

Proportionality in Administrative Law: *Wunderkind* or Problem Child?



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Over the last decade courts and commentators in Australia have debated whether proportionality is or should be an independent ground of judicial review in administrative law or whether it should continue to be located in the traditional ground of 'unreasonableness'. This article explores the debate in a comparative law context. It concludes that proportionality can function, in different ways, both independently of, but also within, traditional unreasonableness. It also proposes a role for proportionality in merits review.

PROPORTIONALITY has recently become a much discussed topic in both constitutional and administrative law. The courts, however, have only gradually ventured into this largely uncharted territory.¹ A trickle of articles has attempted to explore its profile.² In the process it is now becoming clear that more definite judgments need to be made about

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1. In Australia: see *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital TV v Cth* (No 2) (1992) 177 CLR 106; *SA v Tanner* (1989) 166 CLR 161, 165; *Davis v Cth* (1988) 166 CLR 79, 100; *Cunliffe v Cth* (1994) 182 CLR 272; *NSW v Macquarie Bank* (1992) 30 NSWLR 307; *NSW v Law* (unreported) NSW Ct App 13 Nov 1992; *Minister for Resources v Dover Fisheries* (1993) 116 ALR 54, 74; *Minister for Primary Industry v Austral Fisheries* (1993) 40 FCR 381; *Bienke v AFMA* (1994) 125 ALR 151, 163; *Fares Rural Meat and Livestock Co v Australian Meat and Livestock Corp* (1990) 96 ALR 153, 166-168; *Hill v State Planning Commission* (1994) 10 SR (WA) 354, 365; *Don v Minister for Immigration* (unreported) Fed Ct 10 Mar 1993 no NG582; *Magno Koh v SA* (1989) 151 LSJS 468, 481; *House v Forestry Tasmania* (unreported) Tas Sup Ct 24 Aug 1995 no FCA103; *Abernether v Deitz* (unreported) NSW Ct App 9 May 1996 no BC9602790.
2. Eg PW Young 'Recent Cases: Proportionality' (1993) ALJ 388-389; R Smyth 'The Principle of Proportionality Ten Years After GCHQ' (1995) 2 Aust Journ Admin Law

the place and function of proportionality in the public law system.

Whilst proportionality has attracted particular attention in both constitutional and administrative law, it has also been a feature of other substantive legal topics.³ This article focuses on its application in administrative law and practice. It leaves unresolved the question whether proportionality functions differently in the constitutional law arena.⁴

In discussing the application of proportionality in administrative law it is necessary to distinguish between how this concept functions as a ground of *judicial* review and how it operates as a ground of *administrative* review. In Australian commentary, the focus has been on its role in the former, that is, review by the courts of the validity of administrative action or the legality of subordinate legislation. Arguably it may be that proportionality could have its greatest impact in so-called 'merits review' of administrative decisions.

THE DEVELOPMENT OF PROPORTIONALITY IN ENGLISH ADMINISTRATIVE LAW

The impetus behind contemporary interest in the principle of proportionality can be traced to the now classic statement of Lord Diplock in the *CCSU* case in 1985. Speaking of the three grounds on which English courts may review administrative action, his Lordship said:

The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in the course of time add further grounds. *I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well established heads that I have mentioned will suffice....* By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness'.... It applies to a decision which is so outrageous in its defiance of logic or of accepted morals standards that no sensible person who had applied

189; P Bayne 'Reasonableness, Proportionality and Delegated Legislation' (1993) 67 ALJ 448; B Fitzgerald 'Proportionality and Australian Constitutionalism' (1993) 12 Tas L Rev 263; HP Lee 'Proportionality in Australian Constitutional Adjudication' in G Lindell *Future Directions in Australian Constitutional Law* (Sydney: Federation Press, 1994) 126; H Burmester & M Bezzi 'Proportionality: A Fashionable and Dangerous Doctrine, or an Essential Safeguard Against Abuse of Power?' (Sydney: Aust Inst Admin Law, 12 Apr 1996); T McEvoy 'New Flesh on Old Bones: Recent Developments in Jurisprudence Relating to *Wednesbury* Unreasonableness' (1995) Aust Journ Admin Law 36.

3. For criminal sentencing: see *R v Veen (No 2)* (1988) 164 CLR 465, 472; *R v Chester* (1988) 165 CLR 611.

4. Smyth *supra* n 2, 194 suggests it does not follow that because proportionality has established a foothold in constitutional law it will necessarily be adopted in administrative law.

his mind to the question to be decided could have arrived at it.⁵

Legal scholarship is familiar with the process whereby general legal principles are broken down into a variety of sub-categories: after a period of time the sub-categories often become so complex that new formulations of principle are required. Lord Diplock's statement is, arguably, one such instance of simplification, clarification and unification. It attempts to bring coherence into an area where multifarious sub-categories had brought confusion to judicial review. Although Lord Diplock's statement seemed only to operate prospectively, some commentators have argued that prior English decisions in the administrative law area could have been explained in terms of proportionality.⁶ This is particularly so of situations where delegated legislation or planning decisions had been struck down on the ground of 'unreasonableness'.⁷ In fact much of the current debate, at least with respect to judicial review, is about whether proportionality is not truly a novel principle but rather a variant or alternative explanation of that well recognised ground. It is a principal theme of this paper that such debate is liable to reveal only superficial and arid conclusions unless one appreciates that the past approach to 'unreasonableness' itself involves a kind of judicial schizophrenia. The claim here is that unreasonableness is a broad collective description of other distinct but related factors which suggest cumulatively that administrative decisions or subordinate legislation were ultra vires.

THE HISTORY OF 'UNREASONABLENESS' AS A GROUND OF REVIEW

One of the earliest formulations of unreasonableness is to be found in *Kruse v Johnson*. With respect to the alleged unreasonableness of certain by-laws, Lord Russell asked:

But unreasonable in what sense? If, for instance, they [the by-laws] 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

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5. *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, 410 (emphasis added).
 6. J Jowell & A Lester 'Proportionality: Neither Novel Nor Dangerous' in J Jowell & D Oliver (eds) *New Directions in Judicial Review* (London: Stevens, 1988). Instances cited by the authors include: *Congreve v Home Office* [1976] 1 QB 629; *Wheeler v Leicester CC* [1985] AC 1054.
 7. As in the following cases mentioned by Jowell & Lester, *ibid*: *Niarchos Ltd v Secretary of State for the Environment* (1978) 76 LGR 480; *Hall v Shoreham UDC* [1964] 1 All ER 1; *R v Hillingdon LBC, ex parte Royco Homes Ltd* [1974] QB 720. Cf J Jowell & A Lester 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' (1987) Public Law 368.

