Case Note

Palmer v Western Australia: A Critique of the High Court of Australia's Approach to Constitutional Review of Executive Exercises of Power

Tom Manousaridis*

Abstract

In *Palmer v Western Australia*, the High Court of Australia dismissed a challenge to Western Australia's border closure, which was implemented to prevent the spread of the COVID-19 virus. Mr Palmer challenged the *Quarantine (Closing the Border) Directions* (WA), which were authorised by the *Emergency Management Act 2005* (WA), on the basis that they infringed freedom of intercourse between the states guaranteed by s 92 of the *Australian Constitution*. The High Court dealt with several constitutionally significant issues, but an aspect of the decision that has received less attention is the Court's further endorsement and application of the approach to constitutional review of executive exercises of power taken in *Wotton v Queensland*, which only allows constitutional analysis to be directed at the impugned legislation, not the exercise of executive power under that legislation. This case note suggests that this approach has several shortcomings, and the approach will be difficult to apply in practice. As such, the High Court may wish to reconsider this approach to constitutional review of executive exercises of power.

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* BA (Syd) LLB (Syd); Graduate at Law, Clayton Utz. Email: tom.manousaridis@gmail.com. ORCID iD: https://orcid.org/0000-0001-9264-7650.

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I Introduction

To prevent the COVID-19 virus from infecting Western Australians, the State Emergency Coordinator issued the *Quarantine (Closing the Border) Directions* (WA) ('Directions') on 5 April 2020,[1] which closed the Western Australian border to all persons unless they were an exempt traveller under the Directions. While this was seen as a drastic response at the time, border closures and internal travel restrictions have become ubiquitous in Australia during the COVID-19 pandemic. Eventually, the Directions were challenged in the High Court in *Palmer v Western Australia*[2] on the basis that the Directions infringed s 92 of the *Australian Constitution* ('*Constitution*') by restricting freedom of intercourse between the states. *Palmer* is a significant decision for several reasons,[3] including its unification of the test to determine an infringement of both the trade and commerce and intercourse 'limbs' of s 92[4] and its discussion of structured proportionality analysis.[5] However, a development that has not received as much attention is the High Court's decision to assess the constitutionality of the *Emergency Management Act 2005* (WA) ('*EM Act*') rather than the exercise of executive power under the *EM Act*; namely, the Directions. This is despite Mr Palmer directing the constitutional challenge at the Directions. Directing constitutional analysis at the impugned legislation, rather than the exercise of executive power, was an application of the approach taken by the majority of the High Court of Australia in *Wotton v Queensland*.[6] However, the *Wotton* approach can be problematic and its further application by the High Court raises several issues for future challenges to the constitutionality of executive exercises of power. It is this aspect of *Palmer* that I will explore in this case note. Part II provides a brief explanation of the background and findings of the case. Part III provides a detailed overview of the *Wotton* approach and how the High Court applied it in *Palmer*. Part IV outlines both the strengths and weaknesses of the *Wotton* approach. Part V argues that the deficiencies in the *Wotton* approach have not been remedied after *Palmer*, and that courts determining future challenges to the constitutionality of executive exercises of power will struggle with applying the *Wotton* approach as further developed in *Palmer*.

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1 Commissioner of Police and State Emergency Coordinator, *Quarantine (Closing the Border) Directions* (WA) (5 April 2020) ('Directions').

2 *Palmer v Western Australia* (2021) 388 ALR 180 ('*Palmer*').

3 Also published in this issue of the *Sydney Law Review* is Anuki Suraweera's case note, which explores the unification of s 92 and the High Court's discussion of structured proportionality analysis in greater depth.

4 See David J Townsend, 'Constitutional Algebra: *Palmer v Western Australia* Reunites the Broken Parts of s 92' (2021) 76 *Law Society Journal* 84.

5 Amanda Stoker and Jye Beardow, '"Mr McGowan, Tear Down This Wall!": Section 92 after *Palmer v Western Australia*' (Speech, Samuel Griffith Society, 2021 Online Speaker Series) 10.

6 *Wotton v Queensland* (2012) 246 CLR 1 ('*Wotton*').

