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Freedom of Religion under the Australian Constitution: Is Proportionality the Answer?

Guy Baldwin*

Under the current approach set out in the 1997 'Stolen Generations' case of Kruger v Commonwealth, *the free exercise clause of s 116 of the Australian Constitution is only violated if a law has the purpose of prohibiting the free exercise of religion. In the light of the introduction of structured proportionality testing in some areas of Australian constitutional law, scholars have recently considered whether the current test under the free exercise clause might be replaced with proportionality, given its current momentum. However, proportionality is a controversial test whose introduction to Australian law has been contested. This article seeks to contribute to the debate over proportionality in Australian law by outlining a case for why proportionality should not be adopted in respect of the free exercise clause under s 116. After first considering the current interpretation given to the free exercise clause, the article assesses proportionality as a possible test. It contends that proportionality is a flawed test because its final balancing stage involves a weighing of incommensurable values that confers excessive discretion on the judiciary. Rather than proportionality, the High Court should return to earlier dicta and develop a means-end test of reasonable necessity for assessing interference with the free exercise of religion.*

INTRODUCTION

Very few human rights are protected by the Australian Constitution, though there is statutory human rights protection in some jurisdictions in Australia.[1] One of the few protections for human rights in the Australian Constitution is that in respect of the free exercise of religion, provided for by s 116 of the Constitution.[2] The heading of s 116 is 'Commonwealth not to legislate in respect of religion'. Reflecting influence from the First Amendment to the United States Constitution,[3] the text of the provision is as follows: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for

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[1] See *Human Rights Act 2004* (ACT), *Human Rights Act 2019* (Qld), and *Charter of Human Rights and Responsibilities Act 2006* (Vic). Given the presence at the constitutional level of a limited number of protections, the Australian Constitution has been described as providing for a 'partial bill of rights': Rosalind Dixon, 'An Australian (Partial) Bill of Rights' (2016) 14(1) *International Journal of Constitutional Law* 80.

[2] The High Court construes s 116 (including the free exercise clause) as placing a limitation on Commonwealth legislative power rather than as conferring a right: see, eg, *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559, 605, 609 (Stephen J), 615–16 (Mason J), 652–53 (Wilson J) ('*DOGS Case*'); *Kruger v Commonwealth* (1997) 190 CLR 1, 46 (Brennan CJ), 124–5 (Gaudron J), 147 (Gummow J) ('*Kruger*'). Nonetheless, in substance the provision protects a human right, since the Commonwealth Parliament is disabled from passing laws for prohibiting the free exercise of religion: see, eg, *DOGS Case* (n 2) 603 (Gibbs J).

[3] See, eg, Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 83. The First Amendment to the US Constitution relevantly provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …'. In addition, the fourth clause of s 116, prohibiting religious tests, resembles a clause of art VI of the US Constitution.

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prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

The provision has four clauses; this article focuses on the third clause relating to the free exercise of religion. In practice, the free exercise clause has been given little effect and never found to be violated by the High Court. Under the current approach, set out in the 1997 'Stolen Generations' case of *Kruger v Commonwealth* ('*Kruger*'),[4] the free exercise clause is only violated if a law has the purpose of prohibiting the free exercise of religion. In the light of the introduction of structured proportionality testing in some areas of Australian constitutional law,[5] scholars have recently considered whether the current test under the free exercise clause of s 116 might be replaced with proportionality, given its current momentum.[6] However, proportionality is a controversial test whose introduction to Australian law has been contested.

This article seeks to contribute to the debate over proportionality in Australian law by outlining a case for why proportionality should not be adopted in respect of the free exercise clause of s 116. After first considering the current interpretation given to the free exercise clause, the article assesses proportionality as a possible test. It contends that proportionality is a flawed test because its final balancing stage involves a weighing of incommensurable values that confers excessive discretion on the judiciary. Rather than proportionality, the High Court should return to earlier dicta and develop a means-end test of reasonable necessity for assessing interference with the free exercise of religion.

The article proceeds in two main parts. First, I outline and critique the current interpretation of the free exercise clause, tracing the three High Court decisions that have considered it, culminating in the decision in *Kruger*. I advance the view that the 'purpose' test set out in that decision is inapposite, in particular because it focuses on the nature of the law interfering with religious exercise rather than the justification for the interference. Second, I discuss whether to introduce proportionality under the free exercise clause of s 116 as a replacement for the purpose test, putting forward a possible alternative approach instead. Adopting either this alternative approach, or indeed proportionality, might well have led to a different result for the victims of the Stolen Generations in *Kruger*.

I. THE CURRENT INTERPRETATION OF THE FREE EXERCISE CLAUSE

In more than 100 years, there have only been three High Court cases interpreting the free exercise clause of s 116: *Krygger v Williams* ('*Krygger*')[7] in 1912, *Adelaide Company of Jehovah's Witnesses v Commonwealth* ('*Jehovah's Witnesses*')[8] in 1943, and *Kruger*[9] in 1997. These cases each adopted different approaches, culminating in the purpose test set out in *Kruger.* In this part, I first outline these cases before turning to a critique of the current law in

[4] *Kruger* (n 2).
[5] See *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); *Palmer v Commonwealth* (2021) 272 CLR 505 ('*Palmer*').
[6] See, eg, Benjamin B Saunders and Dan Meagher, 'Taking Seriously the Free Exercise of Religion under the Australian Constitution' (2021) 43(3) *Sydney Law Review* 287; Anthony Gray, 'Proportionality in Australian Constitutional Law: Next Stop Section 116?' (2022) 1 *Australian Journal of Law and Religion* 103; Dane Luo, 'The "March of Structured Proportionality": The Future of Rights and Freedoms in Australian Constitutional Law' (Blog Post, 8 April 2022) <https://www.auspublaw.org/blog/2022/04/the-march-of-structured-proportionality-the-future-of-rights-and-freedoms-in-australian-constitutional-law>.
[7] (1912) 15 CLR 366 ('*Krygger*').
[8] (1943) 67 CLR 116 ('*Jehovah's Witnesses*').
[9] *Kruger* (n 2).

the form of the purpose test. I argue that this test is not a suitable one for the free exercise clause as it misdirects the inquiry, turning it away from the question of the justification for a law that burdens the free exercise of religion, towards a focus on the nature of the law.