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'. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is *not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient*, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.⁸

Whilst *Kruse v Johnson* is of historical importance, most post-World War II cases concerning unreasonableness take as their starting point the restatement of the law by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* in 1948. Referring to the earlier statements in *Kruse v Johnson*, his Lordship said:

It is true the discretion must be exercised reasonably. But what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something *so absurd that no sensible person could ever dream that it lay within the powers of the authority*.⁹

On a close analysis of the statements both by Lord Russell and Lord Greene it becomes evident that unreasonableness covers a broad spectrum. At one extreme are decisions which can be described in terms of 'absurdity' or '*manifest unreasonableness*' (in this paper referred to as '*crude Wednesbury unreasonableness*'). In this instance, the emphasis is placed on primary, intuitive judicial reaction. There is an underlying notion of 'unacceptability' or 'offence to common sense'.

On the other hand, each of the above statements adverts to situations where the judicial emphasis is on the *process* by which a decision is made. In this paper, such unreasonableness is described as the '*rationality ground*'.¹⁰

8. *Kruse v Johnson* [1898] 2 QB 91, 99-100 (emphasis added).

9. *Assoc Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (emphasis added). Though criticised because of inconsistencies and overlaps in its internal logic, it should be noted that the Master of the Rolls was delivering an ex tempore judgment. On the problems of ex tempore decisions, see M Kirby 'Delivering an Ex Tempore Judgment' (1995) 25 UWAL Rev 213.

10. The writer, at the risk of some confusion, therefore distinguishes 'rationality' from 'unreasonableness' and does not adopt Lord Diplock's suggestions in *CCSU* which treat 'rationality' as inclusive of *Wednesbury* unreaonableness. Commentators who note the

In this instance, the emphasis is placed on the way in which the decision-maker *makes* the decision. Does he omit matters which should be taken into account, or overlook significant facts, or fail to make due enquiries which the evidence before him should have prompted? Administrative law is familiar with such errors but gives them differing labels such as 'irrelevant considerations', 'error of law' or 'no evidence'. This analysis exposes the particular decision to the objection that it is logically flawed. Of course, as suggested above, 'crude *Wednesbury*' and faulty reasoning processes should be seen as the opposite ends of a spectrum rather than as mutually exclusive categories. There will be intermediate areas where the two merge.¹¹ For example, a glaring failure to adopt a clearly indicated line of enquiry may be seen to be so arbitrary or outrageous as to draw a response in crude *Wednesbury* terms.

PROPORTIONALITY AS A COMPARATIVE CONCEPT

In suggesting that proportionality might become a feature of English law, Lord Diplock referred to the place of the doctrine in continental jurisprudence.¹² By way of a thumbnail sketch, one may note that proportionality has featured extensively in human rights discourse and judicial decisions in the European Community.¹³ It is particularly relevant to freedom of speech under Articles 10 and 14 of the European Convention on Human Rights.¹⁴ A restriction must be *necessary* to the maintenance of democratic government, though a 'margin of appreciation' is allowed in judicial determination.¹⁵ It is also a feature of community trade law particularly in the area of 'protectionism'.¹⁶

overlap of the *Wednesbury* 'unreasonableness' ground with others include Jowell & Lester supra n 6, 370; PP Craig *Administrative Law* 3rd edn (London: Sweet & Maxwell, 1994) 410-411; P Walker 'Irrationality and Proportionality' in M Supperstone & J Gaudie (eds) *Judicial Review* (London: Butterworths, 1992) 122-124. One of the most sophisticated analyses is that of M Allars who reduces the *Wednesbury* statement to 3 paradigms: see M Allars *Introduction to Australian Administrative Law* (Butterworths: Sydney, 1990) 188-193, ¶¶ 5.54-5.60.

11. W Wade & C Forsyth *Administrative Law* 7th edn (Oxford: Clarendon Press, 1994) 403 also concludes that the principles of reasonableness and proportionality cover a great deal of common ground.
12. Smyth supra n 2.
13. Jowell & Lester supra n 6, 56.
14. Id, 58.
15. *Sunday Times* case, ECHR Judgment (26 Apr 1979) Series A, No 52, 402; J Schwarze *European Administrative Law* (London: Sweet & Maxwell, 1992) 680 puts the matter thus: 'In the law of a number of European countries there is a "principle of proportionality" which ordains that administrative measures must not be more drastic than is necessary for attaining the desired result.'
16. Jowell & Lester supra n 6, 57.

Proportionality is also well known in particular legal jurisdictions in Europe. German administrative courts refer to the notion of 'Verhältnismässigkeit', which holds that state power may only encroach upon individual freedom to the extent that it is indispensable for the protection of the public interest.¹⁷

With respect to French administrative law, proportionality has been invoked in a wide variety of circumstances ranging from the dismissal of a public servant for minor transgressions¹⁸ to cost-benefit analyses regarding the expropriation of private property for public goals.¹⁹ Thus, in the civil liberties context, particularly freedom of speech, an official will have to justify the banning of a public meeting by demonstrating that other measures to control public violence (eg, the provision of more police at the meeting) would not have been effective.²⁰ The emphasis here is on alternative, better or less costly solutions or on a more sensitive balancing of civil liberties and restrictive measures.

Similarly, French law knows of the 'erreur manifeste d'appréciation des faits' (gross error of appreciation of the facts). As Boyron²¹ and Jowell and Lester²² suggest, this is effectively the equivalent of *Wednesbury* (and one might add *crude-Wednesbury*) unreasonableness in that it is invoked in a situation where no reasonable person could have taken the decision in question.