II The Case

A *Background*

COVID-19 is a novel respiratory virus with the potential to cause severe health problems. It was officially detected in Australia for the first time on 25 January 2020[7] and was declared a pandemic by the World Health Organization on 11 March 2020.[8] To prevent the spread of COVID-19, several Australian states and territories prevented persons living or residing in other states or territories from entering their jurisdictions.[9] Western Australia was one of these states. Using powers conferred by s 67 of the *EM Act*, the Western Australian Government prohibited entry into Western Australia by issuing the Directions, which came into effect on 5 April 2020.[10] The Directions had the effect of closing 'the border of Western Australia to all persons from any place unless they were the subject of exemption under the Directions'.[11]

B *Relevant Legislative Provisions*

The relevant provisions of the *EM Act* for the purposes of this case note are ss 56 and 67. Section 56(1) of the *EM Act* permits the Minister for Emergency Services ('the Minister') to 'declare that a state of emergency exists in the whole or in any area or areas of the State'. Section 56(2) outlines the conditions that the Minister must fulfil in order to make a state of emergency declaration, which include considering the advice of the State Emergency Coordinator[12] and being satisfied 'that extraordinary measures are required to prevent or minimise … loss of life, prejudice to the safety, or harm to the health, of persons or animals'.[13] A state of emergency initially lasts for three days,[14] but can be extended for up to 14 days and is then renewable.[15]

Once a state of emergency is declared under s 56, s 67 of the *EM Act* outlines the powers that can be exercised relating to movement for the purposes of emergency management:

> 67. Powers concerning movement and evacuation
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> For the purpose of emergency management during an emergency situation or state of emergency, a hazard management officer or authorised officer may do all or any of the following —

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7 Department of Health (Cth), 'First Confirmed Case of Novel Coronavirus in Australia' (Media Release, 25 January 2020).

8 *Palmer* (n 2) 183 [1] (Kiefel CJ and Keane J).

9 See Rebecca Storen and Nikki Corrigan, 'COVID-19: A Chronology of State and Territory Government Announcements (up until 30 June 2020)' (Research Paper Series 2020–21, Parliamentary Library (Cth), 22 October 2020) 6. The specifics of these orders have varied slightly throughout Australia over the course of the pandemic, and some jurisdictions made exceptions for their residents to return.

10 Directions (n 1) [3].

11 *Palmer* (n 2) 184 [7] (Kiefel CJ and Keane J).

12 *Emergency Management Act 2005* (WA) s 56(2)(a) ('*EM Act*').

13 Ibid s 56(2)(c)(i).

14 Ibid s 57.

15 Ibid s 58.

> (a) direct or, by direction, prohibit, the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area;
>
> (b) direct the evacuation and removal of persons or animals from the emergency area or any part of the emergency area;
>
> (c) close any road, access route or area of water in or leading to the emergency area;
>
> (d) direct that any road, access route or area of water in or leading to the emergency area be closed.

An 'emergency area' can include the entirety of Western Australia.[16] 'Emergency management' is defined in s 3 of the *EM Act*:

> ***emergency management*** means the management of the adverse effects of an emergency including —
>
> (a) prevention — the mitigation or prevention of the probability of the occurrence of, and the potential adverse effects of, an emergency; and
>
> (b) preparedness — preparation for response to an emergency; and
>
> (c) response — the combating of the effects of an emergency, provision of emergency assistance for casualties, reduction of further damage, and help to speed recovery; and
>
> (d) recovery — the support of emergency affected communities in the reconstruction and restoration of physical infrastructure, the environment and community, psychosocial and economic wellbeing[.]

C *The Challenge and Findings*

In May 2020, Mr Palmer, former Member of Parliament and current chairman of the United Australia Party, was denied an exemption under the Directions to travel to Western Australia.[17] As a result, he challenged the Directions in the High Court.

The substantive question to be determined by the High Court was whether the Directions and/or the *EM Act* were 'invalid (in whole or in part, and if in part, to what extent) because they contravene s 92 of the *Constitution*'.[18] While the plaintiffs challenged the validity of the Directions and the *EM Act* on s 92 grounds, they also submitted that the High Court should assess the constitutionality of the Directions rather than the *EM Act*. Victoria, intervening, submitted that the question reserved 'can be answered by focusing on the legislative scheme … rather than any particular exercise of statutory power'.[19]

The High Court unanimously held that ss 56 and 67 of the *EM Act* 'in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic comply with the constitutional limitation of s 92 of the

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16 Ibid s 3 (definition of 'emergency area').

17 Henry Cooney and Harry Sanderson, 'Border Closures and s 92: Clive Palmer's Quest to Enter WA', *Australian Public Law (AUSPUBLAW)* (Blog Post, 4 August 2020) <https://auspublaw.org/2020/08/border-closures-and-s-92-clive-palmers-quest-to-enter-wa/>.

