLAND

The case of *Kruse v Johnson*[3] contains a key doctrine of English administrative law. The facts of the case are easy to relate: a by-law prohibited singing or the playing of musical instruments within 50 feet of any dwelling house after a request by a constable or a resident of the dwelling house to desist. The appellant challenged the validity of the by-law on the ground that it was unreasonable. Although the challenge failed, Lord Russel CJ established a rule that has governed challenges to delegated legislation on grounds of unreasonableness ever since:[4]

> I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn bye-laws, made under such authority as these were made, as invalid because

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1 [1898] 2 QB 91.

2 (2013) 295 ALR 197.

3 [1898] 2 QB 91.

4 Ibid 99–100.

> unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.

Examples of the application of the rule include *Repton School Governors v Repton Rural District Council*,[5] in which a by-law was held invalid on grounds of unreasonableness where it imposed a building construction rule that was impossible to comply with, as well as a series of other cases related to local planning laws[6] which, as de Smith notes, were held invalid under the *Kruse v Johnson* rule on grounds of unreasonableness even though they fell short of being absurd.[7] Similarly, regulations were declared invalid in *R v Immigration Appeal Tribunal, Ex p. Manshoora Begum*,[8] where delegated legislation imposing income tests on migration applicants was held to be 'partial and unequal' and 'manifestly unjust' because it discriminated against residents of poor countries; *R v Secretary of State for the Home Department, ex parte Leech*,[9] where prison rules that permitted prison governors to read every letter to and from prisoners and to stop letters that were 'objectionable' or of 'inordinate length' (sic) were invalidated; and *Saleem v Home Secretary*,[10] concerning a migration tribunal rule which denied an appellant a hearing if they failed to meet a 5-day deadline for the lodgment of an appeal, even if that was through no fault of their own. In this decision, Roch LJ said[11] of the Rule in *Kruse v Johnson*:

> Even where it can be said that the making of a rule under powers to make rules by subordinate legislation arise by necessary implication, it will still be in question whether the rule formulated is reasonable. Even where the need for such a rule does not arise by necessary implication either because the purpose of Parliament cannot be achieved without it or the function Parliament has laid in a person or body cannot be discharged without it, the rule will be *ultra vires* the rule-making power if the rule as framed is unreasonable: if it is wider than necessary; if it infringes the fundamental right to a greater extent than is required.

Similar to *Saleem* was *FP (Iran) & MB (Libya) v Secretary of State for the Home Department*,[12] where rules governing the operation of an asylum and migration tribunal were held invalid on grounds of unreasonableness because they denied a hearing to applicants who had failed to attend a hearing through no fault of their own.

The doctrine in *Kruse v Johnson* relating to invalidation of delegated legislation on grounds of unreasonableness is related to, but different from, judicial review of administrative action on grounds of unreasonableness. In the latter class of case, the test applied is that which originated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[13] In that case, Lord Greene MR held[14] that administrative action would be set aside on grounds of unreasonableness only if it was 'so absurd that no sensible person could ever dream that it lay within the powers of the authority.' Subsequently, in *Council of Civil Serviced Unions v Minister for the Civil Service*,[15] it was held[16] that unreasonableness meant that the decision was 'So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'. This test, with its reference to absurdity (in *Wednesbury*) and to outrageousness (in the *Council for Civil Service Unions* case)

5 [1918] 2 KB 133.
6 *Hall & Co v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240; *Mixnam's Properties Ltd v Chertsey Urban District Council* [1964] 1 QB 214; and *Alnatt London Properties Ltd v Middlesex County Council* (1964) 62 LGR 304.
7 S A de Smith, *Judicial Review of Administrative Action* (Stevens & Sons, 4th ed, 1980) 353–4.
8 [1986] Imm.A.R. 385.
9 [1993] 4 All ER 539.
10 [2004] 4 All ER 814.
11 Ibid 821.
12 [2007] EWCA Civ 13.
13 [1948] 1 KB 223.
14 Ibid at 229.
15 [1985] AC 374.
16 Ibid 410 (Diplock LJ).

is obviously narrower than that enunciated by Lord Russel CJ in *Kruse v Johnson*. It is therefore something of a paradox that whereas *Wednesbury* unreasonableness was not only adopted into Australian administrative law but also appears to have been expanded,[17] reception of *Kruse v Johnson* has been far less enthusiastic.