One must be aware that there are dangers in translating concepts from one system of jurisprudence to another. In particular, in the French case, one must take account of the complex nature of their system of administrative review through tribunaux administratifs and the Conseil d'Etat.²³ These bodies are not instruments of judicial review as known in the Anglo-Australian context. As an adjunct of executive government, they are engaged in a blend of what common lawyers would know as 'merits review' and judicial review. But while French analogies may not perfectly translate into instances of *judicial* review in England or Australia, they reinforce the case for proportionality as a basis for *administrative* review.²⁴

17. Ibid.

18. Id, 55.

19. Ibid: see *Ville Nouvelle Est* CE 28 May 1971.

20. *Benjamin Rec* CE 19 May 1933, 541, discussed by S Boyron 'Proportionality in English Administrative Law: A Faulty Translation?' (1992) 12 *Oxford Journ Legal Studies* 236, 244.

21. Id, 238.

22. Jowell & Lester supra n 6, 55.

23. Boyron supra n 20, 238, 245, 258-264.

24. This, in the writer's view, is the most likely area where proportionality might develop in Australian administrative law, though it has attracted little comment to date. See infra p 156.

A PROMISE OF THINGS TO COME

Reflecting on the English situation in 1985, Lord Diplock's statement in *CCSU* seemed to hold out a promise that significant developments in administrative law could be made by relying on the concept of proportionality, looking to the European courts for guidance.

However, after some initial skirmishing in the lower courts,²⁵ proportionality seemed to take a significant blow in the House of Lords decision in *R v Home Secretary, ex parte Brind*.²⁶ At first sight, this case would seem to represent something of an obstacle to English adoption of proportionality, at least in its continental forms. The facts in *Brind* were not very propitious because of their national security and public order implications. The Home Secretary had issued directives under the Broadcasting Act 1981 (UK) banning the broadcast of words spoken by persons representing certain proscribed terrorist organisations including the IRA. It was contended that this restriction contravened Article 10 of the European Convention on Human Rights such as to take the directives outside the intended scope of the statutory grant of power. Further, it was contended that the directives were unreasonable because they were disproportionate to the objective of preventing the mischief of attracting publicity and legitimacy to such organisations. It was argued by the TV networks which were subject to the directives that the application of a continental notion of proportionality would result in a stricter 'margin of appreciation' being applied by English courts. In consequence, the government directives, having regard to their dire impact on freedom of political speech, should be deemed to be beyond the dictates of necessity in a democratic society. The House of Lords, upholding the Home Secretary's appeal, held the directives to be valid.

Three points may be noted about the decision in *Brind*. First, although Lords Roskill and Templeman did not entirely rule out the possibility,²⁷ Lords Ackner and Lowry explicitly denied the place of continental proportionality in English common law.²⁸ Their concern was that if English courts ventured into continental jurisprudence, they would inevitably become entangled in merits review.²⁹ Lord Lowry saw common law judges as ill-equipped to make the evaluations necessary to apply the European

25. Smyth *supra* n 2, 192, citing *ex parte Assegai* (1987) 151 LG Rev 891; *R v General Medical Council, ex parte Colman* [1990] 1 All ER 489.

26. [1991] 1 AC 696.

27. *Id.*, 750 and 751 respectively.

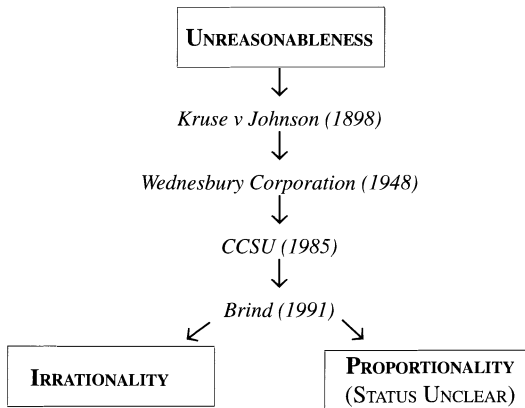
28. *Id.*, 762 and 766 respectively.

29. On this view, proportionality is seen to be a more exacting test which would require the court to substitute its judgment for that of the proper authority. Wade & Forsyth, *supra* n 11, 402.

notion.³⁰ Secondly, several of the Law Lords, including Lord Ackner, were prepared to accept that proportionality was a species of *Wednesbury* unreasonableness.³¹ Lord Ackner conceded that where there was a total lack of proportionality it would be a case of '*Wednesbury* unreasonableness'.³² Thirdly, the speeches of these two law lords (Lords Ackner and Lowry) proceeded on the basis that there was a dividing line between the judicial function and the function of ministers and public officers to whom Parliament had entrusted a statutory discretion.³³ Deference to Parliament required judges to be cautious in exercising judicial review.³⁴ Basically, this assertion is a variant of the separation of powers doctrine,³⁵ even if not constitutionally entrenched. In emphasising the need for judicial restraint they were acting consistently with the earlier English decisions, *Kruse* and *Wednesbury*, which were themselves based on respect for the demarcation line between judicial and merits review.³⁶

English developments to 1991 can be summarised by the following chart.

ENGLISH DEVELOPMENTS TO 1991



30. *Brind* supra n 26, 767.

31. For a rather marked divergence of views as to whether *Wednesbury* is apt to resolve conflicts where fundamental human rights are in issue, see Lord Bingham MR and Lewis J in *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898, discussed by R Mullander 'Judicial Review and the Rule of Law' (1996) 112 LQR 182.

32. *Brind* supra n 26, 762.

33. The reluctance to exercise judicial review where the subject matter of a minister's power is predominantly political is also prominent in the House of Lords' decisions in *R v Secretary for Environment, ex parte Hammersmith LBC* [1991] 1 AC 521, 595; *R v Secretary of State for Environment, ex parte Nottinghamshire CC* [1986] AC 240, 247.

34. *Brind* supra n 26, Lord Ackner 762; Lord Lowry 766; see also Lord Bridge 749. For further commentary on *Brind*, see Craig supra n 10, 411-414; Walker supra n 10, 137.

35. Jowell & Lester supra n 7, 382.

36. See passages cited in the text accompanying nn 8, 9.

Although English commentators including Wade and Forsyth take a fairly pessimistic view of the future development of the proportionality doctrine in England³⁷ others, including Craig,³⁸ are more optimistic.

THE AUSTRALIAN POSITION: SUNLIGHT DOWN-UNDER?

