Case Note

Palmer v Western Australia: Pandemic Border Closures and Section 92 of the *Australian Constitution*

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Abstract

In *Palmer v Western Australia*, the High Court of Australia found unanimously that the Western Australian Government's pandemic border restrictions were not invalid under s 92 of the *Australian Constitution*. The bench delivered its decision in four judgments, expressing significant disagreement regarding structured proportionality testing's applicability to s 92 and its place in Australian constitutional law broadly. This case note examines the hardening of differences between proponents and critics of structured proportionality and suggests that structured proportionality is not the appropriate analytical tool for assessing invalidity claims under s 92. It also explores two other notable, and unanimous, findings of the High Court: the reunification of 'trade, commerce and intercourse' in s 92 as a composite expression subject to the same test used to invalidate statutes, and the affirmation of the Court's earlier decision in *Wotton v Queensland* that the constitutional question is determined at the level of the statute, rather than the ministerial exercise of power under the statute.

Please cite this case note as:

Anuki Suraweera, '*Palmer v Western Australia*: Pandemic Border Closures and Section 92 of the *Australian Constitution*' (2022) 44(2) *Sydney Law Review* 311.

 ISSN: 1444–9528

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ORCID iD: https://orcid.org/0000-0002-6767-3790. I am very grateful to Professor Chester Brown for his invaluable feedback in preparing this case note.
A version of this case note was joint winner of the 2021 Peter Paterson Prize for best LLB or JD student contribution to the *Sydney Law Review* unit of study.

I Introduction

In *Palmer v Western Australia*,[1] the High Court of Australia held that Western Australian border restrictions imposed in response to the COVID-19 pandemic were within power and not invalid for contravening s 92 of the *Australian Constitution*. In four separate judgments, the bench of five justices unanimously rejected the challenge brought by Mr Palmer and the mining company he owns and controls, Mineralogy Pty Ltd, against both the authorising Act and Directions made under the Act. *Palmer* departs significantly from the High Court's previous jurisprudence, including the landmark decision on s 92, *Cole v Whitfield*,[2] in three respects. First, by a narrow majority, the Court adopted 'structured proportionality' as the appropriate analytical tool for determining contraventions of s 92 in place of the 'reasonable necessity' test. Second, the Court departed from the bifurcated approach to 'trade and commerce' and 'intercourse' in *Cole*, finding instead that both limbs only invalidate statutes that impose 'discriminatory' burdens on s 92 freedoms. Third, the Court followed and further developed its approach in *Wotton v Queensland*[3] by holding that the constitutional question arises at the level of the statute's terms, rather than the decision taken under the statute.[4]

In Part II of this case note I introduce the border restrictions that were subject to challenge and outline the High Court's reasoning. I then explore each of the key findings of *Palmer*, beginning with the Court's findings regarding 'structured proportionality' in Part III, before turning to the reunification of the two limbs of s 92 in Part IV and considering the Court's application of the principle in *Wotton* in Part V. I conclude that the Court's findings in *Palmer* represent a significant development in Australian constitutional law and in an area of jurisprudence that has been relatively subdued since *Cole*,[5] with the four diverging judgments leaving room for future clarification.

II Background

A *The Border Restrictions and the Challenge*

The challenge in *Palmer* was made against the *Emergency Management Act 2005* (WA) ('*EM Act*') and border restrictions imposed under the *EM Act*.[6] The first plaintiff, Mr Palmer, is a Queensland resident and Chairman and Managing Director

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

2 *Cole v Whitfield* (1988) 165 CLR 360 ('*Cole*').

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

4 Also published in this issue of the *Sydney Law Review* is Tom Manousaridis's case note, which gives fuller attention to the High Court's findings regarding *Wotton*.

5 Peter Gerangelos, Nicholas Aroney, Sarah Murray, Patrick Emerton, and Adrienne Stone, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Thomson Reuters, 4th ed, 2017) 653–7 [8.10]–[8.30]; Stephen Gageler, 'The Section 92 Revolution' in James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018) 24, 24–33; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 131–44 ('*Proportionality in Australian Constitutional Law*'); Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 314–35.

6 *Emergency Management Act 2005* (WA) ('*EM Act*'); *Palmer* (n 1) 183 [1].

of the second plaintiff, Mineralogy Pty Ltd, a mining company with operations in Western Australia. In response to Mr Palmer being refused entry into Western Australia on 22 May 2020, the plaintiffs submitted that the *EM Act* and the *Quarantine (Closing the Border) Directions* (WA) ('the Directions') made under the Act contravened s 92 of the *Australian Constitution* by burdening the freedom of trade, commerce and intercourse between States.