III. *Kruse v Johnson* in Australia

The status of the rule in *Kruse v Johnson* in Australian law was most recently addressed by the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide*.[18] This case involved a challenge to By-law No 4, enacted by the Adelaide city council under powers conferred by s 667(1)(9)(XVI) of the *Local Government Act 1934* (SA). Paragraph 2 of the by-law stated that a person could not 'preach, canvass, harangue, tout for business or conduct any survey or opinion poll' on any road without a permit. The by-law had been challenged by the second and third respondents, who had preached on Rundle Mall in the Adelaide city centre. One of those grounds was that the by-law was unreasonable under administrative law, the other was that the by-law failed the test of reasonable proportionality.

A. *Challenges Based on Unreasonableness*

In discussing the issue of unreasonableness, French CJ surveyed the history of the High Court's approach to review of delegated legislation and the rule in *Kruse v Johnson*. From the earliest cases it was apparent that the High Court viewed unreasonableness as relating to whether the legislation was within the power conferred on the enacting authority, not to whether the legislation was unreasonable on its merits. Thus in *Widgee Shire Council v Bonney*,[19] Higgins J stated that

> Questions as to the validity of by-laws really come under the ordinary principles applicable to powers; and when it is said that a by-law is unreasonable, and therefore invalid, what is really meant is that the provisions in the by-law cannot reasonably be regarded as being within the scope or ambit or purpose of the power.

This marked a fundamental and early divergence in Australia from the position in England where, as has been shown above, the various limbs of the rule in *Kruse v Johnson* established unreasonableness on the merits as a ground of review of delegated legislation. *Widgee Shire Council* was followed in *Williams v Melbourne Corporation*,[20] where Dixon J held that

> Although in some jurisdictions the unreasonableness of a by-law made under statutory powers by a local governing body is still considered a separate ground of invalidity in this Court it is not so treated …

Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power.

The only exception to this approach evident in a High Court decision was *Brunswick Corporation v Stewart*,[21] where Starke J[22] and Williams J[23] equated unreasonableness with the 'oppressive and gratuitous interference with rights' limb of *Kruse v Johnson*.

17 In *Minister for Immigration and Citizenship v Li* [2013] HCA 18, Hayne, Kiefel and Bell JJ held (at [68]) that *Wednesbury* unreasonableness was neither the starting nor the end point of unreasonableness in Australian law, and that a decision did not need to be irrational or bizarre to be unreasonable.

18 (2013) 295 ALR 197.

19 (1907) 4 CLR 977, 989.

20 (1933) 49 CLR 142, 154–5 (citations in excerpt omitted).

21 (1941) 65 CLR 88.

22 Ibid 97.

23 Ibid 99.

There have however, been a number of Federal Court cases in which delegated legislation has been invalidated on grounds of substantive unreasonableness: In *Re Minister of Primary Industries and Energy v Austral Fisheries Pty Ltd,*[24] a management plan made under the *Fisheries Act 1952* (Cth) which contained a formula which produced an irrational result was held to be invalid on grounds of unreasonableness because it was found to be one which no reasonable person could have devised. In *Minister for Immigration and Multicultural Affairs v Singh,*[25] the Federal Court of Appeal held invalid a regulation which was manifestly absurd in its application, in so far as the time limits it set could lead applications for review of decisions of the Refugee Review Tribunal being held to be out of time in circumstances where it was impossible for applicants to have complied with the regulations.

These Federal Court decisions are puzzling in that by appearing to adopt an approach to invalidity of delegated legislation similar to that adopted in England, they seem to be at odds with decisions of the High Court which (with the exception of *Brunswick Corporation v Stewart*)[26] have consistently interpreted reasonableness of delegated legislation as relating only to strict *ultra vires* − that is, whether a reasonable person could find a connection with the enabling power.[27] However, it could perhaps be argued that the delegated legislation challenged in these cases would also have fallen foul of the narrower approach adopted by the High Court in that an irrational formula (in *Austral Fisheries*) or a time limit that was impossible to comply with (*Singh*) could possibly not fall within the power to make delegated legislation.

The approach adopted by the High Court has led to a prevailing view that unreasonableness other than in the sense of strict *ultra vires* is not a ground of review in Australia. As stated by Pearce and Argument:[28] 'On the decided cases, it is fair to say that unreasonableness as a ground for review is more theoretical than practical'.

Thus it comes as no surprise that after analysing the history of the doctrine in-*General (SA) v Corporation of the City of Adelaide*[29] French CJ affirmed the approach in *Widgee Shire Council v Bonney* and *Williams v Melbourne,* and found the by-law requiring permission for those wishing to engage in preaching on public roads not to be invalid on grounds of reasonableness, as it was rationally connected with the matters contained in the enabling Act.[30] Hayne J[31] expressly adopted a dictum by Fullagar J in *Clements v Bull*[32] to the effect that 'the idea that a by-law could be held invalid because it appeared to a court to be an "unreasonable" provision' was discredited. The contrast between this approach and that adopted by Lord Russel CJ could not be more clearly demonstrated.