The acceptance of proportionality as a judicial construct has been more certain in this country. This is perhaps explicable because its initial adoption by members of the High Court occurred in the constitutional context rather than at the level of administrative law 'ultra vires'. As such, proportionality has been perceived to have a higher status in Australian jurisprudence than in its English counterpart.

Specifically, in constitutional law, proportionality has received endorsement in the following contexts:

- Where there are questions whether the exercise of a Commonwealth legislative power is valid. Basically, what has been at stake here is the *purposive* exercise of power (eg, where the Commonwealth is seeking to implement an international treaty banning a certain activity and oversteps the mark by proposing a *total* ban on that activity without regard to the potential for actual damage).³⁹ Proportionality has also arisen in the context of the incidental reach of Commonwealth legislative powers.⁴⁰
- A second field where proportionality has been recognised is in relation to constitutional prohibitions. This includes both: (i) *express limitations* such as those in section 92;⁴¹ and (ii) *implied limitations*, particularly where a Commonwealth statute unduly restricts freedom of 'political' speech.⁴²

37. Wayde & Forsyth supra n 11, 403.

38. Id, 421: 'It is highly likely that proportionality will be recognised as an independent ground of review or domestic law'. G Nardell 'Presumed Innocence, Proportionality and the Privy Council' (1994) 110 LQR 223, 237 points out that English courts have applied what is effectually a proportionality test in assessing judicial restraints on fundamental rights, citing inter alia, *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 534 and concludes that the Privy Council decision in *A-G of Hong Kong v Lee Kwong-Kut* [1993] AC 951 could mark a new departure or bridge-head to proportionality developing as a common law principle.

39. See *Ch v Tasmania* (1983) 158 CLR 1, 260; *Richardson v Forestry Commission* (1988) 164 CLR 261, 311-312, 344-345.

40. See *Davis* supra n 1; *Nationwide News* supra n 1.

41. *Castlemaine-Tooheys v SA* (1990) 169 CLR 436, discussed in Fitzgerald supra n 2, 280-282. One can also reconsider some of the older s 92 cases before *Cole v Whitfield* (1987) 165 CLR 360 which applied the test of 'reasonable regulation' to whether State laws avoided infringing s 92: see eg *Hughes and Vale v NSW (No 2)* (1955) 93 CLR 127; *O'Sullivan v Miracle Foods* (1965) 115 CLR 177.

42. *Nationwide News* supra n 1; *ACTV* supra n 1.

As an instance where 'implied limitations' were invoked, an alleged malapportionment between numbers of voters in different Commonwealth electorates was explicitly though unsuccessfully relied upon by the ALP as the basis for the argument that the relevant Commonwealth electoral legislation did not conform to the requirement in section 24 of the Commonwealth Constitution that members of the House of Representatives should be 'directly chosen by the people'.⁴³

In the administrative law field, proportionality received qualified recognition by the High Court in the case of *South Australia v Tanner*.⁴⁴ While not explicitly adopted in that case (one involving delegated legislation) the principle was at least acknowledged, even if rejected on the facts.

Further administrative law instances have occurred, particularly in the New South Wales Court of Appeal⁴⁵ and the Federal Court.⁴⁶ In *New South Wales v Macquarie Bank*, Kirby P, in one of the most comprehensive discussions of the role of proportionality, stated:

Under European law it is now well-established that a public authority (including the Executive Government) may not impose legal obligations except to the extent that they are strictly necessary in the public interest to attain the purpose of the measure authorised by the legislature. If the burdens imposed are clearly out of proportion to the authorised object, the measure will be annulled. There must therefore exist a reasonable relationship likely to bring about the apparent objective of the law. The detriment to those adversely affected must not be disproportionate to the benefit to the public envisaged by the legislation.⁴⁷

Kirby P then adopted the test applied by Wilson, Dawson, Toohey and Gaudron JJ in *Tanner*,⁴⁸ namely, that a regulation may be invalid where it is 'so lacking in reasonable proportionality as not to be a real exercise of the power'. He stated:

If this proportionality test is adopted in the present case, I would have no hesitation in concluding that the provisions of clause 37(5) of the Regulation, as it stood at the relevant time, were so lacking in proportionality that it does not amount to a real exercise of the power conferred either by section 80(6) or by the more general provisions of section 156(1)(a) of the Act....⁴⁹ In my view there is no proportionality

43. *A-G, ex rel McKinlay v Cth* (1975) 135 CLR 1; confirmed so far as a similar phrase in s 73(2)(c) of the Constitution Act 1889 (WA) is concerned in *McGinty v WA* (1996) 70 ALJR 200.

44. (1989) 166 CLR 161, 165.

45. *NSW v Law* supra n 1; *NSW v Macquarie Bank* supra n 1. Note in neither case does it appear that *Brind* was cited to the court though it was decided in early 1991. In *Law* supra n 1, 26 Kirby P's remarks were obiter, and suggest that he might have seen disproportionality and unreasonableness as interchangeable.

46. *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298, Einfield J 347-349; *Austral Fisheries* supra n 1; *Dover Fisheries* supra n 1.

47. (1992) 30 NSWLR 307, 323-324.

48. Supra n 1, 165.

49. Supra n 47, 324.

between the object for which section 80(6) provided the power to make regulations and the purported exercise of that power by clause 37(5) of the Regulation. In so far as the Regulation purported to provide automatic cancellation for late payment of a licence fee and penalty, it was therefore outside the purposes for which the power was granted. It is invalid.⁵⁰

PROPORTIONALITY: AN ASSESSMENT

Two strands of opinion can be discerned in the latter group of cases. First, so far as delegated legislation is concerned, there is a division of opinion between judges such as Einfeld J⁵¹ in the Federal Court and possibly Kirby P,⁵² who see proportionality as an independent ground of review, and judges such as Mahoney JA in the New South Wales Court of Appeal,⁵³ who, at least for the time being, can see no real difference between proportionality and unreasonableness. On the latter view disproportionality between the scope and purpose of the grant of power locates the matter within the *Wednesbury* ground of review.⁵⁴

Even where proportionality has received an endorsement (eg, in *Dover Fisheries*),⁵⁵ the Federal Court, following *Tanner*, has tentatively regarded the concept as based on the *degree of connection* with the authorising power in the head statute. In *Dover Fisheries*, after an extensive discussion of both the English and Australian cases, Gummow J concluded:

These observations in the High Court indicate that whatever may be the sweep of the proportionality principle in federal constitutional law, when the question of validity is concerned with delegated legislation made pursuant to a law of the Parliament whose validity itself is not impugned, the proportionality principle is differently focused. The observations by their Honours further suggest that here at least there has been no significant shift in doctrine and, indeed, that the subject still is controlled by what was said by Sir Owen Dixon over 50 years ago.... The fundamental question is whether the delegated legislation is within the scope of what the Parliament intended when enacting the statute which empowers the

50. Id, 324-325.

51. *Minister of Foreign Affairs v Magno* supra n 46, 347-350. His Honour also discusses at considerable length the way in which the test of unreasonableness may encompass concepts of proportionality in *Don v Minister for Immigration* supra n 1, 46-54.