(a) High Court Decisions on the Free Exercise Clause

In *Krygger*, s 116 was found not to apply to a conscientious objector who cited his religious beliefs as a basis for refusing to engage in military training (including for non-combatant duties) because according to Griffith CJ — who set out his views in a very brief judgment — military service had 'nothing at all to do with religion' and therefore it was 'not prohibiting him from a free exercise of religion'.[10] Griffith CJ reasoned as follows:

> It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of s 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.[11]

Barton J, the other member of the Court sitting in the case, added: 'I think this objection is as thin as anything of the kind that has come before us'.[12] Although the Court's reasoning is vague and dismissive, it seems to turn on a distinction between belief and conduct, in which there is freedom of belief but s 116 does not extend to conduct, even if that conduct is required or motivated by a person's religious convictions. A similar distinction was emphasised by the US Supreme Court in *Reynolds v United States* in 1879.[13] Waite CJ (delivering the opinion of the Court) drew a distinction between 'practices', which were said not to be protected by the Free Exercise Clause of the First Amendment, and 'belief', which was protected.[14] However, US courts have long since adopted a different approach to the First Amendment.[15]

The next case in which the High Court considered the free exercise clause was *Jehovah's Witnesses*, which concerned the Commonwealth dissolving a group of Jehovah's Witnesses and taking possession of its premises pursuant to national security regulations, on the basis that the group was prejudicial to the defence of the Commonwealth and the efficient prosecution of World War II.[16] The group had been preaching that the British Empire and also other organised political bodies were organs of Satan.[17] In this decision, the Court did not rely upon any distinction between conduct and belief.[18] Instead, the focus was on the fact that the free exercise of religion under s 116 was not 'absolute'.[19] Because of the prejudice to the

[10] *Krygger* (n 7) 369, 371 (Griffith CJ).
[11] Ibid 369 (Griffith CJ).
[12] Ibid 373 (Barton J).
[13] (1879) 98 US 145.
[14] Ibid 166. This approach of protecting only belief seems inadequate because it does not give real protection to the free exercise of religion. As Sachs J of the Constitutional Court of South Africa has put it, '[r]eligion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture': *Christian Education South Africa v Minister of Education* (2000) 4 SA 757, [33]. Some religious freedom provisions, such as art 9 of the *European Convention on Human Rights*, make explicit that manifestations of religious belief are protected, not merely the holding of beliefs (*forum internum*).
[15] For the current approach in the US, see *Employment Division v Smith* (1990) 494 US 872 and *Church of Lukumi Babalu Aye v Hialeah* (1993) 508 US 520 ('*Lukumi*').
[16] *Jehovah's Witnesses* (n 8) 145 (Latham CJ).
[17] Ibid 146 (Latham CJ).
[18] Ibid 124, 129 (Latham CJ).
[19] Ibid 127 (Latham CJ), 149 (Rich J), 154 (Starke J), 157 (McTiernan J), 160 (Williams J).

prosecution of the war thought to be posed by the Jehovah's Witnesses group, the Court found that s 116 was not violated, though it struck down part of the regulations on other grounds.[20]

Most recently, *Kruger* related to a 1918 Ordinance empowering the 'Chief Protector of Aborigines' to undertake the care, custody, or control of any Aboriginal or 'half-caste' person if 'in his opinion it is necessary or desirable in the interests of the Aboriginal or half-caste for him to do so', as well as to 'cause any Aboriginal or half-caste to be kept within the boundaries of any reserve or Aboriginal institution'.[21] The resulting abductions of large numbers of Indigenous children from their families have come to be known as the Stolen Generations.[22] This Ordinance was challenged on various grounds before the High Court, 40 years after its repeal in 1957. In respect of the challenge under s 116, the claim was that the removal of Indigenous children violated the free exercise clause because it interfered with their ability to practise religion. However, the Ordinance was found not to violate s 116 because it was said not to have the purpose of prohibiting the free exercise of religion.

The reasoning in *Kruger* was again different from the previous two cases and turned on the use of the word 'for' in the phrase 'any law … for prohibiting the free exercise of any religion' in s 116. This word was now read to mean, as Gummow J put it, that '[t]he question becomes whether the Commonwealth has made a law in order to prohibit the free exercise of any religion, as the end to be achieved'.[23] Most members of the Court found that the Ordinance did not have that purpose,[24] while Gaudron J did not consider that whether the Ordinance had the proscribed purpose could 'presently be determined' and reached no decision on the issue.[25] Dawson J, with whom McHugh J agreed, also rejected the claim on the different basis that s 116 did not apply to the Northern Territory.[26] In the result, the reading of s 116, alongside the rejection of other bases of challenge, meant that the Ordinance was found to be constitutional.

(b) Critique of the Purpose Test

There are a number of difficulties with the purpose test under s 116 as set out in *Kruger.* A significant one is that the test is not textually compelled. 'Purpose' is only one possible reading of 'for' in s 116. 'For' can also mean 'in respect of or with reference to',[27] making it, as Stephen McLeish puts it, a 'tenuous basis for directing the whole interpretive enterprise'.[28] Luke Beck

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[20] Ibid 168.
[21] *Kruger* (n 2) 33–5 (Brennan CJ), quoting *Aboriginals Ordinance 1918* (NT) ss 6, 16.
[22] See generally Human Rights and Equal Opportunity Commission, *Bringing Them Home* (Report, April 1997).
[23] *Kruger* (n 2) 160 (Gummow J, Dawson J agreeing at 60–1); see also at 40 (Brennan CJ), 86 (Toohey J).
[24] Ibid 40 (Brennan CJ), 60–1 (Dawson J), 86–7 (Toohey J), 161 (Gummow J).
[25] Ibid 134 (Gaudron J). Gaudron J, in dissent, instead considered provisions of the Ordinance to be invalid on the basis of an implied freedom of movement and association: ibid 130, 141. Toohey J also considered that there was an implied freedom of movement and association, as well as a principle of legal equality, but did not reach a conclusion about whether provisions of the Ordinance were invalid as a result: ibid 97–8.
[26] Ibid 60 (Dawson J, McHugh J agreeing at 141–2). Section 116 is expressed to apply to the Commonwealth government, rather than the States, though most members of the Court in *Kruger* were prepared to consider its application to the Northern Territory. Attempts to amend s 116 to apply to the States have failed at referenda: see Constitution Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944 (Cth) s 2; Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth) s 4.
[27] See, eg, *Australian Oxford Dictionary* (2nd ed, 2004), 'for'. See also *Lamshed v Lake* (1958) 99 CLR 132, 141 (Dixon CJ) (interpreting 'for' as meaning 'with respect to' in the context of s 122).
[28] Stephen McLeish, 'Making Sense of Religion and the Constitution' (1992) 18(2) *Monash University Law Review* 207, 212. For the narrow and literal approach that the High Court has taken to some express protections, see George Williams, 'Civil Liberties and the Constitution: A Question of Interpretation' (1994) 5(2) *Public Law Review* 82, 89.