B. *Challenges Based on Lack of Reasonable Proportionality*

Although not part of the rule in *Kruse v Johnson,* lack of reasonable proportionality has emerged as a separate ground of challenge to delegated legislation in Australia. This issue requires discussion because, as is argued below, proportionality should more correctly be seen as a tool to be used to determine whether delegated legislation is unreasonable, rather than as a separate ground of review.

Proportionality is used in three contexts in Australian public law. As explained in the next paragraph, the concept first originated in a series of constitutional cases in which the sufficiency of the connection between a law and an enumerated power needed to be determined. The second

24 (1992) 112 ALR 211. *Austral Fisheries* was followed in *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201.

25 (2001) 171 ALR 53.

26 (1941) 65 CLR 88.

27 See *Clements v Bull* (1953) 88 CLR 572, 581–2 (Fullagar J), 577 (Williams ACJ and Kitto J); *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 578 (Gummow J) and *Coulter v R* (1988) 164 CLR 350, 357 (Mason CJ, Wilson and Brennan JJ).

28 D Pearce and S Argument, *Delegated Legislation* (Lexis Nexis, 4th ed, 2012) 331–2.

29 (2013) 295 ALR 197.

30 Ibid 216–17. The same reasoning and conclusion were adopted at 232–4 (Hayne J) and at 252–3 (Crennan and Kiefel JJ).

31 Ibid 232.

32 (1953) 88 CLR 572, 581.

context in which proportionality is used is in statutory interpretation cases where the courts need to determine whether regulations are *intra vires* an enabling power. The third context is where proportionality is used for the purpose of determining whether limitations of express and implied constitutional rights were constitutional. Despite these different contexts, the courts have used the concept in a similar way in each.

The first cases in which proportionality was used were *Commonwealth v Tasmania (Tasmanian Dams Case)*,[33] in which the High Court held that regulations enacted in pursuance of an international Convention must display 'reasonable proportionality' to the obligations imposed by the Convention,[34] and *South Australia v Tanner*,[35] in which the Court held that a regulation had to be 'reasonably proportionate to' the purposes for which the power to enact it was established.[36]

The leading case in which proportionality is used in the context of statutory interpretation is *Minister for Resources v Dover Fisheries*,[37] in which Gummow J held that where proportionality was used as a ground to challenge the validity of delegated legislation, the issue to be determined by the court was whether the delegated legislation was within the scope of the authorising Act. In the same case, Cooper J[38] analysed the difference between challenges based on unreasonableness and those based on lack of proportionality, and held as follows:

> Where the likely substantive operation of the delegated legislation in its impact upon matters beyond the subject matter of the power or matters incidental thereto is grossly disproportionate to its operation on matters properly the subject matter of the power, there will be no real or sufficient connection to sustain the validity of the delegated legislation. That is, no reasonable mind could justify the delegated legislation by reference to the object of the power. It is the disproportionate operation of the delegation which denies to it a place in the range of alternative modes of implementation available to an objective reasonable mind.

The proportionality test reflects an underlying assumption that the legislature did not intend that the power to enact delegated legislation would be exercised beyond what was reasonably proportionate to achieve the relevant statutory object or purpose; the test of reasonableness assumes that the legislature did not intend to confer a power to enact delegated legislation which enactment no reasonable mind could justify as appropriate and adapted to the purpose in issue and the subject matter of the grant. Whether one describes the test as one of 'reasonable proportionality' or 'unreasonableness', the object is to find the limit set by the legislature for the proper exercise of the regulation or rule making power and then to measure the substantive operation of the delegated legislation by reference to that limit. In my view there is no substantive difference between the tests as stated.

Two important features emerge from *Dover Fisheries*. First, Gummow J set limits to challenges based on proportionality in similar terms as those which the High Court set in relation to challenges based on reasonableness – namely that they relate to whether there is a connection to the enabling Act, rather than whether there is substantive unreasonableness. The second feature, which appears from dicta by Cooper J, is that one needs to address the question as to what, if anything, is the distinction between reasonableness and proportionality.[39] This issue is discussed below.

In *Vanstone v Clark*[40] Weinberg J applied the proportionality doctrine to find invalid a provision of a determination[41] which took the form of delegated legislation made under s 40 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). Weinberg J discussed the law relating to challenges to delegated legislation on grounds of lack of reasonable proportionality, and followed the approach that had been adopted in *Dover Fisheries*.