52. While on the NSW Court of Appeal. (His Honour's position seems favourable to proportionality but is equivocal.)

53. *NSW v Macquarie Bank Ltd* supra n 47, 330.

54. One of the stronger expressions of this view is found in *Peverill v Backstrom* (1994) 54 FCR 410, 428 where the Full Federal Court stated: 'The fourth point evokes *Wednesbury* unreasonableness. The submission also is put in terms that the sanction imposed on Dr Peverill is "disproportionately severe". However, as Dawson J has explained in *Cunliffe v Cth* (1995) 182 CLR 272, 357, the notion of proportionality has its origin in European systems with a different basic structure for administrative review to that which has developed in common law countries.'

55. Supra n 1.

subordinate authority to make certain laws.⁵⁶

Lack of proportionality is thus translated into lack of a requisite relationship between the measure stated in the legislation and a head power. As Cooper J observed in *Dover Fisheries*:

The test of proportionality 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.⁵⁷

If a tentative conclusion can be drawn about the Australian venture into the field of proportionality, it would be that it is temporarily 'stalled'. The concept is 'catching breath', but has not been rejected. Despite a more pessimistic prognosis by Smyth,⁵⁸ and a similar conclusion by Burmester and Bezzi,⁵⁹ the prospects for proportionality are, in the writer's opinion, certainly more promising than in England.

WHERE TO FROM HERE?

At this point, one should make some observations about the theoretical pedigree of the 'doctrine of proportionality' as seen through the cases. In this regard, it is necessary to distinguish the English cases from the Australian. The English decisions were influenced by the particular constitutional context arising from the relationship of the United Kingdom to the European Community. There is a debate as to whether, and the extent to which, the common law of England can receive 'transfusions' of European legal principles. That should not of itself bring academic discussion about the future of the English cases to a halt. There are reasons why the continental cases provide interesting insights for both English and Australian courts regarding the way that proportionality can be applied in particular instances. In this respect, the continental jurisprudence provides

56. See *Austral Fisheries* supra n 1, 66.

57. Id, 74.

58. Smyth supra n 2, 195-196, while conceding there are very real problems with *Wednesbury* unreasonableness, insists that it is better to clarify *that* concept rather than substitute another which is also problematic. He accepts, however, that recognition of proportionality could be a positive step.

59. Burmester & Bezzi supra n 2, 15-16.

models and examples capable of adaptation. They occur against a 'rights' background, not dissimilar to the Australian theory of implied constitutional guarantees currently embraced by the High Court. Thus, concepts such as the 'margin of appreciation', and the need for justification, measured against the necessity for intrusion into human rights, may be instructive for Australian courts. One special application where international legal principles could be influential is in the interpretation of statutory provisions empowering officials to make administrative decisions. In this context, there is a close parallel with the way in which international law principles (eg, in the International Covenant on Civil and Political Rights) provide a yardstick against which domestic Australian legislation may be tested.⁶⁰

Besides European human rights examples, various French and German decisions can perhaps also be reformulated in terms of the Anglo-Australian common law. If one accepts that the continental decisions can provide a fund of principles and parallels for future development, they may yet provide an impetus for the continuation of the proportionality debate in Australia.

BACK TO BASICS: 'BLEND CONCEPTS'

At this point, it may be useful to look more closely at: (i) the meaning and applications of proportionality; and (ii) the meanings of the cognate notions of unreasonableness and irrationality.

Proportionality, unreasonableness and irrationality can each be described as 'blend' concepts. A blend concept, as formulated by Heidi Feldman,⁶¹ is one which has both *descriptive* force (ie, it can be applied categorically in various circumstances for classification purposes) and also *evaluative* significance (ie, it can function to indicate, in the legal context, the preferred judicial conclusion). As such, a blend concept provides *reason-giving*, explanatory justifications in judicial determinations. Familiar blend concepts in other areas of Anglo-Australian law include judgments about whether conduct is 'negligent' or 'inequitable'.⁶²

For Feldman a blend concept (and this would include proportionality) can be used to guard against arbitrary and unprincipled judicial assessments by applying a yardstick (the evaluative aspect) of shared communal values and interests to the empirically ascertained facts.⁶³ One can develop this in regard to proportionality, taking oppression and undue restraint by official

60. *Minister for Immigration v Teoh* (1995) 128 ALR 353; *Chow Hung Ching v The King* (1948) 77 CLR 449, 477; *Mabo v Qld* (1992) 175 CLR 1, discussed by Einfeld J in *Don* supra n 1, 49.

61. HL Feldman 'Objectivity in Legal Judgment' (1993) 92 Mich L Rev 1187.

62. *Ibid.*

63. *Id.*, 1229-1236.

or executive action as a communally endorsed, protected value. However, in evaluating violations, a court can allow a margin of toleration by way of respect for political judgment by accountable public officers and elected representatives of the community.

Although it is possible to look at proportionality and unreasonableness as separate concepts to determine their essential elements, it is necessary to recognise the relationship between them. By disentangling them and reducing them to their most fundamental components, including their descriptive and evaluative aspects, we may be able to reassemble them into a model that allows the genie of proportionality to escape its present confines.

PROPORTIONALITY: ITS DIVERSE USAGES AND RELATIONSHIP WITH REASONABLENESS

One of the problems concerning proportionality is that the courts have referred to it in general and also abstract terms without further analysis. It is, of course, a principle capable of various applications and therefore may be defined in various ways. One can differentiate, as Professor Xavier Philippe does,⁶⁴ at least two different usages of the term in regard to:

- its *mathematical* or scientific meanings; or
- its function as a *juridical construct* (in French 'la controle de proportionnalit ')

the latter being not an absolute or exact concept but rather a relative one.