18 Clive Frederick Palmer, 'Plaintiffs' Submissions', Submission in *Palmer v Western Australia*, Case No B26/2020, 22 September 2020, 2 [2].

19 Attorney-General (Vic), 'Submissions of the Attorney-General for the State of Victoria (Intervening)', Submission in *Palmer v Western Australia*, Case No B26/2020, 19 October 2020, 5 [10].

Constitution in each of its limbs'.[20] Each Justice also held that constitutional analysis could only be directed at the *EM Act* as opposed to the Directions, given the exercise of the power conferred by the *EM Act* 'does not raise a constitutional question'.[21] Provided that the *EM Act* itself does not infringe the *Constitution*, the Directions could only be invalidated on statutory grounds in an administrative challenge (that is, if the Directions went beyond their statutorily defined jurisdiction) and the issue of whether they comply with the *Constitution* would not arise. This finding was based on the application of the majority approach in *Wotton*.

III The *Wotton* Approach and its Application in *Palmer*

In accepting that constitutional review can only be directed at enabling legislation and not the executive exercise of power, *Palmer* adopted and further entrenched the *Wotton* approach to constitutional review.[22] An application of the *Wotton* approach results in exercises of executive power only being challenged on administrative grounds of review, provided that the authorising legislation is not invalid on its face and does not need to be read down to comply with the *Constitution*. Before evaluating the *Wotton* approach and its development in *Palmer*, it is necessary to understand what the *Wotton* approach is and how exactly it was applied in *Palmer*.

A *Overview of* Wotton

The High Court of Australia has, on several occasions, considered how it should assess the constitutionality of executive exercises of power and its approach has evolved.[23] For instance, prior to *Wotton* the High Court was reticent to leave exercises of power solely to administrative review applications due to, inter alia, underdeveloped grounds of review.[24] However, this and other concerns have dissipated, paving the way for the High Court to adopt the approach undertaken in *Wotton*.

Mr Wotton was convicted of an offence under the *Criminal Code Act 1899* (Qld) in relation to riots on Palm Island in November 2004.[25] Mr Wotton challenged provisions that permitted a parole board to impose bail conditions that allegedly impugned the implied freedom of political communication.

In considering Mr Wotton's challenge, the majority made observations regarding how discretionary executive decisions made under an authorising statutory provision are kept within their constitutional limits. The majority in *Wotton* applied Brennan J's judgment in *Miller v TCN Channel Nine Pty Ltd*,[26] and concluded that 'the discretionary powers must be exercised in accordance with any applicable law,

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20 *Palmer* (n 2) 255 [293].
21 Ibid 256 [293].
22 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)', *Australian Public Law (AUSPUBLAW)* (Blog Post, 23 June 2021) <https://auspublaw.org/2021/06/palmer-v-western-australia-2021-95-aljr-229-2021-hca-5/>.
23 James Stellios, '*Marbury v Madison*: Constitutional Limitations and Statutory Discretions' (2016) 42(3) *Australian Bar Review* 324, 327 ('Constitutional Limitations and Statutory Discretions').
24 Ibid.
25 *Wotton* (n 6) 8 [4] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
26 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 ('*Miller*').

including the *Constitution* itself'.[27] Brennan J in *Miller* held that while a statutory discretion must be wide in its application out of necessity, 'it is not so wide that considerations foreign to the purpose for which the discretion is conferred can be taken into account'.[28]

In adopting Brennan J's approach, the majority in *Wotton* held that 'the conferral by statute of a power or discretion upon [an administrative body] will be constrained by the constitutional restrictions upon the legislative power, with the result that in this particular respect the administrative body must not act ultra vires'.[29] That is to say, given the legislation conferring executive decision-making power is itself limited by the *Constitution*, the exercise of executive power cannot go beyond the limits imposed by the *Constitution*. The Commonwealth's submissions in *Wotton* adopted this approach. The High Court accepted these submissions and summarised them as follows:

> The Commonwealth submitted that: (i) where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power; (ii) whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law; (iii) rather, the question is whether the repository of the power has complied with the statutory limits; (iv) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case … does not raise a constitutional question, as distinct from a question of the exercise of statutory power. …
>
> The Commonwealth further, and correctly, developed these points by emphasising … that if the power or discretion be susceptible of exercise in accordance with the constitutional restriction upon legislative power, then the legislation conferring that power or discretion is effective in those terms. No question arises of severance or reading down of the legislation.[30]

This summary constitutes the *Wotton* approach to constitutional review.