The *EM Act* provided a statutory framework for emergency management, including a host of emergency powers exercisable by authorised members of the executive. Section 56 of the *EM Act* empowered the Western Australian Minister for Emergency Services to declare a state of emergency if they were satisfied that an emergency had occurred and that extraordinary measures were required to minimise loss of life, prejudice to safety or harm to health of the Western Australian population. When a declaration was in force, s 67 of the *EM Act* empowered a hazard management officer or authorised officer to make directions regarding the movement of persons within or in proximity to the designated emergency area. On 15 March 2020, the Minister for Emergency Services declared a state of emergency with respect to the COVID-19 pandemic.[7] On 5 April 2020, the Commissioner of Police, empowered under the *EM Act* as State Emergency Coordinator, issued the Directions pursuant to s 67 of the *EM Act*.[8] The Directions included community isolation measures which closed the border of Western Australia to all but certain 'exempt travellers', including those with the written approval of the State Emergency Coordinator.[9] The Directions applied for a finite duration and required regular renewal by the Commissioner of Police,[10] and the *EM Act* also confined the scope of the discretion by imposing preconditions before the Minister's powers were enlivened.[11]

Mr Palmer's application to enter Western Australia as an 'exempt traveller' was refused.[12] The plaintiffs brought proceedings against Western Australia seeking a declaration that the authorising Act (the *EM Act*) and the Directions were invalid on the basis that they contravened s 92 of the *Australian Constitution*.[13] They argued that the Directions imposed a burden on the freedom of intercourse between States by prohibiting the cross-border movement of persons or, alternatively, that the freedom of trade and commerce was contravened by the imposition of a discriminatory burden with protectionist effect.[14] The defendants, the State of Western Australia and the Commissioner of Police for Western Australia, argued the *EM Act* and the Directions had the legitimate, non-protectionist purpose of protecting residents of Western Australia from the dangers of COVID-19

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7 *Palmer* (n 1) 183 [1].
8 Ibid.
9 *Quarantine (Closing the Border) Directions* (WA) [27]; ibid 184 [7]; David Tomkins, 'The Constitutional Challenge to End the COVID Border Closures', *Law Society Journal Online* (Blog Post, 1 October 2020) <https://lsj.com.au/articles/the-constitutional-challenge-to-end-the-covid-border-closures/>.
10 *EM Act* (n 6) ss 10, 51–2.
11 Ibid s 56(2).
12 *Palmer* (n 1) 185 [10].
13 Ibid 185 [12].
14 Ibid 185 [13]; Michelle Sharpe, 'Case Notes: The Latest from the High Court' (2021) (77) *Law Society of NSW Journal* 88, 88.

transmission.[15] The parties could not arrive at agreed facts, requiring the High Court to remit the issues to the Federal Court.[16] On remittal, Rangiah J found that the facts pleaded by the defendants had been established.[17] His Honour concluded that the uncertainties of COVID-19 merited a precautionary approach to decision-making.[18] After hearing the submissions of the parties and interveners, the High Court delivered judgment on 24 February 2021, holding in favour of the defendants that the *EM Act* was valid. The Court swiftly rejected the plaintiffs' allegation that the Directions imposed a burden on the freedom of trade and commerce that was discriminatory in a protectionist sense,[19] and instead the four judgments focused primarily on the freedom of intercourse as it applied to the provisions of the *EM Act*.

B *The High Court's Decision*

The High Court held that while the Directions did impose a burden on trade, commerce and intercourse, the *EM Act* was constitutionally valid. Sections 56 and 67 of the *EM Act* did not discriminate against interstate trade, commerce and intercourse on their terms, but did impede interstate intercourse in their application.[20] The burden imposed by the *EM Act* was reasonably necessary in the context of the 'extraordinary' emergency circumstances resulting from the COVID-19 pandemic.[21] This conclusion relied strongly on the findings of fact made by Rangiah J in the Federal Court. Particular reliance was placed on the 'precautionary principle',[22] a public health management concept introduced by two expert witnesses and accepted by Rangiah J.[23] The health consequences of a COVID-19 outbreak in Western Australia were found to be potentially catastrophic.[24] That the High Court found in favour of the defendants is therefore unsurprising, given past jurisprudence that has consistently regarded threats to public health as justifying some restriction of the freedom of intercourse.[25] Those decisions indicate that s 92 does not preclude States from controlling their borders in circumstances of necessity. In coming to this conclusion, the Court rejected the plaintiffs' submissions that the *EM Act* was analogous to the legislation invalidated in *Gratwick v Johnson*,[26] and that restrictions

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15 Western Australia and Christopher John Dawson, 'Defendants' Submissions', Submission in *Palmer v Western Australia*, Case No B26/2020, 12 October 2020, 16–17 [54]–[57]; *Palmer* (n 1) 185 [14]; Sharpe (n 14) 88.