33 (1983) 158 CLR 1.
34 Ibid 266 (Deane J).
35 (1989) 166 CLR 161.
36 Ibid 167–8 (Wilson, Dawson, Toohey and Gaudron JJ).
37 (1993) 116 ALR 54.
38 Ibid 74.
39 The same conclusion is reached by Pearce and Argument above n 28, 340–1.
40 (205) 224 ALR 666.
41 Clause 5(1)(k) of the *Torres Strait Islander Commission (Misbehaviour Determination) 2002*.

Proportionality was a ground upon which the Adelaide by-law was challenged in *Attorney-General (SA) v Corporation of the City of Adelaide*.[42] French CJ held that in relation to 'purposive' law-making powers – that is, where the provision authorising the enactment delegated legislation evinces a purpose – the delegated legislation will be invalid where there is no reasonable proportionality between the delegated legislation and the purpose of the authorising statute.[43] In so doing, French CJ followed earlier High Court decisions[44] to the effect that reasonable proportionality required only than that delegated legislation must be appropriate and adapted to the achievement of the objects of the enabling legislation, and on this basis held that because the by-law did seek to achieve the objectives of the enabling power it could not be invalidated.[45] Here again, as with French CJ's treatment of challenges based on unreasonableness, the test that was framed involved a determination of whether the delegated legislation could be seen as being related to the purpose of the enabling statute – it did not require that the delegated legislation be otherwise reasonable. In similar vein, Hayne J stated[46]

> … the question to be asked and answered is not whether the by-law is a reasonable or a proportionate response to the mischief to which it is directed but whether, in its legal and practical operation, the by-law is authorised by the relevant by-law making power. The question of validity is to be decided by characterising the impugned provisions and assessing the directness and substantiality of the connection between the likely operation of the by-law and the statutory object to be served. *Could* the by-law, so characterised and assessed, reasonably be adopted as a means of fulfilling that object? No further inquiry into the proportionality of the by-law is permitted or required.

The distinction drawn between 'unreasonableness' and (lack of) 'reasonable proportionality' as grounds for review of delegated legislation is problematic for four reasons:

- First, under current case law, challenges on grounds of lack of reasonable proportionality can be launched only where the enabling legislation is 'purposive' in the sense that the power to make delegated legislation is directed towards the achievement of a particular purpose.[47]
- Second, the doctrine of reasonable proportionality as developed in Australia does not give full effect to the rule in *Kruse v Johnson* because the doctrine is afflicted by the same flaw as affects the law in relation to unreasonableness: challenges will succeed only of it can be shown that the disproportionality gives rise to strict *ultra vires,* rather than that the legislation in question is substantively unjust. It is quite conceivable that delegated legislation could, depending on the terms of the enabling provision, be found not to constitute a disproportionate means of giving effect to the purpose of the enabling provision *and yet* be manifestly unjust, or amount to an oppressive interference with rights in the sense that those words are used in *Kruse v Johnson*.
- Third, it is logically incorrect to view disproportionality as a separate ground of review from unreasonableness, because it is difficult to see what the basis for a rule that laws should not be disproportionate in their operation is other than with reference to a higher concept such as unreasonableness. In short, disproportionality is logically a tool to be used in determining unreasonableness – it should not be seen as a separate ground of review on its own.[48]

42 (2013) 295 ALR 197.

43 Ibid 217–18.

44 *Commonwealth v Tasmania* (1983) 158 CLR 1, 259–60 (Deane J), 232 (Murphy and Brennan JJ); Ri*chardson v Forestry Commission* (1988) 164 CLR 261, 312 (Deane J), 289 (Mason CJ and Brennan J), 303 (Wilson J) and 345 (Gaudron J). See also *South Australia v Tanner* (1989) 166 CLR 161, 165 (Wilson, Dawson, Toohey and Gaudron JJ).

45 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, 218–19 and 221.

46 Ibid 234.

47 *Vanstone v Clarke* (205) 224 ALR 666, 703 and 707 (Weinberg J) and 218 (French J).

48 For a discussion of this issue see Garry Downes 'Reasonableness, Proportionality and Merits Review' (Paper delivered to the New South Wales Young Lawyers Public Law CLE Seminar, The Law Society, Sydney, 28 September 2008 <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/ReasonablenessSeptember2008.htm>

- The fourth and final problem is the confusing approach taken by the courts in relation to whether proportionality requires that a measure limiting individual rights should do so to the least extent possible.[49] This issue has arisen in the specific context of constitutional cases in which the validity of laws restricting express and implied rights have been litigated. However, given that the courts have adopted the same conceptual framework when discussing proportionality in both administrative and constitutional law, it is legitimate to discuss the constitutional cases in this context.

In *Lange v Australian Broadcasting Corporation*[50] the unanimous court said the following in relation to the application of the proportionality test:

> In *ACTV*, for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved.