To invoke in argument the mathematical or scientific meaning of proportionality, positing a definable correspondence or relationship between discrete known entities, is superficially attractive because it confers an appearance of objectivity. But, if sought to be applied in a legal context, it is somewhat illusory. Although judges from time to time wistfully invoke 'objectivity' to give their pronouncements the appearance of an ideal, logically-compelled result, we know from many decades of close scrutiny (going back to the Realist school of jurisprudence⁶⁵) that concepts like objectivity have variable, and indefinite, contents. As Philippe⁶⁶ and Feldman⁶⁷ suggest, any attempt to invoke proportionality as an inherently objective measure in a way analogous to the mathematical model is therefore misconceived.

On the other hand, used as a juridical guide, a sense of proportion can be integrated with notions of what is reasonable, importing considerations

64. X Philippe *Le Controle de Proportionnalit  dans les Jurisprudences Constitutionnelle et Administrative Francaises* (Paris: Economica, 1990).

65. FS Cohen *Ethical Systems and Legal Ideas* (New York: Falcon, 1933).

66. *Supra* n 64, 34.

67. *Supra* n 61, 1221.

of equality and equilibrium into judicial decision-making. In its legal applications it carries with it fundamental ideas of what is fair and just. Proportionality is thus capable of conveying, in particular circumstances, an evaluative measure that condemns, in some cases, *arbitrary* or *discriminatory* actions (deviating from equality of treatment), and in others, actions which are judged to be *irrational* (logically flawed or unreasonable because they ascribe undue weight to some factors whilst ignoring or giving inappropriate consideration to others).⁶⁸ Proportionality can thus function as a criterion of reasonableness in *its* different senses.

More pragmatically, one can discern in the comparison between an objective and the legislative or decisional means to effect that objective, outcomes which, allowing for some margin of discretion, one can more readily regard as 'admissible' or 'acceptable' than others. Here 'admissible' or 'acceptable' will reflect community values.⁶⁹

In pursuit of such a determination, the role of the principle of proportionality will be reflected in the degree to which one measures the margin of appreciation. That in turn requires explicit acknowledgement of the constraining factors involved in balancing restrictive measures against wider considerations of public interest.

One can also include in the balancing act such considerations as whether the decision maker, particularly where delegated legislation is concerned, is democratically organised (eg, where by-laws are made by an elected local authority) or otherwise subject to democratic scrutiny (eg, by a requirement to table in the Houses of Parliament).⁷⁰ Thus, the principle of proportionality serves to define more precisely and concretely the relationship between ends and means in a context which takes into account individual rights and democratic values.

UNREASONABLENESS / IRRATIONALITY

As suggested earlier,⁷¹ unreasonableness can be broken down into several overlapping but distinguishable categories. On the one hand, there is what can be described as the *intuitive* or perhaps *common-sensical* application.⁷² This is reflected in judicial formulations such as 'unreasonableness' or 'manifestly beyond what any reasonable decision

68. Phillippe supra n 64, 19-21.

69. These, in Phillippe's treatment, function to provide a 'threshold' of admissibility; supra n 64, 19.

70. See *Wednesbury* supra n 9, Lord Greene.

71. Supra pp 141-142 and see *Bond v Australian Broadcasting Tribunal* (1990) 170 CLR 321, Deane J as to the relationship between irrationality and unreasonableness.

72. An appeal to 'common sense' values and proportionality was made by Lord Wolff in *A-G of Hong Kong v Lee Kwong-Kut* supra n 38, 975.

maker could conclude'. This determination is largely an appeal to common sense and community standards.⁷³ It emphasises a sense of disproportion approaching the outrageous and does not dwell on finer or deeper elements or explanations.

A second sense of unreasonableness is that which may more properly be described as *irrationality*.⁷⁴ This is where the elements or in-puts by which the outcome or decision is reached are traced through the decision-making process. Where there are defects, often of a logical kind, such as a failure to take into account relevant considerations, the making of a decision without a basis in fact or evidence, drawing impermissible inferences, or incorporating logically flawed information,⁷⁵ the decision can be described as 'unreasonable' in the 'irrational' sense. The descriptive task is the identification of the steps and matters taken into account and the evaluation is the measuring of those elements against a notional model of acceptable reasoning.

RECONCILIATION OF THE VARIOUS CONCEPTS

At this stage, one can propose the following model as a way of reconciling and distinguishing the interrelated notions of unreasonableness and proportionality.

CONTINUUM			
← UNREASONABLENESS		DISPROPORTIONALITY →	
'Irrational'	'Manifestly unreasonable'	'Excessive'	Separate ground
Irrelevant considerations	Absurd	Discriminatory (undue emphasis on irrelevant factors)	Invasion – human rights – more than what is necessary
No evidence	No right thinking person	'Partial' (arbitrary) exercise of power	Purposive exercise of discretionary power by excessive measures
Failure to enquire	Outrageous and arbitrary	Failure to adopt less drastic alternative	Means pursued by delegated legislation more onerous than necessary
Impermissible inferences – flawed method			Penalising to undue extent

73. Allars supra n 10, 186, ¶ 5.50.

74. Allars id, 188, ¶ 5.53.

75. See the discussion of *Wednesbury* and *Kruse* supra pp 140-141.

In this hypothetical model, though lines of demarcation are drawn between 'irrational', 'manifestly unreasonable', 'excessive' and 'separate ground', each should be seen as an extension of a spectrum in which irrationality is furthest from pure proportionality. Particular cases, depending on which feature is emphasised, may fall within different parts of the spectrum. Considerations of unreasonableness and proportionality can be drawn in such a way that proportionality can be recognised as an alternative explanation for each of the two principal senses of *Wednesbury* unreasonableness. This also indicates that proportionality can be recognised, in other instances, as a separate and independent ground of review.