similarly points out that the purpose test is a 'narrow and pedantic' interpretation at odds with the High Court's general approach to constitutional interpretation.[29] Moreover, it is not a historically sound interpretation that aligns with the intent of the framers. Beck outlines that the drafting history of s 116 seems to indicate that the intention was for it to have a broad, not narrow, effect; the use of the word 'for' was apparently not a deliberate choice to narrow the scope of the provision.[30]

Equally important, the purpose test was not compelled by precedent: although consonant with the approach to the establishment clause taken by several members of the Court in the *DOGS Case*,[31] it departed, without explanation, from the approach of the Court to the free exercise clause taken in *Jehovah's Witnesses*. Unlike the reasoning in *Kruger*, this was a justificatory analysis that treated the purpose of the law as merely an aspect of assessing an interference with free exercise.[32] The members of the Court in *Kruger* were seemingly aware of the discontinuity with precedent. As Gaudron J said — considering the dicta of Latham CJ in *Jehovah's Witnesses* — purpose was (now) 'the only matter to be taken into account in determining whether a law infringes s 116'.[33] However, it was not made clear for what reason the approach in *Jehovah's Witnesses* had been rejected.

Commentators have pointed out that the purpose test seems to deprive the free exercise clause of meaningful operation. This view is bolstered by the decision in *Kruger*, as the extreme seeming interferences with free exercise of religion that occurred in that case were immune from challenge under s 116 since the Court concluded that they did not have the proscribed purpose. As Carolyn Evans puts it, it is not sufficient under the purpose test 'to show that the effect of the law is to restrict or even seriously undermine … free[] exercise'.[34] Benjamin Saunders and Dan Meagher argue that this 'has made the clause of little or no effect in practice, … affording little protection to the free exercise of religion'.[35] Given this concern, it might be said that the better approach to an express constitutional protection such as s 116 is to give it meaningful scope.

However, by way of partial qualification to the point, the narrowness of a purpose test can vary based on how it is interpreted. In the US, courts have increasingly managed to find proscribed purposes under the First Amendment's neutrality test — which looks to whether the object of a law is to restrict the free exercise of religion — due to some creative (and at times rather strained) readings of the impugned laws.[36] Much depends on what approach a court takes to discerning the purpose of a law. This directs attention to an ambiguity under the purpose test as articulated in *Kruger* — namely, how deep courts are willing to dig to find a proscribed purpose.[37] Is a court just looking at the face of the legislation, or beyond it, at parliamentary

[29] Luke Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Australian Constitution' (2016) 44(3) *Federal Law Review* 505, 529.
[30] Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018) 96, 161–2. See also Beck (n 29) 514–20.
[31] See *DOGS Case* (n 2) 579 (Barwick CJ), 598 (Gibbs J), 609 (Stephen J), 615–16 (Mason J), 653 (Wilson J).
[32] See *Jehovah's Witnesses* (n 8) 132 (Latham CJ).
[33] *Kruger* (n 2) 132 (Gaudron J).
[34] Carolyn Evans, *Legal Aspects of the Protection of Religious Freedom in Australia* (2009) 23. However, the law's effect might be considered to demonstrate its purpose: see *Kruger* (n 2) 131–2 (Gaudron J), 160–1 (Gummow J).
[35] Saunders and Meagher (n 6) 288.
[36] See generally Guy Baldwin, 'The Coronavirus Pandemic and Religious Freedom: Judicial Decisions in the United States and United Kingdom' (2021) 26(4) *Judicial Review* 297.
[37] See, eg, *Kruger* (n 2) 160 (Gummow J). See also Nathan Van Wees, 'Judicial Review of Legislators' Motives' (2017) 45(4) *Federal Law Review* 681.

materials? Or does the court infer the proscribed purpose from the mere fact of differential treatment of religious exercise, as the US Supreme Court often does?

Even if a purpose test is not necessarily narrow, since whether that is so depends on the approach taken by the courts, its focus — on the nature of the law that interferes with free exercise of religion rather than its justification — seems misplaced. Such a focus can lead to distorted results because if a law lacks the proscribed purpose it is valid even if it has a burden on freedom of religion that has minimal justification. Consider as a hypothetical example if Parliament banned the consumption of carrots out of an erroneous health concern, and a religion existed for which carrot consumption was an important practice. Despite the negligible, indeed mistaken, justification for the ban, and the burden it imposed on a religious practice, since the law's purpose was health related it would not be in violation of the free exercise clause of s 116 under the purpose test.

Equally, a law might have the proscribed purpose, but with good reason, and yet be invalid. A religious practice such as animal sacrifice might be deliberately targeted out of concerns for the welfare of non-human animals,[38] yet the law would fail the purpose test with no consideration of whether it was justified because it has the purpose of prohibiting a religious practice. Such a test might also overlook the impact of a religious practice on the rights of others: provided that a law has the proscribed purpose, it would not matter if the religious practice that is constitutionally protected harms others. For these reasons, a focus on the nature of the law diverts attention from more relevant matters. To give the free exercise clause of s 116 an operation that protects religious freedom within appropriate limits — the concern to which the free exercise clause is directed — it is preferable for the legal test to turn not on the nature of a law interfering with free exercise, but on its justification.

Although in all three cases in which the free exercise clause was considered the High Court rejected the religious freedom claim, of these three cases, the judgments in *Jehovah's Witnesses* represented the best approach to the clause because they emphasised the non-absoluteness of religious freedom. As Latham CJ suggested in *Jehovah's Witnesses*, the issue under the free exercise clause might appropriately be understood as 'whether a particular law is an undue infringement of religious freedom'.[39] A test that considers this question of justification, while taking into account any effect on the rights of others of the religious practice that is sought to be protected, would give the free exercise clause of s 116 meaningful operation while also constraining its scope. The question that then arises is what the most appropriate test is for assessing a law's justification.

The obvious choice may seem to be structured proportionality. For example, Saunders and Meagher consider that proportionality would 'provide the analytical tools needed: to perform a justification analysis that transparently ventilates and evaluates the competing rights and interests in legislative play; and to ensure that it is done in a manner that is sufficiently context-sensitive', though they consider the alternative of 'calibrated scrutiny' advanced by Gageler J to do so as well.[40] Anthony Gray makes a prediction: 'Given the embrace of proportionality by

[38] See *Lukumi* (n 15). See also Guy Baldwin, 'Rawls and Animal Moral Personality' (2023) 13(7) *Animals* 1238. Under the US test, even if a law is considered not to be neutral and of general applicability, it can still be found to be constitutional at the strict scrutiny stage if it is narrowly tailored to serve a compelling state interest. However, there seems to be no such additional stage in the *Kruger* test, which suggests that if a law has the proscribed purpose, it is unconstitutional, irrespective of any other considerations: cf *Kruger* (n 2) 133–4 (Gaudron J).
[39] *Jehovah's Witnesses* (n 8) 131 (Latham CJ).
[40] Saunders and Meagher (n 6) 314.

a majority of the High Court in relation to both express and implied freedoms in the Australian Constitution, it is considered likely that, when the Court next considers a s 116 challenge to a law, it will apply proportionality analysis to that section.'[41]

II. EVALUATING PROPORTIONALITY AS AN ALTERNATIVE TEST

Is proportionality the right choice for a test of justification to apply in relation to the free exercise clause of s 116? Since it is a test of justification, it may be accepted that proportionality has one clear advantage over the purpose test applied in *Kruger*. However, it also has significant problems. In this part, I first set out the circumstances of the introduction of proportionality in Australia, before critiquing proportionality, and finally advancing an alternative proposal. I argue that proportionality is not the best possible test for the free exercise clause of s 116, and instead make a suggestion for a test based on High Court dicta in *Jehovah's Witnesses*.