Stellios has noted that propositions (i)–(iv) in the Commonwealth's submissions 'identify judicial review in the classic binary way' by separating constitutional review (undertaken at the level of the enabling statute) from judicial review (undertaken at the level of the exercise of power).[31] He explores this binary by placing legislative provisions that confer executive decision-making power into four categories. In the first three categories, it is clear at what stage constitutional and judicial reviews take place:

1. If the statutory discretion fails to comply with the constitutional limitation, then it is invalid on its face.
2. If the statutory discretion is completely within the bounds of the constitutional limitation, the statutory discretion is entirely valid in all circumstances (provided it is within jurisdiction).

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27 *Wotton* (n 6) 9 [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
28 *Miller* (n 26) 613 (Brennan J).
29 *Wotton* (n 6) 14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
30 Ibid 14 [22]–[23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
31 Stellios, 'Constitutional Limitations and Statutory Discretions' (n 23) 334.

3. If the statutory discretion is calibrated in its terms to the constitutional limitation, constitutional review takes 'an abbreviated form' and administrative review ensures that the exercise of power was made within limits.[32]

The fourth category is what Stellios calls the difficult category:

4. Legislation falls within the difficult category when it cannot be determined that, in all its possible operations, it will comply with the *Constitution*.[33] This may occur when legislation is cast in broad terms and has no mechanism to limit its applicability.

For legislation that falls within the difficult category, it may be appropriate to direct constitutional review at the exercise of executive power, rather than the impugned legislation, creating an exception to the general approach taken in *Wotton*.

B *The Application of* Wotton *in* Palmer

Each Justice in *Palmer* applied the *Wotton* approach, and instead of assessing the constitutionality of the Directions, their Honours assessed whether the impugned provisions of the *EM Act* infringed the *Constitution*.

Kiefel CJ and Keane J expressly adopted Victoria's intervening submission, which urged applying the *Wotton* approach.[34] Their Honours held that 'the question of compliance with the constitutional limitation is answered by the construction of the statute. This is consistent with an understanding that constitutionally guaranteed freedoms operate as limits on legislative and executive power.'[35] Their Honours also acknowledged the existence of the exception to the *Wotton* approach by noting that '[i]n some cases difficult questions may arise because the power or discretion given by the statute is broad and general.'[36] However, their Honours did not hold that the *EM Act*'s provisions fell into the difficult category, as the prohibition on entry into Western Australia 'is largely controlled by the EM Act itself and is proportionate to its purposes'.[37]

Gageler J also held that constitutional analysis must be directed at the legislation and clearly distinguished between the 'statutory question' and the 'constitutional question'.[38] Like Kiefel CJ and Keane J, Gageler J noted the existence of the difficult category and held that in such cases the constitutional and statutory questions

> can converge … in respect of executive action undertaken in the exercise of a discretionary power conferred by a statutory provision that is so broadly expressed as to require it to be read down as a matter of statutory construction to permit only those exercises of discretion that are within constitutional limits.[39]

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32 Ibid 335.
33 Ibid 337.
34 *Palmer* (n 2) 196 [63], [65].
35 Ibid 196 [65] (Kiefel CJ and Keane J).
36 Ibid 197 [68] (Kiefel CJ and Keane J).
37 Ibid.
38 Ibid 208 [119].
39 Ibid 209 [122] (Gageler J).

This convergence can occur when there is not 'a ready answer'[40] as to whether a statutory discretion that could impose a burden on constitutional freedoms was justified 'across the range of potential outcomes of the exercise of that discretion'.[41] When a convergence occurs, the Court may assess whether the exercise of power infringes the *Constitution* by asking the hypothetical: 'If the subordinate legislation in issue had been enacted as legislation, would that legislation have been compliant with the constitutional guarantee in issue?'.[42] However, like Kiefel CJ and Keane J, Gageler J did not think that the *EM Act* fell into this category. Asking this hypothetical question with the Directions would fail 'to acknowledge the constitutional significance of critical constraints built into the scheme of the Act which sustained the Directions'.[43]

Edelman J also adopted the *Wotton* approach and identified two premises underlying the application of the approach. First, 'questions of constitutional validity should be determined at the level of an empowering statute'[44] and leave the validity of an exercise of power 'to be resolved by reference to whether the valid statute empowers that action'.[45] Second, the answer to the question before the High Court did not determine the validity of the impugned provisions of the *EM Act* 'in all of their applications'.[46] Despite the slightly different approach, his Honour held that the constitutional analysis must be undertaken at the level of the enabling statutory provisions and, in this case, they did not infringe s 92.