In the first set of circumstances, as much of the current judicial debate suggests, proportionality can function metaphorically, but differently, in relation to both crude *Wednesbury* and *rationality* findings of unreasonableness. There will even be room in that spectrum for overlap as to the explanation proportionality brings to both the manifestly excessive side of the spectrum and the illogical, conclusion-drawing aspects. Thus disproportionate weight and concentration on a particular factor and ignorance of other relevant factors invite a conclusion in extreme cases of arbitrary unreasonableness. Even so, many instances of clear irrationality (eg, a failure to consider relevant evidence or facts) would be inappropriately described as a lack of proportionality (unless perhaps the failure was 'egregious').

Moving further right across the spectrum proportionality will in some cases occupy the same territory as crude *Wednesbury* unreasonableness. But it will also emerge in other cases as providing a more acceptable explanation for the judicial decision than simple 'unreasonableness'. Proportionality will be particularly relevant where issues of purpose are involved, not just incidentally, but at the heart of the grant of statutory powers. Proportionality will also provide better explanations in instances where rights (particularly human rights) are involved. It is at this point that the continental models become most relevant.⁷⁶

By way of an alternative analysis, Allars⁷⁷ suggests that the *Wednesbury* test can be formulated in terms of three paradigms. The first is the use of an inappropriate power to achieve an objective where another power is available.

76. Take eg the following: Officers of the Commonwealth Bank often of many years standing employed under the Commonwealth Bank Act 1959 (Cth) have been dismissed sometimes for relatively minor offences. As a result, under the rules of the superannuation scheme authorised under that Act, both the employee and the spouse are liable to forfeit amounts approaching \$250 000 in superannuation entitlements in the form of employee contributions. This would attract the kind of French response referred to in n 18. Alternatively, even English courts have given relief in situations where a decision gives what is, in effect, a disproportionate penalty: see *R v Barnsley MBC, ex parte Hook* [1976] 1 WLR 1052.

77. *Supra* n 10, 188-191, ¶¶ 5.54-5.57.

The second is where a power is exercised indiscriminately without justification and the third are *Wednesbury* examples that represent a principle of proportionality. Under the analysis presented above, many first paradigm cases would fall in the irrationality part of the spectrum, whilst second paradigm instances involving discrimination would fall into the overlap between 'manifestly unreasonable' and 'excessive/disproportionate' (perhaps they could be described as cases of 'Kruse-unreasonableness'). Allars' third paradigm would correspond roughly to the two sections on the right of the spectrum entailing, in extreme cases, some instances where sheer disproportion could be separately identified as the reason why there has been no 'real' exercise of the power.⁷⁸

Hypothetically, isolating and emphasising the element of proportionality where it occurs, allows a balancing to be effected between public interests and the impact upon individuals, particularly where elements of discrimination and unequal treatment are involved. It is arguable that the margin of tolerance in those cases allowed to government will be more strictly scrutinised and narrower (to use American concepts)⁷⁹ than normal judicial deference to executive or legislative decisions.

One must go back to Lord Russell's pronouncement in *Kruse v Johnson*⁸⁰ to realise that considerations of unequal and partial treatment have always had a place in relation to the ground of unreasonableness. What is unique is that the element of executive discretion may come under much stricter scrutiny where certain aggravating features are present. This is where notions of disproportionality might provide a more sophisticated analysis that is more persuasive in terms of the end result.

A caveat, however, should be expressed concerning review of Commonwealth decisions under the Administrative Decisions (Judicial Review) Act 1977 (Cth). Sections 5(1)(e) and 5(2)(g) of that Act contemplate unreasonableness review solely in crude *Wednesbury* terms.⁸¹ An alternative and possibly less restrictive attack on a *Commonwealth* decision is available

78. Since this article was written that of T McEvoy supra n 2 appeared. McEvoy suggests 'unreasonableness' has 2 dimensions: the first an 'umbrella sense' encompassing other grounds such as irrelevant considerations (in this article *process irrationality*); the second, 'substantive' as in *Wednesbury* supra n 1, 38. He sees the latter as having developed ('expanded sense') to include unreasonableness in failing to make due inquiry. Cf *Prasad v Minister of Immigration* (1985) 6 FLR 155. In this article the latter would still fall within process irrationality. McEvoy disputes that proportionality can have an independent role in judicial review: supra n 1, 45-51. So his views are at odds with the present writer.

79. MW Janis & RS Kay *European Human Rights Law* (Connecticut: Foundation Press, 1990) 134-137, 247-251.

80. *Kruse* supra n 8.

81. Burmester & Bezzi supra n 2, 1. The problems of attacking 'unreasonable' decisions under s 5(2)(g) are discussed by Einfeld J in *Don* supra n 1, 53-54.

by way of prerogative writ under section 39B of the Judiciary Act 1903 (Cth), provided that the decision-maker can be characterised as 'an officer of the Commonwealth'.⁸²

WHY THE FUSS?

One may ask whether this is merely academic musing or whether there is a more serious side to my analysis. The point relates to an over-arching theme that has perhaps been the unarticulated assumption behind all that has been said in this paper. What really is at stake is the structure of judicial review. In particular, the debate about unreasonableness and its relationship to proportionality touches the very heart of judicial review in terms of the relationship between the courts, the government and the legislature. In other words, deep-rooted notions of separation of powers, whether mandated, as in the federal Constitution,⁸³ or a quasi-judicial constraint (particularly as regards judicial independence)⁸⁴ are of great significance.⁸⁵

The emergence of proportionality does not necessarily threaten that distinction. What it presents is a mechanism whereby the judiciary may use some aspects of governmental actions in a way that allows the threshold of invalidity to be reached more readily in some circumstances than others. It may involve a stricter test but it still leaves considerable room for judicial deference to executive or legislative judgment. Proportionality in appropriate cases will focus on the justification for governmental action and highlight the factors which the judges see as most compelling. It also introduces considerations such as the availability of alternative solutions as part of the calculus for determining the validity of governmental processes.

PROPORTIONALITY IN ADMINISTRATIVE REVIEW OR APPEALS

Up to this point I have been considering only the role of proportionality in judicial review. Arguably proportionality may have an even more

82. S 39B can be used in some instances where Commonwealth authorities such as the Commonwealth Bank are exempt under the Administrative Decisions (Judicial Review) Act 1977 (Cth), Schd 1.

83. *R v Kirby, ex parte Boilermakers' Society of Aust* (1956) 94 CLR 254.