(a) The Introduction of Proportionality to Australian Constitutional Law

Proportionality was developed in Germany before it spread internationally.[42] Its relevance to Australian constitutional law was previously doubted in High Court dicta.[43] Nonetheless, it has come to be accepted as the test in respect of the implied freedom of political communication and s 92, which is a constitutional provision that concerns the freedom of interstate trade, commerce, and intercourse.[44] The pre-proportionality test for the implied freedom was set out by a unanimous seven member High Court in *Lange v Australian Broadcasting Corporation* ('*Lange*') in 1997.[45] The test in *Lange* asked: does the impugned law effectively burden freedom of communication about government or political matters, and if it does, is the law reasonably appropriate and adapted to serve a legitimate end which is compatible with the maintenance of the system of representative and responsible government?[46]

The relevance of structured proportionality to Australian constitutional law was raised by the current Chief Justice at the time of writing, Susan Kiefel, while a puisne Justice of the Court, in *Rowe v Electoral Commissioner* in 2010 and some subsequent cases.[47] Proportionality was then adopted in respect of the implied freedom of political communication in *McCloy v New*

[41] Gray (n 6) 104.

[42] See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) ch 7; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) ch 2. See also Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8(2) *International Journal of Constitutional Law* 263.

[43] See, eg, *Cunliffe v Commonwealth* (1994) 182 CLR 272, 356–7 (Dawson J); *Leask v Commonwealth* (1996) 187 CLR 579, 601 (Dawson J), 615–16 (Toohey J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197–200 [34]–[39] (Gleeson CJ); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–9 [17] (Gleeson CJ). For commentary on the previous position, see generally Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21(1) *Melbourne University Law Review* 1; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668 ('Limits of Constitutional Text and Structure').

[44] See *McCloy* (n 5); *Palmer* (n 5). Cf *Murphy v Electoral Commissioner* (2016) 261 CLR 28, in which proportionality was not applied in relation to the franchise: at 52–3 [37]–[39] (French CJ and Bell J).

[45] (1997) 189 CLR 520 ('*Lange*').

[46] Ibid 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[47] (2010) 243 CLR 1, 131–45 [424]–[478] (Kiefel J). See also *Momcilovic v The Queen* (2011) 245 CLR 1; Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *Monis v The Queen* (2013) 249 CLR 92; *Tajjour v State of New South Wales* (2014) 254 CLR 508.

South Wales ('*McCloy*') in 2015 by a majority comprising French CJ, Kiefel, Bell and Keane JJ.[48] The change altered the test for the implied freedom set out in *Lange* (as slightly amended in 2004 in *Coleman v Power*).[49] The plurality judgment did not explain how the new test could be supported by the text and structure of the *Constitution*, instead describing proportionality as a 'tool of analysis' and placing emphasis on benefits for 'transparency' in applying proportionality because it was 'structured'.[50] The plurality wrote that:

> Proportionality provides a uniform analytical framework for evaluating legislation which effects a restriction on a right or freedom. It is not suggested that it is the only criterion by which legislation that restricts a freedom can be tested. It has the advantage of transparency. Its structured nature assists members of the legislature, those advising the legislature, and those drafting legislative materials, to understand how the sufficiency of the justification for a legislative restriction on a freedom will be tested.[51]

However, the change was criticised by Gageler J and Gordon J in separate judgments in that case and in the years since in other cases.[52] In *McCloy,* Gageler J described the move of the majority as the 'wholesale importation' of a 'one size fits all' approach, without the benefit of argument on the point from counsel, and raised concerns about the 'adequacy' stage of the test in particular.[53] Gordon J wrote that 'there can be no automatic adoption or application of forms of legal analysis made in overseas constitutional contexts', which might not align with 'the constitutional framework which underpins those principles in Australia'.[54] Despite this criticism, proportionality has the support of a majority, including recent appointments Steward J and Gleeson J (though the former has doubted whether the implied freedom exists).[55] In *Palmer v Commonwealth* ('*Palmer*'), a case that concerned border closures during the coronavirus pandemic, proportionality was extended by Kiefel CJ and Keane J and Edelman J to s 92, again over the objections of Gageler J and Gordon J.[56]

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[48] *McCloy* (n 5) 193–5 [2]–[3] (French CJ, Kiefel, Bell and Keane JJ).
[49] (2004) 220 CLR 1, 51 [95]–[96] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J).
[50] *McCloy* (n 5) 200–1 [23], 213 [68], 215–16 [74] (French CJ, Kiefel, Bell and Keane JJ).
[51] Ibid 215–16 [74] (French CJ, Kiefel, Bell and Keane JJ).
[52] For a summary of the criticisms, see Chordia, *Proportionality in Australian Constitutional Law* (n 42) 181–8.
[53] *McCloy* (n 5) 234 [140], 235 [142], 236 [145] (Gageler J). Gageler J has advanced a preferred approach of 'calibrated scrutiny', which 'adjusts the level of scrutiny brought to bear on an impugned law to the nature and intensity of the risk which the burden imposed by the law on political communication poses for the constitutionally prescribed system of representative and responsible government': see *Clubb v Edwards* (2019) 267 CLR 171, 225 [161] ('*Clubb*'). For suggestions of a hybrid approach between proportionality and calibrated scrutiny, see Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92; Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123; Anne Carter, 'Bridging the Divide? Proportionality and Calibrated Scrutiny' (2020) 48(2) *Federal Law Review* 282.
[54] *McCloy* (n 5) 288–9 [339] (Gordon J).
[55] See *LibertyWorks v Commonwealth* (2021) 274 CLR 1, 23 [46] (Kiefel CJ, Keane and Gleeson JJ), 95 [247] (Steward J).
[56] *Palmer* (n 5) 530 [62] (Kiefel CJ and Keane J), 556 [151] (Gageler J), 572 [198] (Gordon J), 597 [264] (Edelman J). The extension of proportionality to s 92 was in some ways surprising because, as Chordia observes, s 92 purports to provide an absolute standard. Proportionality is usually a test for qualified rights and freedoms, and seems unsuited to the interpretation of such a provision; the more obvious choice would have been a test of characterisation: see Shipra Chordia, 'Border Closures, COVID-19 and s 92 of the Constitution – What Role for Proportionality (If Any)?' (Blog, 5 June 2020) AUSPUBLAW. <https://www.auspublaw.org/blog/2020/06/border-closures-covid-19-and-s-92-of-the-constitution>; Chordia, *Proportionality in Australian Constitutional Law* (n 42) ch 7.