16 *Palmer* (n 1) 185 [15].

17 *Palmer v Western Australia (No 4)* [2020] FCA 1221 ('*Palmer (No 4)*').

18 *Palmer* (n 1) 187 [23] (Kiefel CJ and Keane J), quoting ibid [366] (Rangiah J).

19 *Palmer* (n 1) 199 [82] (Kiefel CJ and Keane J).

20 Ibid 197–8 [72] (Kiefel CJ and Keane J).

21 Ibid 197 [68]–[69] (Kiefel CJ and Keane J), 222 [178] (Gordon J).

22 Ibid 199 [79] (Kiefel CJ and Keane J); *Palmer (No 4)* (n 17) [73] (Rangiah J).

23 *Palmer* (n 1) 199 [79] (Kiefel CJ and Keane J).

24 Ibid 187 [21] (Kiefel CJ and Keane J).

25 *Ex parte Nelson (No 1)* (1928) 42 CLR 209, 218 (Knox CJ, Gavan Duffy and Starke JJ); *James v Cowan* (1932) 47 CLR 386, 396; *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559, 584 (Barwick CJ), 600 (Gibbs J), 607 (Mason J); *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 641; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) ('*Castlemaine Tooheys*'); *Nationwide News v Wills* (1992) 177 CLR 1, 58 (Brennan J) ('*Nationwide News*'); *Tasmania v Victoria* (1935) 52 CLR 157, 168–9 (Gavan Duffy CJ, Evatt and McTiernan JJ); *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 110 (Barton J).

26 *Gratwick v Johnson* (1945) 70 CLR 1.

on the State border 'could not be justified on any terms'.[27] The Court followed its decision in *Cole* by declining to return to the 'criterion of operation' doctrine,[28] whereby laws directed to an essential attribute of interstate trade, commerce or intercourse are invalid.[29]

III Structured Proportionality in Australian Constitutional Law

The first noteworthy aspect of *Palmer* is that, despite unanimously determining the *EM Act* to be valid, the High Court was divided on the appropriate test for determining validity under s 92 of the *Australian Constitution*. Kiefel CJ, Keane and Edelman JJ departed from the Court's earlier approach to s 92 of 'reasonable necessity' by adopting structured proportionality as the appropriate test. Structured proportionality is an analytical tool of German origin, now experiencing global popularity in constitutional law.[30] Since its introduction into Australian law in the context of the implied freedom of political communication ('the implied freedom'), judges and commentators have expressed significant doubts regarding whether it is appropriate to import it into the Australian context[31] and have posited alternatives that they consider more appropriate.[32] It has been described as an 'exotic jurisprudential pest destructive of the delicate ecology of Australian public law'[33] and has weathered nearly a decade of criticism in implied freedom jurisprudence.[34] Nonetheless, structured proportionality has been adopted in several instances by other common law jurisdictions,[35] where it has demonstrated sufficient flexibility to justify its importation into Australian law. I suggest however, that the High Court in *Palmer* has inappropriately extended the application of this imported principle by applying it in relation to s 92, where it provides less value as an analytical tool than in an implied freedom context.

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27 Clive Frederick Palmer, 'Plaintiffs' Submissions', Submission in *Palmer v Western Australia*, Case No B26/2020, 22 September 2020, 7 [11].

28 *Cole* (n 2) 400–3.

29 *Palmer* (n 1) 188 [28], 198 [74]–[75] (Kiefel CJ and Keane J); 214–5 [147]–[149] (Gageler J).

30 Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) *Columbia Journal of Transnational Law* 72, 73; *R v Oakes* [1986] 1 SCR 103; *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 ('*Bank Mellat*'); *R v Hansen* [2007] 3 NZLR 1.

31 Murray Wesson, 'The Reception of Structured Proportionality in Australian Constitutional Law' (2021) 49(3) *Federal Law Review* 352; Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47(4) *Federal Law Review* 551; Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123; Amelia Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone' (2005) 33(3) *Federal Law Review* 445.

32 Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92; Anne Carter, 'Bridging the Divide? Proportionality and Calibrated Scrutiny' (2020) 48(2) *Federal Law Review* 282.