Gordon J adopted the *Wotton* approach without qualification.[47]

Following *Palmer*, it appears that there is little room for constitutional analysis to be directed at an exercise of executive power like the Directions. Such an approach suffers from several practical and theoretical shortcomings, and it is unclear how it would be applied in practice.

IV Analysing the *Wotton* Approach

A *Strengths*

The main strength of the *Wotton* approach, at least in the eyes of the executive branch of government, is that it limits the ways in which executive actions can be challenged.[48] In a constitutional challenge against an executive exercise of power, the constitutional analysis is limited to the impugned legislation (except when legislation falls within the difficult category), with the challenge to the exercise of executive power being limited to administrative grounds of review. Such a result means that the executive can act without the threat of a constitutional challenge

40 Ibid 209 [123] (Gageler J).
41 Ibid.
42 Ibid 209 [124] (Gageler J).
43 Ibid 210 [126] (Gageler J).
44 Ibid 234 [224] (Edelman J).
45 Ibid.
46 Ibid 235 [226] (Edelman J).
47 Ibid 229 [201] (Gordon J).
48 See Hume (n 22).

looming over each exercise of executive power made under an enabling piece of legislation.

In this regard, the *Wotton* approach is a practical one. Courts do not want to unnecessarily burden the executive in a way that prevents them from dealing with urgent crises. The judicial acknowledgment of 'problems of society'[49] has led to an acceptance of the need to 'confer, and to uphold the validity of, administrative powers which involve constitutional interpretation, constitutional fact findings and the making of decisions whose validity depends on a constitutional purpose'.[50]

B *Weaknesses*

The *Wotton* approach has been criticised for not adequately reflecting the principle that the *Constitution* limits both legislative and executive power. Prior to *Palmer*, the High Court in *Comcare v Banerji* considered the question of where constitutional review should be directed.[51] *Comcare* involved a challenge to the termination of an Australian Public Service ('APS') employee who allegedly infringed the APS Code of Conduct due to social media posts, and a subsequent Administrative Appeals Tribunal decision that the termination was unlawful as it burdened the implied freedom of political communication.[52] It was ultimately held by the High Court that the termination of the employee was not unlawful. However, the Australian Human Rights Commission ('AHRC') as amicus curiae submitted that constitutional analysis should be directed at individual exercises of executive power.[53] Given the implied freedom 'acts as a limit on both legislative *and* executive power',[54] the constitutional limitation 'operates *directly* on the exercise'[55] of executive power and therefore 'a constitutional challenge to the exercise of a statutory discretion may be resolved at *either* the statutory level or at the level of the individual exercise'[56] (although this argument was ignored by the plurality and rejected by Gageler J).[57] Gageler J in *Palmer* also acknowledged that s 92, like the implied freedom of political communication, operates as a limitation on both Commonwealth and state/territory legislative and executive power.[58] Given the *Wotton* approach directs constitutional analysis at impugned legislation and not executive power (except in narrow circumstances), the approach does not fully give effect to the principle that constitutional provisions limit both executive and legislative power.

It is also unclear how the *Wotton* approach will apply to legislation that falls within the difficult category. In such cases, courts will interpret the legislation in such a way that the statutory conferral of jurisdiction is 'read … to only authorise

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49 James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 333.
50 Ibid.
51 *Comcare v Banerji* (2019) 267 CLR 373 ('*Comcare*').
52 Ibid 388–9 [1] (Kiefel CJ, Bell, Keane and Nettle JJ).
53 Australian Human Rights Commission ('AHRC'), 'Submissions of the Australian Human Rights Commission Seeking Leave to Appear as Amicus Curiae', Submission in *Comcare v Banerji*, Case No C12/2018, 12 December 2018, 3–4 [9]–[10] ('AHRC *Comcare* Submissions').
54 Kieran Pender, '*Comcare v Banerji*: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131, 141 (emphasis in original).
55 Ibid (emphasis in original).
56 Ibid (emphasis in original).
57 *Comcare* (n 51) 408 [51] (Gageler J).
58 *Palmer* (n 2) 208 [117].

decisions that would comply with the constitutional limitation'.[59] The AHRC in its *Comcare* amicus curiae submissions criticised this approach as it involved reading the statutory text as if 'it contained the words "unless the particular exercise of discretion would be contrary to the implied freedom"', which may be contrary to its ordinary meaning.[60] This method of interpretation risks legislation being construed in a way that distorts its ordinary and intended meaning to prioritise its validity. The AHRC argued that if legislation is interpreted in this way, legislation 'is less accessible to the public, Parliament is less accountable to the electorate … [and a] toll is exacted on the rule of law when the meaning of a law departs markedly from its ordinary meaning'.[61]