To guide the discussion of whether proportionality should be applied in respect of the free exercise clause of s 116, it is helpful to set out the current test under the implied freedom of political communication, drawing from the judgment of Kiefel CJ and Keane J in *Farm Transparency v New South Wales* ('*Farm Transparency*').[57] This case concerned a challenge to what are sometimes called 'ag gag' laws, that is, laws that have the effect of preventing the communication or publication of recordings, taken as a result of a trespass, of the slaughter or mistreatment of animals in the agriculture industry.[58] The High Court, by majority, upheld the laws as proportionate to a legitimate end in their application to recordings of lawful activity (at least where communicated or published by a person complicit in the recording being obtained exclusively in breach of the statute).[59] The case is the most recent application of structured proportionality by the Court at the time of writing, handed down in August 2022. The test in respect of the implied freedom of political communication as stated by Kiefel CJ and Keane J may be summarised as follows:

1. There is an initial question of whether the implied freedom of political communication is burdened having regard to the legal and practical operation of the impugned law.[60]
2. If the law burdens the implied freedom, the next question is the legitimacy of the purpose of the law. The purpose is required to be compatible with the system of representative government for the law to be valid.[61]
3. Then there is a three-stage proportionality assessment:
    a. First, the law must be suitable, which requires that its measures are rationally connected to the purpose they seek to achieve.[62]
    b. Second, the law must be necessary. This test looks to whether there is an alternative measure available which is equally practicable when regard is had to the purpose pursued, and which is less restrictive of the freedom than the impugned provision. The alternative measure must be obvious and compelling.[63]
    c. Third, the law must be adequate in its balance. The current position is that a law is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom.[64]

The proportionality test as stated by Kiefel CJ and Keane J in *Farm Transparency* has changed since its original articulation by French CJ, Kiefel, Bell and Keane JJ in *McCloy* in 2015. In *Brown v Tasmania* ('*Brown*') in 2017, the plurality judgment of Kiefel CJ, Bell and Keane JJ corrected a point of confusion by making clear that a court assesses the legitimacy of a law's purpose without also assessing the means at that stage; rather, the means are assessed at the later stages, through the proportionality test.[65] In *Clubb v Edwards* ('*Clubb*') in 2019, Kiefel CJ, Bell and Keane JJ tacitly adopted an observation made by Nettle J in *Brown*, requiring at the adequacy stage that 'it is only if the public interest in the benefit sought to be achieved by

[57] (2022) 96 ALJR 655 ('*Farm Transparency*').
[58] Ibid 662–3 [1]–[5] (Kiefel CJ and Keane J).
[59] Ibid 708–9.
[60] Ibid 666 [27] (Kiefel CJ and Keane J).
[61] Ibid 666–7 [29] (Kiefel CJ and Keane J).
[62] Ibid 668 [35] (Kiefel CJ and Keane J).
[63] Ibid 669–70 [46] (Kiefel CJ and Keane J).
[64] Ibid 671 [55] (Kiefel CJ and Keane J).
[65] *Brown v Tasmania* (2017) 261 CLR 328, 363–4 [104] (Kiefel CJ, Bell and Keane JJ) ('*Brown*'). Cf *McCloy* (n 5) 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ).

the legislation is *manifestly* outweighed by an adverse effect on the implied freedom that the law will be invalid'.[66]

(b) Critique of Proportionality

Proportionality has so far been extended to two areas of Australian constitutional law — the implied freedom of political communication and s 92 — but not to the free exercise of religion under s 116. Should it be so extended? Certainly, proportionality has a degree of momentum, and — although proportionality is a controversial test internationally — there has been little criticism of it in the commentary in Australia. But whether proportionality is the best possible test for the free exercise clause may be doubted. The difficulty with proportionality is that, of the three stages of the test (suitability, necessity, and adequacy), only the necessity stage appears to be both useful and an appropriate task for the judiciary to perform.

Suitability, which in Australia requires that the impugned measures are rationally connected to the purpose that they seek to achieve, does not add very much because a law that is not suitable will inevitably fail necessity, a more stringent test. That is, it will not be possible to say that a law that has no rational connection to its purpose represents the least restrictive means of pursuing that purpose. Suitability is a low bar: as Shipra Chordia says, 'it will be a rare case where a law is said by the government to be pursuing a particular purpose when it is indeed not pursuing that purpose'.[67] For example, in *Farm Transparency*, suitability was not even put in issue by the plaintiffs.[68]

Possibly the strongest argument that can be made in favour of the suitability stage of proportionality is that it allows a court, in a particularly clear case, to invalidate a law without recourse to the more evaluative assessments taken at the necessity and balancing stages. Further, in so doing, it might enable a court to send a stronger signal to the legislature than would be possible at the later stages — specifically, that the impugned law lacks even a rational connection with its purpose. Although this much may be true, it is a slight benefit at best, since it is a rare law that would fail such a test, and such a law would be caught at the necessity stage anyway, so suitability would have no impact on the outcome. In the vast majority of cases, the suitability stage merely adds an unnecessary step.

However, the main problem with proportionality is the final stage requirement of adequacy (also referred to as the balancing stage or proportionality *stricto sensu*). This stage of the test seems ill suited to be performed by the judiciary, because it is not well placed to 'balance' the benefit of a law against the adverse effect on a freedom. The objection is often put in terms of an 'incommensurability' problem because there is no common measure between the two things that are being compared.[69] In practice, balancing the benefit of a law against the adverse effect

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[66] *Clubb* (n 53) 200–1 [69]–[70] (Kiefel CJ, Bell and Keane JJ) (emphasis added), citing *Brown* (n 65) 422–3 [290] (Nettle J). While all three Justices were on the High Court, Kiefel CJ, Bell and Keane JJ had a tendency to agree with each other and produce joint judgments in almost every case in which they sat together. For concerns about this tendency, which might have been important to the adoption of proportionality by a 4-3 majority in *McCloy*, see Jeremy Gans, 'The Great Assenters', *Inside Story* (Web Page, 1 May 2018) <https://insidestory.org.au/the-great-assenters/>.