84. In *R v S* (1995) 12 WAR 392 the Supreme Court held its independence was not constitutionally guaranteed.

85. On the other hand, one can accept Allars' propositions that the legality/merits distinction is logically flawed and of little value as a check on judicial review particularly in the context of newly developing, highly indeterminate, bases for review: supra n 10, 163, ¶ 5.5.

significant role to play as an aspect of administrative review in situations where the divorce between supervisory judicial review (legality) and merits adjudication ceases to be an objection.

Proportionality has in fact featured on occasions as the basis for decisions made by the Administrative Appeals Tribunal. For example, in *Re O'Connell and the Department of Social Security*,⁸⁶ the Tribunal reversed a decision of the Department to automatically terminate payment of a family allowance to 25 000 families where the latter had failed to notify the Department of their changes of address. The Tribunal considered a range of alternative ways in which the new addresses could have been ascertained, measuring the effect of the latter against the drastic effect of cutting off the allowance. The Tribunal stated:

Given that there were a range of measures quite easily available to the respondent, though undoubtedly entailing some cost to the respondent, such as searching electoral rolls, telephone directories, or, even if such measures were thought to be impractical given the large number of persons involved, simply by sending a notice care of the bank into which payments were being made, it seems that there were simple steps that could have been taken to provide an opportunity for persons such as the applicant to bring their situation up to date with the department before the allowance was cancelled. Such an approach could have been justified in terms of good governmental practice as both a *rational and proportionate* response to the failure to receive a response to the queries about qualifying income level, measured against the finality of action to cancel, and even allowing for the fact that persons like the applicant took some time to realise the allowance was not being paid.... In that way, there would also be a stronger basis for treating failure to respond as founding an inference that the qualifying income level for entitlement had been exceeded. As it was, the mere fact of non-reply, being open to several equivocal explanations, forms no rational basis for drawing the conclusion actually stated as the basis of the decision.⁸⁷

The approach of the Tribunal in *O'Connell* was evidently accepted by the Full Federal Court on appeal. The court cited the above passage without demur.⁸⁸ Certainly, administrative review is an area for future development of the concept of proportionality. There should be no objections to incorporating it into assessments of what good administration reasonably requires in appropriate cases.⁸⁹

86. (1992) 16 AAR 466. The writer was the Deputy President of the Tribunal.

87. *Id.*, 471.

88. (1992) 38 FCR 540, 545. The kind of criticism of lack of policy expertise made by Lord Lowry in *Brind* supra n 26 does not apply to the same extent in Tribunals like the Administrative Appeals Tribunal which include non-legal, specialist members.

89. See also *Re McKnight and Australian Archives* (1992) 28 ALD 95, 117, where in regard to the release of ASIO records after 30 years, the Tribunal (constituted by the present writer) stressed that even though security considerations were entailed, a sense of proportion should guide decisions about the records of individuals. Cf *Re SRB and Department of Health – Local Government and Community Services* (1994) 33 ALD 171, 180 where, when discussing unreasonableness, the Tribunal described its task as

Similarly, where State legislation provides for merits review by way of appeal to State courts or tribunals, proportionality may have a more direct role to play as the basis on which an appeal de novo should be allowed.

Further, where State administrative tribunals or courts are required to determine whether certain conditions imposed in respect of planning are 'reasonable' or not, proportionality can be more directly invoked than in the case of judicial review. As Wade and Forsyth point out,⁹⁰ statutory reasonableness, including the power in an administrator to take such action as is 'reasonably necessary' (or 'reasonable') imports the standard of the reasonable person, though the degree of objectivity will vary with the statutory concept and purpose.⁹¹ It is on this basis that criticism can be made of the decision of the Western Australian Town Planning Appeals Tribunal in the decision of *Hill v the State Planning Commission*.⁹² After a careful examination of the way in which the Australian courts have not fully accepted proportionality as a separate ground of judicial review,⁹³ the Tribunal declined to apply proportionality as the measure of whether certain conditions had miscarried. But in so doing it failed to distinguish between the functions of *judicial*, as against *administrative*, review. As the Tribunal was expected to review the matter on its merits, proportionality could well have been an appropriate guide.

CONCLUSION

In 1985 Lord Diplock turned the diamond of judicial review and exposed an exciting new facet, namely, the prospect that proportionality could emerge as a separate ground of review. Ten years later, two trends are apparent. First, there is a conservative tendency to disclaim proportionality as a separate ground, preferring simply to incorporate it within the traditional boundaries of *Wednesbury* unreasonableness. For the reasons given above, there is certainly scope to reinterpret *Wednesbury* unreasonableness, in at least some respects, in terms of proportionality.

weighing up the considerations for and against the situation and forming a balanced judgment of reasonableness, based on objective evidence.

90. Supra n 11, 453-454.

91. An analogy here is a determination whether an action to dismiss an employee is unreasonable: s 170DE of the Industrial Relations Act 1988 (Cth). In *Gregory v Philip Morris* (1988) 80 ALR 455 Jenkinson J indicated this was a question of fact, determinable by reference to moral values and prudential considerations current in the community as to what a 'reasonable' employer would have done in the circumstances.

92. Supra n 1.

93. Supra n 1, 364-365, including the comment by Ipp J in *Rogers v Marion* (1990) 3 WAR 279, 290 that, 'no Australian authority in support of the "proportionality" principle as mooted by Lord Diplock was cited. I have not been able to find such authority.' His Honour's comment was true in 1990.

But that requires a court to appreciate that *Wednesbury* unreasonableness may inform and illuminate the assessment by providing a more satisfactory explanation of why the court holds a decision to be ultra vires. In other instances, proportionality can be seen to function quite separately as a basis for judging whether an administrative decision or delegated legislation bears a sufficient relationship with the grant of the head power, particularly if that head power is conferred in purposive terms. In each of these cases, proportionality is not seen to operate independently but merely to provide an alternative explanation of grounds already well established in traditional administrative law.

It is perhaps outside the area of judicial review, however, that proportionality may have the most significant role. As pointed out in this paper, the prospect of using it in administrative review is tempting. In that respect, the continental notion of narrower margins of appreciation should be more frequently used by administrative tribunals. Particularly where the human or social rights of individuals are concerned the time may well be coming for proportionality to assume centre stage.