Did the court in *Lange* thereby impose a requirement that a law which limits freedom of political communication will be valid only if the limitation of the freedom goes no further than necessary to achieve a legitimate objective? Unfortunately, the dictum quoted above was not further elaborated on, although it did echo the approach to rights limitations enunciated by the Canadian Supreme Court in *R v Oakes*,[51] and which was used as the basis for the limitations clause in the South African Bill of Rights.[52] However, in Australia, subsequent High Court cases saw a retreat from this requirement: In *Coleman v Power*,[53] majorities of the Court held that limitations on rights must be proportionate only in the sense that they were reasonably appropriate and adapted to achieving a legitimate object or end in a manner that was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The words 'a manner' are important, because they signalled a move away from a requirement that the method used to limit right be the least invasive available method, and the adoption of the far less onerous requirement that the method be just one of any possible methods that might be consistent with the system of government, even though it might not be the method that was least restrictive of freedom. As Heydon J said[54]

> The inquiry into whether a law is reasonably appropriate and adapted to achieving a legitimate end does not call for a judicial conclusion that the law is the sole or best means of achieving that end. Apart from the fact that that would be an almost impossible task for which the judiciary is not equipped, this Court has not said anything of the kind either in *Lange v Australian Broadcasting Corporation* or in any other case. This Court has only called for an inquiry into whether the law was reasonably appropriate and adapted to serve a legitimate end … The question is not 'Is this provision the best?", but "Is this provision a reasonably adequate attempt at solving the problem?'

Despite this, in *Betfair Pty Ltd v Western Australia*,[55] six members of the Court,[56] applying the proportionality doctrine in the context of s 92 of the Constitution, held that a restriction on inter-state trade would be disproportionate where it failed a test of necessity – that is, where it went further than was necessary to achieve a legitimate object.[57] Similarly, in *Attorney-General (SA) v Corporation of the City of Adelaide*,[58] Crennan and Keiffel JJ stated as follows:

> These reasons should be read in conjunction with the reasons of Crennan, Kiefel and Bell JJ in *Monis v The Queen* so far as they concern the *Lange* test. As is there explained, the

49 For a critique of the High Court's approach to proportionality see Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

50 (1997) 189 CLR 520, 567.

51 [1986] 1 S.C.R. 103, 138–9; (1986) 26 DLR (4th) 200, 227 (Dickson J).

52 Section 36 of the *Republic of South Africa Constitution Act 1996* (South Africa)

53 (2004) 220 CLR 1, 50 (McHugh J), 31–2 (Gleeson J), 77–9 (Gummow and Hayne JJ), 82 (Kirby J).

54 Ibid 123–4.

55 (2008) 234 CLR 418.

56 Ibid 477, 479 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

57 For a discussion of the necessity test in the *Betfair* case see Gonzalo Villalta Puig, 'A European Saving Test for Section 92 of the Australian Constitution' (2008) 13 *Deakin University Law Review* 99.

58 (2013) 295 ALR 197, 253.

> first enquiry of the second limb of the *Lange* test concerns the relationship between a valid legislative object and the means provided for its attainment. The means must be proportionate to that object. If the means employed go further than is reasonably necessary to achieve the legislative object, they will be disproportionate and invalid for that reason. A test of reasonable necessity has been adopted by the Court in relation to the freedoms spoken of in s 92, in *Betfair Pty Ltd v Western Australia.* It may consistently be applied with respect to the implied freedom of political communication.

and later:[59]

> In *Lange v Australian Broadcasting Corporation*, reference was made to *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*"), where a law was held to be invalid because there were other, less drastic, means by which the objectives of the law could be achieved. This accords with the test of reasonable necessity adopted in *Betfair Pty Ltd v Western Australia*, by reference to *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*. A necessary qualification to such a test is that the alternative means are equally practicable.

Yet in the very same case, Hayne J, in addressing the argument that the by-law restricting freedom of political communication would be valid only if it constituted the least restrictive means of achieving the object authorised by the enabling Act, cast doubt on the relevance of necessity saying as follows:[60]

> The correctness of the assertion that less restrictive means of achieving the same object could have been devised depends upon what is meant by "less restrictive means". In particular, the assertion provokes two further questions: "less restrictive of what?" and "less than what?". Assuming both of those further questions could be answered satisfactorily (and no answer was proffered in argument), that less restrictive means could be designed to achieve the same object raises the question why that proposition is relevant to the validity of the by-law. It could be relevant to validity only if at least one of the following assumptions is made good. Either the by-law making power is to be construed as conferring only a power to make by-laws which have the least restrictive effect possible on some specific interest while still achieving the same object, or the possibility of less restrictive means suggests that the by-law has an insufficient connection to the by-law making power.