[67] Chordia, *Proportionality in Australian Constitutional Law* (n 42) 52. For a possible rare case, see *Brown* (n 65) 371 [135]–[136] (Kiefel CJ, Bell and Keane JJ).

[68] *Farm Transparency* (n 57) 668 [35] (Kiefel CJ and Keane J).

[69] See, eg, Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) *International Journal of Constitutional Law* 468, 471–5. For opposing views, see, eg, Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4(1) *Law & Ethics of Human Rights* 1, 15–16.

on a freedom entails such a broad discretion to evaluate the merits of a law that it resembles something of a political exercise, rather than a legal test. In this vein, Patrick Elias writes in respect of proportionality as follows:

> The controversial area is [the final stage of proportionality], the balance between the individual right and the countervailing public interest, and cases frequently turn on this assessment. This is not a simple comparison because one is not comparing like with like; there are no obvious objective criteria for making the assessment. In truth there is little which can properly be called judicial in this exercise, and the fact that Parliament has chosen to give these powers to the judges does not alter that fact. *The courts are being given a power that is often essentially political in nature*.[70]

In response to this problem, Chordia argues that 'incommensurability may be considered inherent to judicial decision-making' because it is found in 'numerous' areas of law.[71] However, there may be a difference in the nature of the task between judicial review for constitutionality and other areas of law, since not all judicial decision-making involves reviewing Acts of Parliament and determining their validity. A judge finding a law disproportionate under the implied freedom or s 92 — or the free exercise clause of s 116 if proportionality is adopted in that context — can strike it down in the Australian system. Other areas of law in which incommensurability is said to arise do not necessarily have those stakes; Chordia gives the example of damages in a tort judgment, but such a judgment only affects the parties to the case.[72] It is legitimate to question the wisdom of investing judges with such a large discretion in the constitutional law context even if some discretions are accepted elsewhere.

There may also be a basis within some other tests for comparisons to take place, whereas no such basis is apparent in proportionality. Ruth Chang describes how comparability proceeds with respect to an evaluative 'covering consideration'.[73] The breach of duty inquiry in negligence may be an example, since the factors there appear to be related by the consideration of what a reasonable person would have done in the circumstances.[74] What assists a court in comparing, say, the burden of taking precautions with the likely seriousness of harm is the effect of those factors on the behaviour of a reasonable person in response to a risk of harm. In

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[70] Patrick Elias, 'Reflections on Judicial Power and Human Rights' in Alan Bogg, Jacob Rowbottom and Alison L Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Bloomsbury, 2020) 3, 10 (emphasis added). Elias writes in the context of the UK's proportionality test under the *Human Rights Act 1998* (UK). It is worth noting that in *McCloy*, the High Court arrogated the power to invalidate statutes under the proportionality test to itself. That is different from a potential situation in which courts are required by statute to compare certain factors, even if those factors are considered to be incommensurable.

[71] Chordia, *Proportionality in Australian Constitutional Law* (n 42) 58.

[72] Ibid. These stakes might also constitute a point of difference between a system like Australia's and a system of review without strike-down powers like that of the UK under the *Human Rights Act 1998* (UK). It may also be relevant that in other areas of law where factors are compared, the question tends to turn on the facts in the individual case. The final balancing stage of proportionality often entails an abstract assessment about social values, though facts may still be relevant: see Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart, 2022).

[73] See Ruth Chang, 'Incommensurability (and Incomparability)' in Hugh LaFollette (ed), *The International Encyclopedia of Ethics* (Blackwell, 2013) 5–8. See also Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1994) 45(4) *Hastings Law Journal* 813 (pointing to the possibility of ordinally comparing some incommensurable considerations even if they cannot be measured against a common cardinal scale).

[74] See, eg, *Civil Liability Act 2002* (NSW) s 5B. See also *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J).

contrast, at the balancing stage of proportionality, there is nothing in the terms of the test that relates the items being balanced; it is simply a matter of which is said to outweigh the other. Moreover, attempts by scholars to discern an unstated common criterion have failed.[75]

As a result, the likely tendency for judges at the balancing stage of proportionality is to supply their own moral or political considerations in order to make the required comparison. Stavros Tsakyrakis observes that 'there is no way to accept the notion that values [at the final balancing stage of proportionality] are commensurable without a moral argument, that is, an argument that relates them and justifies degrees of priority'.[76] Indeed, Chordia seems to accept the 'centrality of normative or moral reasoning to the final balancing stage of proportionality analysis'.[77] But that raises a problem of institutional competence: courts are not well placed to make highly discretionary comparisons of values that are informed by subjective, personally chosen moral or political criteria, particularly when those comparisons determine the constitutional validity of Acts of Parliament.

The incommensurability problem also undercuts the main argument advanced for proportionality: that its steps of analysis create transparency. For example, Evelyn Douek claims that '[o]ne of the key promises of structured proportionality is that it will make judicial reasoning more constrained and transparent' as '[t]he step-by-step nature of the testing' is 'methodical and not "approached as a matter of impression … pronounced as a conclusion, absent reasoning"'.[78] However, because it invests judges with such a large discretion at its final stage, the proportionality test is better understood as opaque, rather than transparent. Timothy Endicott explains that, at this final stage, '[t]he attractive structure of the judicial role crumbles at that point into an unstructured, opaque choice, when the task involves balancing the unbalanceable'.[79]

Admittedly, it might be possible to imagine a proportionality test that omits the balancing stage. Although this stage may be implicit in what Julian Rivers describes as an 'optimising' conception of proportionality, which 'sees proportionality as a structured approach to balancing fundamental rights with other rights and interests in the best possible way', there is an alternative 'state limiting' conception, which 'sees proportionality as a set of tests warranting judicial interference to protect rights'.[80] Such an understanding of proportionality could focus on comparing means and ends, as at the earlier stages of the proportionality test; it may even be more consistent with the initial use of the concept of proportionality.[81] Nonetheless,

[75] See Francisco J Urbina, 'Incommensurability and Balancing' (2015) 35(3) *Oxford Journal of Legal Studies* 575, 591.
[76] See Tsakyrakis (n 69) 474.
[77] Chordia, *Proportionality in Australian Constitutional Law* (n 42) 59.
[78] Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47(4) *Federal Law Review* 551, 552, 557.
[79] Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 311, 328.
[80] Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) *Cambridge Law Journal* 174, 176.
[81] See, eg, Martin Luterán, 'The Lost Meaning of Proportionality' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 21, 26-27; Chordia, *Proportionality in Australian Constitutional Law* (n 42) 4, 18–22. On a possible middle ground approach, see Alison L Young, 'Proportionality Is Dead: Long Live Proportionality!' in Grant Huscroft, Bradley W Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 43, 58.

currently proportionality is widely understood, including by the High Court, as including the balancing stage.