Finally, there is a concern that 'administrative law has simply not developed a framework with which to undertake' the task of reviewing the constitutionality of an impugned exercise of executive power.[62] While there have been 'attempts to incorporate constitutional limitations into existing administrative grounds of review', there has not been universal acceptance of this approach by the courts.[63] Furthermore, while a decision-maker who acts contrary to a constitutional freedom 'has committed a jurisdictional error, this acknowledgment hardly advances the search for an appropriate framework to assess the decision-maker's compliance with the freedom'.[64]

V Lingering Theoretical and Practical Difficulties from *Palmer*

Palmer's application of *Wotton* has highlighted further difficulties with the High Court's approach to constitutional review of executive exercises of power.

A *The Difficult Category: A Lingering Uncertainty*

Each Justice in *Palmer* recognised that when a court is faced with a constitutional challenge that involves legislation falling within the difficult category, (namely legislation that is so wide in its operation that it is not clear whether it will, in all circumstances, be in accordance with the *Constitution*), the strict application of the *Wotton* approach may become impractical. In these difficult cases, it may be appropriate to direct constitutional analysis at the executive action itself. However, because the *EM Act* did not fall within the difficult category, the Justices in *Palmer* did not provide any detailed guidance as to when and how the exception is applicable, leaving this challenge to lower courts.

This challenge was faced shortly after *Palmer* by the Supreme Court of Victoria in *Cotterill v Romanes*.[65] The challenge in *Cotterill* was directed at a Victorian exercise of executive power that restricted movement to prevent the spread

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59 Stellios, 'Constitutional Limitations and Statutory Discretions' (n 23) 338.
60 AHRC *Comcare* Submissions (n 53) 13 [47].
61 Ibid 12 [45] (citations omitted).
62 Kieran Pender, '"Silent Members of Society"? Public Servants and the Freedom of Political Communication in Australia' (2018) 29(4) *Public Law Review* 327, 344.
63 Ibid 345.
64 Ibid.
65 *Cotterill v Romanes* (2021) 360 FLR 341 ('*Cotterill*').

of COVID-19. Ms Cotterill challenged a fine she received for allegedly breaching the *Stay at Home Directions (Restricted Areas) (No 14)* (Vic) ('*Victorian Directions*') issued under the *Public Health and Wellbeing Act 2008* (Vic) ('*PHW Act*') during Victoria's second outbreak of the COVID-19 virus in 2020. Ms Cotterill challenged the constitutional validity of the *Victorian Directions* rather than the *PHW Act*, arguing that they burdened the implied freedom of political communication.[66] Ms Cotterill submitted that the difficult category exception applied because the *PHW Act* was cast too broadly, meaning the constitutional analysis should be directed at the *Victorian Directions*, rather than the *PHW Act*. This was rejected by Niall JA applying *Palmer*.[67] Given the similarity between the impugned statutory provisions in *Cotterill* and *Palmer*, his Honour was able to reason by analogy to conclude that the *PHW Act* was not so wide as to apply the exception. His Honour concluded that the *PHW Act*'s 'criteria, the context in which the power arises, and the manner of its exercise is tightly prescribed' like the *EM Act*'s powers are, meaning that the exception did not apply.[68]

While Niall JA was able to rely on the similarity between the Victorian and Western Australian acts to reach his conclusion, not all public health legislation across the country is similar to either the *EM Act* or the *PHW Act*. Take, for example, New South Wales' *Public Health Act 2010* (NSW) ('*Public Health Act*'). Section 7 of the *Public Health Act* gives the Minister for Health a wide range of powers to respond to a risk to public health. If the Minister for Health considers, on reasonable grounds, that there is or is likely to be a risk to public health,[69] he or she 'may take such action' and 'give such directions' that the Minister considers necessary to deal with the risk and its possible consequences.[70] This provision was used to impose restrictions along the New South Wales border and 'lock down' metropolitan areas during the COVID-19 Delta variant outbreak in Sydney in 2021. Unlike the *EM Act* or the *PHW Act*, s 7 of the *Public Health Act* is a broad and general power. Given the findings in *Cotterill* were based, in part, on the fact that the impugned provision of the *PHW Act* was 'not broad or general in the sense described by Kiefel CJ and Keane J in *Palmer*',[71] it is unclear how courts would approach a challenge to an order made under a broader provision such as s 7 of the *Public Health Act*, which would likely fall within the difficult category.