The former assumption is not lightly to be made and was not shown to apply to the convenience power in this appeal. The assumption seeks, in another guise, to impose a narrow construction upon the convenience power when, as has already been explained, its terms do not warrant such narrowing. And if selection of less restrictive means is not a condition upon the convenience power, the alleged existence of less restrictive means can only be peripheral at best to determining whether a sufficient connection exists between the by-law and the convenience power.

The net effect of these *dicta* is that the state of the law regarding whether the proportionality test includes a requirement that laws limiting rights should do so to the least restrictive extent is at best confused and at worst hostile to that proposition.

Yet where review on grounds of reasonableness is concerned, and in cases involving delegated legislation identified by Lord Russel CJ as being 'manifestly unjust', or which involves 'oppressive or gratuitous interference with the rights of those subject to them', surely the courts ought to adopt the most liberal approach – that is, an approach which provides litigants with the broadest grounds review? I would therefore argue that not only should the Australian courts the follow the broad (English) approach to review of delegated legislation, but that in doing so they should take the opportunity to re-evaluate the doctrine of proportionality in Australian public law in general, and adopt the 'least possible limitation of rights' variant of the concept.

59 Ibid 254.
60 Ibid 233.

IV. *Kruse v Johnson* in South Africa

Kruse v Johnson has been applied in many common law jurisdictions, but it is its application in South Africa – a Roman-Dutch jurisdiction which nevertheless basis its administrative law on English common law – that is of particular interest in demonstrating how powerful a tool the rule can be. The South African example also illustrates a much different approach to review of delegated legislation than the one followed in Australia.[61]

The South African courts have consistently adopted the same approach to review of delegated legislation on grounds of unreasonableness as is followed in England. In *Sinovich v Hercules Municipal Council*,[62] Schreiner JA stated[63] that

> It would I think be more conducive to clearness and more in accordance with the history of the subject if the distinction between excess of power and unreasonableness were maintained. In investigating an issue of unreasonableness one would, on this view, ask ones-self at the outset whether in light of the proved facts the by-law is unreasonable in the sense of being manifestly unjust or highly oppressive and then, if this question were answered in the affirmative, one would consider how far 'unreasonableness' could be said to be authorised by the enabling provision. By following that course one would avoid what seems to me to be the dangerous error of treating the question purely as one of interpretation. One must, I think, bear in mind that in this connection bylaws, presumably because they lay down rules of conduct and so modify the law are not to be treated in the same way as discretionary decisions by public officers. The power of the court is wider than is its power to go behind the exercise of a delegated discretion by an official. In the latter class of case once the court is satisfied that a discretion has been given to an official his exercise of it stands, unless it is shown that he has not applied his mind to the question or has acted from a wrong motive. But that is not the position in regard to bylaws. They are invalid if they are unreasonable, in the specialised sense, and they can only be upheld, despite their unreasonableness, if the enabling provision in effect says that they shall nevertheless be good. The law does not protect the subject against the merely foolish exercise of a discretion by an official, however much the subject suffers thereby. But the law does protect the subject against stupid by-laws, however well intended, if their effect is sufficiently outrageous.

The key feature of this statement is the primacy given by Schreiner JA to the question of substantive unreasonableness: Once a challenge to unreasonableness had been made, the court would then embark on an inquiry as to whether substantive unreasonableness, within the meaning of *Kruse v Johnson*, existed. If unreasonableness was found to exist, then the second stage of the inquiry involved a determination of whether that unreasonableness was specifically authorised by the enabling legislation. This is starkly different from the approach adopted in Australia, where the courts – whether considering a challenge on grounds of unreasonableness or lack of reasonable proportionality – ignore substantive unreasonableness and focus only on the question of whether the challenged law falls within the subject matter over which the enabling Act has given the delegated authority legislative power. In other words, the courts in Australia do precisely what Schreiner JA warned against – they reduce the question purely to one of statutory interpretation. Furthermore, even when considering the second limb of the inquiry (that is, whether the unreasonable delegated legislation was authorised by the enabling Act), the South African courts would find the unreasonable law valid only if the unreasonableness was *specifically* authorised by the enabling Act – in contrast to Australia where, as long as the delegated law falls within the subject matter of the delegated authority, it will be valid.

Kruse v Johnson was successfully used by litigants in the apartheid era to challenge municipal regulations providing for racial segregation of public facilities. Thus in *R v Carelse*[64] a court invalidated a municipal law that segregated beaches and consigned back South Africans to markedly inferior swimming areas. Similarly, in *R v Lusu*[65] the court invalidated regulations

61 For an overview of the application of *Kruse v Johnson* in South Africa see Laurence Baxter, *Administrative Law* (Juta & Co, 1984) 478–80, 492–6 and 523–9.