Given the difficulties with structured proportionality as currently conceived, judicial contestation of it in Australia over the past few years seems only natural. David Hume points to the multi-year effort to introduce proportionality into Australian constitutional law as suggesting that it is 'surprising' that the doctrine remains contested.[82] However, the opposite seems to be true: the lengthy process illustrates that far from being a consensus position, the push for proportionality was a project that attracted little support for years, and was ultimately imposed by a bare majority over minority protests that it was alien to the Australian Constitution.[83] Moreover, the introduction of proportionality unsettled a unanimous seven-member judgment of the High Court without any attempt to support the change by reference to constitutional text or structure.

McCloy also inaugurated a period of volatility in which the test for the implied freedom of political communication changed every few years, first in *McCloy* in 2015, then in *Brown* in 2017, and then again in *Clubb* in 2019. This 'doctrinal instability'[84] raises further questions about the merits of the introduction of proportionality. The alteration in *Clubb* appears intended to offset concerns about the breadth of the final balancing stage, since by requiring a 'manifest' outweighing of benefit by adverse effect, the standard is more deferential, albeit without employing deference as a distinct concept.[85] The UK Supreme Court has, in contrast, expressly invoked deference at this stage.[86] However, attempts to reposition the test to be more deferential seem to be an implicit acknowledgment of the underlying problem: the test gives judges an unsuitable task. That problem persists at the conceptual level even if the practical concerns are eased by applying the test in a restrained manner.[87]

Although proportionality is a popular test around the world, it is not a universal one. Japan and the US are two major jurisdictions that do not apply it.[88] In the US, tests of rational basis, intermediate scrutiny, and strict scrutiny overlap with the earlier stages of the proportionality test, but courts generally seek to avoid analysis similar to the final balancing stage.[89] For example, the strict scrutiny test asks whether a law is narrowly tailored to pursue a compelling

[82] David Hume, '*Palmer v Western Australia* (2021) 95 ALJR 229; [2021] HCA 5: Trade, Commerce and Intercourse Shall Be Absolutely Free (Except When It Need Not)' (Blog Post, 23 June 2021) <https://www.auspublaw.org/blog/2021/06/palmer-v-western-australia-2021-95-aljr-229-2021-hca-5>.

[83] See Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27(2) *Public Law Review* 109, 123.

[84] John Basten, 'Understanding Proportionality Analysis' (2021) 43(1) *Sydney Law Review* 119, 120.

[85] See *McCloy* (n 5) 220 [90]–[92] (French CJ, Kiefel, Bell and Keane JJ). On deference in this context, see, eg, Murray Wesson, 'Crafting a Concept of Deference for the Implied Freedom of Political Communication' (2016) 27(2) *Public Law Review* 101; Caroline Henckels, 'Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference' (2017) 45(2) *Federal Law Review* 181.

[86] See *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, 285 [161] (Lord Reed PSC, Lady Black JSC, Lords Hodge JSC, Lloyd-Jones, Kitchin, Sales and Stephens agreeing).

[87] Although proportionality grants courts a considerable discretion, whether this discretion leads to judicial activism may depend on other factors (such as institutional considerations): see Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press, 2017).

[88] For an account of the convergence of Hong Kong, Taiwan, and South Korea as the only Asian jurisdictions in which courts regularly apply structured proportionality in judicial review of legislation, see Po Jen Yap and Chien-Chih Lin, *Constitutional Convergence in East Asia* (Cambridge University Press, 2022). Proportionality has also sometimes, but not regularly, been used in India.

[89] For criticism of this, see Jud Mathews and Alec Stone Sweet, 'All Things in Proportion? American Rights Review and the Problem of Balancing' (2011) 60(4) *Emory Law Journal* 797.

government interest; this narrow tailoring analysis resembles the necessity stage of proportionality.[90] As Aharon Barak explains, a means-end test of that kind is different from the final balancing stage of proportionality, which 'does not examine the relation between the limiting law's purpose and the means it takes to achieve it' but instead 'examines the relation between the limiting law's purpose and the constitutional right'.[91]

The *Lange* test, before its reformulation in *McCloy*, was stated as a means-end test: it asked whether a law that burdened the implied freedom was appropriate and adapted to a legitimate end, not whether the end outweighed the burden on the freedom. This formulation directs attention to — as Gageler J has put it — the 'degree of fit between means (the manner in which the law pursues its purpose) and ends (the purpose it pursues)'.[92] Adrienne Stone describes this as involving a '*balancing* of means against ends'.[93] Significantly, though, means-end analysis does not involve the wide judicial discretion to compare incommensurable values entailed by the final stage of proportionality. That is not to say that courts applying the pre-*McCloy* test for the implied freedom were not required to evaluate laws. As John Basten says, '[t]here is undoubtedly an evaluative judgment to be made; the question ultimately is whether structured proportionality provides a better basis for that exercise and its expression'.[94]

(c) A Test of Reasonable Necessity as Preferable to Proportionality

In respect of the free exercise clause of s 116, there are dicta from *Jehovah's Witnesses* that can provide guidance without recourse to proportionality. The starting point is the recognition that religious freedom is not absolute, and the relevant question is one of justification of a law that interferes with religious freedom. In *Jehovah's Witnesses*, Latham CJ referred favourably to a test of whether there was an 'undue infringement of religious freedom', before concluding that in the circumstances of the case it was 'consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community'.[95] Rich J similarly emphasised that 'freedom of religion is … subject to powers and restrictions of government essential to the preservation of the community'.[96]

Starke J wrote that '[t]he critical question is whether the particular law, as in this case, is reasonably necessary for the protection of the community and in the interests of social order. In my opinion the present Regulations … would not have transcended those limits'.[97] Although there was not a detailed elaboration of what reasonable necessity requires in the judgment, it is possible to develop Starke J's reference to reasonable necessity into a test that is consistent with the High Court's pre-*McCloy* case law. Addressing the free exercise clause as a non-absolute freedom, a test derived from the language in *Jehovah's Witnesses* might ask whether a law that interferes with or burdens free exercise of religion is 'reasonably necessary' for a

[90] See, eg, *Lukumi* (n 15) 531–2. See also Mathews and Sweet (n 89) 803.
[91] Barak, *Proportionality: Constitutional Rights and Their Limitations* (n 42) 344. See also Chordia, *Proportionality in Australian Constitutional Law* (n 42) 20, 196–7.
[92] *Brown* (n 65) 378–9 [165] (Gageler J) (setting out a calibrated scrutiny approach).
[93] Stone, 'Limits of Constitutional Text and Structure' (n 43) 682 (emphasis added). See also Stone, 'Proportionality and Its Alternatives' (n 53) 141–2; Chordia, *Proportionality in Australian Constitutional Law* (n 42) 157–8.
[94] Basten (n 84) 126.
[95] *Jehovah's Witnesses* (n 8) 131 (Latham CJ).
[96] Ibid 149 (Rich J).
[97] Ibid 155 (Starke J). See also *Palmer* (n 5) for discussion of 'reasonable necessity' in the context of s 92.

legitimate end, a test similar to the *Lange* test before it was altered by the adoption of proportionality in *McCloy*.