B *The High Court's Own Difficulty in Applying the Approach*

In *Palmer*, despite each Justice holding that they were only considering the constitutional validity of the *EM Act* rather than the Directions, some of the Justices appear to have considered the effect of the Directions (that is, the impact that the Directions would have on the health of Western Australians) in their assessment of the constitutionality of the *EM Act*. This goes beyond the provisions of the *EM Act* and instead involves the consideration of an exercise of power under the *EM Act*.

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66 Ibid 245–6 [10] (Niall JA).
67 Ibid 383 [205] (Niall JA).
68 Ibid 383–4 [207] (Niall JA).
69 *Public Health Act 2010* (NSW) s 7(1) ('*Public Health Act*').
70 Ibid s 7(2).
71 *Cotterill* (n 65) 383 [207].

This was most obvious in Kiefel CJ and Keane J's joint judgment[72] when their Honours stated that s 67 of the *EM Act* is valid in part because there is 'little room for debate about effective alternatives' to the border closure imposed by the Directions.[73] The consideration of the exercise of power in determining the constitutional validity of legislative provisions indicates that while the strict distinction between statutory analysis and constitutional analysis is theoretically possible, in practice it is difficult to keep the two kinds of analysis separate.

Beyond demonstrating the practical difficulties in applying the *Palmer* approach, the joint judgment highlights how directing structured proportionality analysis solely at the legislation would result in an analysis that fails to consider the factual circumstances in which a challenge arises. If a court applies the approach taken in *Palmer* strictly, it cannot consider the actual application of the impugned legislation through the exercise of executive power when it undertakes structured proportionality analysis. Such a result would divorce constitutional analysis from the facts that exist when the challenge is made. To remedy such a result, structured proportionality analysis would have to consider, in some way, the factual circumstances by focusing on the exercise of executive power through instruments such as the Directions. This difficulty is most evident when hypothetical constitutional challenges to exercises of executive power are considered.

C *Hypothetical Challenges: Difficulties in Applying the Approach in Practice*

The *Wotton* approach can also lead to an outcome where an executive exercise of power can be found to comply with the *Constitution*, given the *Wotton* approach only permits constitutional analysis to be directed at the impugned statute. But if that same executive exercise of power were enacted as legislation, it would infringe the *Constitution*. To demonstrate these strange outcomes, it is best to use a hypothetical challenge to the Directions and the *EM Act* in different factual circumstances.

Consider a scenario in which some states and territories have very low or zero COVID-19 transmission, or a scenario in which there is community transmission of COVID-19, but there is a high national COVID-19 vaccination rate. In either scenario, the danger posed to Western Australians by COVID-19 is significantly reduced. Presume that an individual who is either from a state or territory with low to zero COVID-19 transmission, or is fully vaccinated against COVID-19, attempts to enter Western Australia, is denied entry due to the Directions and challenges the Directions on the basis that they infringe s 92 of the *Constitution*. This challenge takes place shortly after judgment in *Palmer* is delivered.

In the hypothetical challenges, the court must first consider whether the Directions are ultra vires the *EM Act*. For an authorised officer to exercise restrictions on movement pursuant to s 67, the Minister must validly declare a state of emergency. If the Minister has considered the advice of the State Emergency Coordinator[74] and he or she is satisfied that extraordinary measures are required to

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72 See *Palmer* (n 2) 198–9 [76]–[81].
73 Ibid 199 [80].
74 *EM Act* (n 12) s 56(2)(a).

prevent or minimise loss of life or harm to the health of people,[75] they may be satisfied that an emergency is imminent,[76] enabling the Minister to validly declare a state of emergency. This is so because, despite there being little to no COVID-19 in some states or territories, there is a real risk that it could enter Western Australia undetected.

With a state of emergency validly declared, the Minister may restrict movement within the State[77] by exercising powers granted in s 67 of the *EM Act*. The movement restriction powers may only be used for the purpose of emergency management,[78] which includes the 'mitigation or prevention of the probability of the occurrence of, and the potential adverse effects of, an emergency'.[79] It is arguable that the Directions, which prohibit entry into Western Australia, are for the purpose of emergency management in the sense that the border closure mitigates the possibility of COVID-19 entering Western Australia even from states and territories with low levels of COVID-19, as a case could be detected in these jurisdictions at any time. Therefore, the Directions are not ultra vires. It is at this point that the hypothetical constitutional challenge to the Directions would end, given the court cannot direct constitutional analysis at the executive exercise of power. The High Court in *Palmer* also ruled that there is no need to read down the impugned provisions of the *EM Act* to ensure it does not infringe s 92 of the *Constitution*. As such, it is unlikely that in these hypothetical challenges a court would make a different ruling in relation to reading down the *EM Act*. Therefore, the challenge would fail.