62 1946 AD 783.

63 Ibid 802–3.

64 1943 CPD 242.

65 1953 (2) SA 484 (A).

that provided for segregated railway waiting-rooms, and in *R v Abdurahman*[66] the courts invalidated regulations providing for segregated railway carriages. In *R v Slabbert*[67] the court struck down a regulation which placed restrictions on the right of blacks to receive legal advice. In each of these cases the courts held that racially discriminatory regulations infringed the 'unequal in their operation as between different classes' limb of the *Kruse v Johnson* rule.

In *Mandela v Minister of Prisons*[68] a challenge was launched against the validity of regulations which permitted authorities to seize documents from prisoners including, in this case, communications between prisoners and their legal representatives. Jansen JA held[69] that the test in *Kruse v Johnson* required a balancing between the fundamental rights of prisoners against countervailing considerations of prison security. Although the challenge ultimately failed, the case is important as an example of the explicit balancing process used by the courts in South Africa when considering issues of unreasonableness under administrative law.

The 1950s saw a cat-and-mouse game develop between the courts and Parliament, with the latter responding to judicial invalidation of subordinate legislation by incorporating the offending provisions into Acts[70] (which were not reviewable under the doctrine of parliamentary supremacy), or by immunising delegated legislation from judicial review by means of ouster clauses.[71] Although the end result was a victory for the forces of oppression, the fact that the courts were able to invalidate subordinate legislation meant that Parliament was forced to put the offending provisions into primary legislation, with attendant negative publicity far greater than that involved in the enactment of delegated legislation.

Although the South African case law is useful in its illustration of how radical a tool *Kruse v Johnson* can be, the cases are in one respect disappointing, because given that the laws challenged in South Africa were discriminatory on the face of them, and thus fell foul of the 'partial and unequal in their operation as between different classes' limb of *Kruse v Johnson*, the courts did not need to develop a test for determining what unreasonableness under the other limbs of *Kruse v Johnson* might mean. This important issue – which would obviously need to be addressed if the courts in Australia were to adopt a more activist approach to the doctrine – is addressed below.

V. A SUGGESTED NEW APPROACH

The difference in approach to review of delegated legislation in the United Kingdom and South Africa on the one hand, and Australia on the other, raises the question as to whether courts in Australia, using their power to develop the common law, ought to adopt a more activist approach, which allows delegated legislation to be declared invalid on grounds of unreasonableness not only where it is not reasonably connected to the provisions of the enabling Act, but also on grounds of substantive unreasonableness. Such an approach would give full effect to the 'manifestly unjust' and 'oppressive or gratuitous interference with the rights of those subject to them' categories of review identified by Lord Russel CJ. Three arguments can be advanced in favour of this:

First, although Commonwealth[72] and equivalent state and territory Acts[73] require that delegated legislation be tabled in Parliament or Legislative Assembly, and provide that such

66 1950 (3) SA 136 (A).

67 1956 (4) SA 18 (T).

68 1983 (1) SA 938 (A).

69 Ibid 960 A-B.

70 In the case of the challenges to discriminatory municipal legislation, provisions specifically authorising discrimination were inserted into the *Reservation of Separate Amenities Act 49 of 1953* (South Africa) and the *Group Areas Act 77 of 1957* (South Africa).

71 As was done by inserting an ouster clause into the *Public Safety Act 3 of 1953*(South Africa).

72 The *Legislative Instruments Act 2003* (Cth) requires that delegated legislation be laid before each House of parliament (s 38(1)) and may be disallowed by a House within 15 days of tabling (s 42).

73 Tabling before the legislature is required by s 64 of the *Legislation Act 2001* (ACT), s 40 of the *Interpretation Act 1987* (NSW), s 63(1)(c) of the *Interpretation Act* (NT), s 49 of the *Statutory Instruments Act 1992* (Qld), s 10(3) of the *Subordinate Legislation Act 1978* (SA), s 47(3) of the *Acts Interpretation Act 1931* (Tas), s 15 of the *Subordinate Legislation Act 1994* (Vic) and s 42(1) of the *Interpretation Act 1984* (WA) . Disallowance is provided for by sections of the relevant Acts as follows: Section 65 (ACT), s 41 (NSW), s 63(9) (NT), s 50(1) (Qld), s 10(5b) (SA), s 47(4) (Tas), s 23 (Vic) and s 42(2) (WA).

legislation is subject to disallowance, the reality is that the volume of delegated legislation is so large as to make parliamentary oversight very difficult. The same applies to the operation of the parliamentary committees that exist in each jurisdiction to review delegated legislation.[74] It is therefore quite conceivable that delegated legislation which unduly interferes with rights may escape scrutiny. As things stand, individuals subject to such laws have no remedy other than the political one of lobbying to have the law repealed by the authority vested with delegated legislative power – which is of no use in providing immediate relief and, realistically speaking, is highly unlikely to be successful even in the long term unless substantial public pressure can be mustered. If the courts were able to provide the remedy of a declaration of invalidity, the rights of people adversely affected by unreasonable delegated legislation could be vindicated.