After first determining whether there was a burden on or interference with the free exercise of religion, a court would assess the legitimate end said to be pursued, which could be a state or social interest, or perhaps the protection of the rights of others affected by religious practice. In his dictum, Starke J refers to the protection of the community and the interests of social order; these would certainly be possible legitimate ends. The court would then apply a means-end test that focused on the availability of alternatives to assess whether the means adopted by the impugned law corresponded to the legitimate end identified earlier in the inquiry. The analysis would bear a strong resemblance to the necessity stage of proportionality, which considers whether there is an alternative measure available that is equally practicable and less restrictive of the freedom than the impugned law.[98]

However, by omitting the suitability and final balancing stages of the proportionality test, the reasonable necessity test would avoid the criticisms that can be made against those inquiries. In particular, the omission of the final balancing stage would mean that a law could not be found in violation of the free exercise clause of s 116 on the basis of a weighing of incommensurable values, namely that the benefit sought to be achieved by the law is outweighed (or manifestly outweighed) by its adverse effect on free exercise of religion. Provided that the means adopted by a law – upon assessing the availability of alternatives, their practicality, and the burden they would place on religious freedom – are considered by a court to be reasonably necessary for a legitimate end, it would be upheld as a valid restriction on the free exercise of religion under s 116, and the inquiry would end at that point.

Applying such a test in *Kruger* might well have led to a different result for the victims of the Stolen Generations, though the issue is clouded by some factual difficulties. There were no facts before the Court on the effect on religious practice of the Ordinance; thus, Gaudron J commented that 'the question whether the Ordinance authorised acts which prevented the free exercise of religion involves factual issues which cannot presently be determined'.[99] As Saunders and Meagher point out, the failure to determine or agree these facts before questions were reserved for the consideration of the Full Court was 'procedurally unusual'.[100] However, it is possible that it could have been concluded, through inference from facts about Indigenous communities taken on judicial notice, that the law empowering the removal of Indigenous children interfered with the free exercise of religion by those children by permitting their separation from the communities within which their religious practice was possible.

Some members of the Court acknowledged that there may well have been such an effect, but they seemingly did not consider it necessary to pursue the issue because they were applying a purpose test. For example, Toohey J stated that 'it may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose'.[101] Gummow J (with whom Dawson J agreed on this point) wrote:

[98] *Farm Transparency* (n 57) 669–70 [46] (Kiefel CJ and Keane J).
[99] *Kruger* (n 2) 132 (Gaudron J).
[100] Saunders and Meagher (n 6) 301, citing *Kruger* (n 2) 48–9 (Dawson J).
[101] *Kruger* (n 2) 86 (Toohey J).

> The withdrawal of infants … from the communities in which they would otherwise have been reared, *no doubt may have had the effect, as a practical matter, of denying their instruction in the religious beliefs of their community*. Nonetheless, there is nothing apparent in the 1918 Ordinance which suggests that it aptly is to be characterised as a law made in order to prohibit the free exercise of any such religion, as the objective to be achieved by the implementation of the law.[102]

Yet if that effect on free exercise is accepted, then the question under a reasonable necessity test becomes whether the interference with religious freedom was reasonably necessary for any legitimate end in the circumstances (instead of merely turning on the absence of a proscribed purpose, as under the test applied in *Kruger*). The impugned Ordinance was very unlikely to be reasonably necessary for a legitimate end. On one view, there was no legitimate end that the Ordinance pursued. However, even if there were considered to be a legitimate end, such as protecting the safety of children who actually needed protection, the blanket authorisation of removals, with minimal safeguards, that applied only to Indigenous children could not have been viewed as reasonably necessary to that end. A more tailored law would have been a viable alternative to address such an end. On this view, the relevant provisions of the Ordinance should have been found to be unconstitutional under the free exercise clause of s 116.[103]

CONCLUSION

Despite its inclusion as an express protection in the Australian Constitution, the free exercise clause in s 116 has been considered on only three occasions by the High Court and on each of these occasions it has been found not to be violated. The current approach to the clause was set out by the Court in *Kruger* and focuses on the purpose of a law that interferes with religious freedom. This test has a number of serious faults — it is not textually compelled, it is at odds with the history of the provision, it represents a break with earlier precedent, and it risks being narrow, depending on a court's approach to discerning the purpose — but perhaps the most important fault is that it misdirects the inquiry from the relevant matter of a law's justification to the peripheral matter of the law's nature.

This raises the question, addressed recently by some commentators, whether the test of structured proportionality utilised by the Court in respect of the implied freedom of political communication and s 92 should be applied to adjudicate claimed violations of the free exercise clause of s 116. I argue that it should not be, because proportionality, too, is a flawed test. Its suitability stage adds little, while its final balancing stage invests excessive discretion in a court because it involves weighing incommensurable values. The introduction of proportionality in respect of the implied freedom and s 92 presumably cannot be undone, but the mistake should not be extended any further.

The dicta from *Jehovah's Witnesses* represent a preferable starting point for interpreting the free exercise clause of s 116. Even though the free exercise claim was unsuccessful in that case, the members of the Court in *Jehovah's Witnesses* took s 116 seriously, engaged in careful

[102] Ibid 161 (Gummow J, Dawson J agreeing at 60) (emphasis added).

[103] In reaching this conclusion, I leave aside any question of whether it is better to understand the relevant provisions of the Ordinance as invalid under the Constitution directly or, alternatively, invalid as not authorised by the enabling statute when that statute is interpreted consistently with constitutional requirements. Further, I acknowledge that the same result of unconstitutionality could be arrived at through an application of the proportionality test. However, a reasonable necessity test achieves this result without the weighing of incommensurable values at the final balancing stage of proportionality that strains the judicial function.

reasoning about it, and articulated credible approaches to adjudicating the limits of the free exercise clause. A reasonable necessity test that adopts the dicta in that case and develops them in the way proposed in this article would give the free exercise clause a meaningful and sensible operation while also appropriately limiting the judicial role. The purpose test adopted in *Kruger* unfortunately does not do this, but nor would the proportionality test currently employed under the implied freedom and s 92.