But what if the Directions had been enacted as legislation? Let us refer to this hypothetical statute as the 'Directions Act'. If the Directions Act were challenged in these hypothetical scenarios, applying proportionality analysis (as the majority did in *Palmer*) it is likely that the Directions Act would be disproportionate to the burden on s 92 of the *Constitution*. The Directions Act is not reasonably necessary, as there are other obvious means of achieving the purpose[80] of preventing infection of Western Australians with COVID-19 that impose a lesser burden on s 92, namely restricting access to people coming from states and territories with high cases of COVID-19. Applying the *Wotton* approach, therefore, may result in a strange scenario where an executive exercise of power does not infringe the *Constitution*, but that same executive exercise of power could be found to infringe the *Constitution* if it were enacted as legislation.

D *A Different Outcome? Directing Constitutional Analysis at the Directions*

Still considering the hypothetical challenges to the *EM Act* and Directions above, if the court in these challenges were able to direct constitutional analysis at the Directions themselves, the results would likely be different. In the challenge where

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75 Ibid s 56(2)(c)(i).
76 Ibid s 56(2)(b).
77 Ibid s 67(a).
78 Ibid s 67.
79 Ibid s 3 (definition of 'emergency management').
80 *Palmer* (n 2) 249 [271] (Edelman J).

a plaintiff is coming from a State that has had no recent cases of community transmission, the court, in applying structured proportionality analysis directly to the Directions, would likely find that the Directions were no longer necessary. An obvious and compelling alternative to the blanket border closure that is reasonably practicable would be to institute border closures based on state-specific risk assessment. This would allow free entry to persons coming from states with no recent cases of community transmission.

In the challenge where there is high vaccination coverage but still cases of community transmission, the Directions would likely be inadequate in their balance. Given vaccines are not completely effective at preventing transmission of COVID-19, there is no alternative to the Directions that would prevent COVID-19 transmission within Western Australia. However, given vaccination has changed the nature of the illness, a total border closure to prevent transmission of the disease would no longer be an adequate response for an illness that is not as deadly or as likely to cause severe illness.

By directing constitutional analysis at the Directions themselves, the court can apply structured proportionality analysis in such a way that takes account of the changing circumstances of the pandemic. On one view, such an approach would strengthen one of Australia's 'relatively few constitutional freedoms'[81] by permitting 'the type of fact-sensitive analysis that may be required to reach invalidity'.[82] It would also avoid the absurd result outlined above where executive actions — that would otherwise be invalid if they were legislation — survive constitutional challenges.

VI Conclusion

At the time of writing, it appears as if state and territory border closures are becoming a thing of the past. However, state and territory governments still have the ability to impose restrictions on interstate travel via executive decisions. If such restrictions are reintroduced, someone, or indeed some government, may seek to challenge those measures. It is important, therefore, for the High Court to ensure that a logical approach to challenge the constitutional validity of executive exercises of power exists. This case note has argued that such an approach is not yet settled. *Palmer* has further entrenched the *Wotton* approach to assessing the constitutionality of executive exercises of power. The decision, however, did not take the opportunity presented in *Palmer* to remedy the shortcomings of the *Wotton* approach. Given the High Court's strong endorsement of the *Wotton* approach, *Palmer* appears to be the Court's final answer to the issue 'of ensuring that an administrator will keep within the law'[83] when it comes to ensuring the constitutionality of executive decisions. However, it is likely that courts will face difficulty in applying the approach and more likely still the approach will result in strange outcomes, such as finding an executive exercise of power to be constitutionally valid when, if it were enacted as an Act, it would be invalid. For constitutional analysis to be meaningful, courts should be able to consider facts specific to the exercise of power, which can only

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81 Stoker and Beardow (n 5) 10.
82 Ibid.
83 Stellios, *Zines's The High Court and the Constitution* (n 49) 188.

occur if the analysis is directed toward the exercise of power, rather than the legislation. If, as this case note argues, lower courts are unable to easily apply the approach or its application leads to undesirable outcomes, the High Court should consider altering the *Wotton* approach in future challenges to exercises of executive power to ensure it is a workable approach that allows for a consideration of circumstances as they exist at the time of the challenge.