The second reason favouring a broader interpretation of *Kruse v Johnson* is connected to the first, but relates specifically to anti-terrorist legislation enacted in the wake of the 9/11 and Bali attacks, which vests regulation-making power in the executive which, if used unreasonably, could significantly infringe upon civil liberties. For example, s 5 of the *Criminal Code Act 1995* (Cth), as read with s 102.1 of the *Criminal Code*, confers a power on the Governor-General to make regulations to declare an organisation to be a terrorist organisation, the consequences of which are that a wide range of activities, including providing support to the organisation (s 102.7) or associating with it (s 102.8), become unlawful. Applying substantive review to regulations made under these provisions would provide a safeguard against the application of the regulation-making power to organisations that did not objectively pose a terrorist threat and, more broadly, would establish a precedent that could be used in relation to future regulations which might infringe upon civil liberties.

The third reason justifying a re-interpretation of *Kruse v Johnson* relates specifically to delegated legislation produced by local governments. Although local councils are elected deliberative bodies,[75] their legislative processes qualitatively inferior to those of Parliaments: Their legislation is not subject to disallowance in the same way as are regulations produced by the executive branches of Commonwealth, state and territory governments. This is particularly worrisome given that local authorities sometimes engage in what might charitably be called eccentric law-making.[76] Most importantly, however, in some cases state legislation gives local authorities the power to enact laws administratively – that is *without* legislative deliberation – as for example is the case under s 632 of the *Local Government Act 1993* (NSW), which empowers local authorities to make laws merely by publishing a notice, rather than being enacted by the local council.[77] Although bizarre local laws provide humorous content for media reports, the more serious aspect of this issue is that by its nature, municipal legislation impacts directly on residents' everyday freedom of action, including by regulating the way in which they may use their homes. The fact that local laws affect the private sphere of human activity provides additional justification for their being subject to judicial oversight. Furthermore, while municipal legislatures are usually free of party-political disputes, their small size – and sometimes the personalities of those attracted to local politics – means that they are prone to inter-personal disputes that can render them dysfunctional,[78] which can delay efforts to seek reversal of unreasonable local laws. An application of *Kruse v Johnson* which enabled people

74 For a comprehensive discussion of the operation of legislative controls over regulations see Pearce and Argument above n 28, 59–92.

75 A category of delegated legislation in relation to which Lord Russel CJ himself said the courts should be cautious in exercising review powers – *Kruse v Johnson* [1898] 2 QB 91, 99–100.

76 See, for example, s 21 of the Brimbank City Council *General Local Law* 2008, which prohibits the use of vacuum cleaners after 10 pm.

77 As an example of such law-making, see the report of the notice issued by Willoughby Council prohibiting singing in parks at <http://www.walksydneystreets.net/surprises_signs27.htm>.

78 For examples of this, see the recent controversies that have afflicted Albury in New South Wales (Brad Worral, 'Is Albury Council Running Scared?', *Border Mail* (Albury), 24 August 2011, 5), and Wangaratta in Victoria, where the state government appointed an Inspector of Municipal Administration under s 209 of the *Local Government Act 1999* (Vic) to conduct an inquiry into the functioning of the Rural City Council (David Johnston, 'Over the edge – McInerney pulls the pin', *Border Mail* (Albury), 9 May 2013, 4). Both incidents involved in a breakdown in the functioning of the councils following interpersonal disputes.

affected by unreasonable local laws to challenge their validity in the courts would address these concerns with local government law-making which do not apply to law enacted by primary legislative bodies.

Finally, as indicated above, and assuming that our courts adopted the approach advocated in this paper, along with adopting the broad approach to *Kruse v Johnson*, the High Court should take the opportunity to reform the jurisprudence surrounding the concept of proportionality under Australian law so as to recognise the logic of the position that proportionality is a determinant of reasonableness, rather than being an independent ground of review. Furthermore, I would argue that our courts should depart from the current test for proportionality, which is both parsimonious and timorous, and adopt instead the test used in Canada and South Africa – namely that a law will be disproportionate (and thus unreasonable) where, balancing the interest served by the law and the extent to which it affects individual rights, a less restrictive means of achieving the objective could have been adopted. This would ensure far broader protection for individual rights than the test currently used.