33 *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 52 [37] (French CJ and Bell J) ('*Murphy*').

34 *McCloy v New South Wales* (2015) 257 CLR 178, 215–16 [74] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'); *Clubb v Edwards* (2019) 267 CLR 171, 208–9 [96]–[102] (Kiefel CJ, Bell and Keane JJ), 266–9 [270]–[275] (Nettle J), 341–5 [491]–[501] (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373, 402–5 [38]–[42] (Kiefel CJ, Bell, Keane and Nettle JJ), 455–8 [202]–[206] (Edelman J) ('*Comcare v Banerji*').

35 *R v Oakes* (n 30); *Bank Mellat* (n 30); *R v Hansen* (n 30); Chordia, *Proportionality in Australian Constitutional Law* (n 5) 23–7; Carlos Bernal, 'The Migration of Proportionality to Australia' (2020) 48(2) *Federal Law Review* 288, 289.

A *History*

Structured proportionality testing was originally developed by the German Federal Constitutional Court in a context of constitutional rights and freedoms.[36] In *McCloy v New South Wales*,[37] the High Court of Australia adopted a three-stage process of structured proportionality analysis in relation to the implied freedom that asks whether the impugned law is 'suitable', 'necessary' and 'adequate in its balance'.[38] A law is suitable if it possesses a 'rational connection' to its purported legitimate purpose;[39] necessary if there is no reasonably practicable 'obvious and compelling alternative' with a less restrictive impact on the freedom;[40] and adequate in its balance if the law's legitimate purpose is adequate to support the extent of the burden on the constitutional freedom.[41] Structured proportionality was adopted for its perceived advantages in encouraging a culture of justification, producing predictable outcomes and improving dialogue between the legislature and judiciary compared to the 'reasonably appropriate and adapted' formulation applied in respect of the implied freedom in *Lange v Australian Broadcasting Corporation*.[42]

B *Divisions in* Palmer

Palmer is the first instance of structured proportionality being applied to s 92 of the *Australian Constitution*. Applying the three stages of structured proportionality analysis from *McCloy*, the plurality held that the *EM Act* did not impose a discriminatory burden on the freedom of intercourse. First, the purpose of the *EM Act* was to protect the health of residents of Western Australia and the Act was suitable for achieving the purpose of preventing infected persons from entering the community.[43] Second, there were no effective alternatives to a general restriction on entry into Western Australia, accepting Rangiah J's endorsement of a precautionary approach to COVID-19.[44] Finally, balancing the burden on the freedom against the *EM Act*'s legitimate purpose, the plurality held that the importance of protection of public health justified the severity of the restrictions.[45]

Gageler and Gordon JJ formed the minority, maintaining in separate judgments that reasonable necessity remains the correct approach for determining invalidity.[46] Under this approach, an Act or provision would be deemed invalid if it imposed a differential burden on s 92 freedoms that was not reasonably necessary to

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36 Chordia, *Proportionality in Australian Constitutional Law* (n 5) 29–62.
37 *McCloy* (n 34).
38 Ibid 217 [79] (French CJ, Kiefel, Bell and Keane JJ); Anne Carter, 'Moving Beyond the Common Law Objection to Structured Proportionality' (2021) 49(1) *Federal Law Review* 73, 74.
39 *Palmer* (n 1) 249 [269] (Edelman J).
40 Ibid 248 [265] (Edelman J).
41 Ibid.
42 *McCloy* (n 34) 215–16 [74] (French CJ, Kiefel, Bell and Keane JJ), citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); Chordia, *Proportionality in Australian Constitutional Law* (n 5) 163–5.
43 *Palmer* (n 1) 198 [74], 199 [77] (Kiefel CJ and Keane J).
44 Ibid 199 [79]–[80] (Kiefel CJ and Keane J).
45 Ibid 199 [81] (Kiefel CJ and Keane J).
46 Ibid 202 [94]–[97] (Gageler J); 226 [192]–[193] (Gordon J).

achieve its legitimate purpose.[47] Their Honours held that imposing a differential burden on interstate intercourse was justified in response to an epidemic emergency and, being justified, the burden imposed was neither discriminatory nor protectionist.[48] Both noted that discretionary powers under the *EM Act* were tightly constrained, and could only be exercised reasonably for the sole purpose of managing an emergency in specific circumstances.[49] Despite reaching the same conclusion as the majority, both Gageler and Gordon JJ were critical of structured proportionality's application to s 92 and in the Australian constitutional context more broadly.

C *Structured Proportionality in Australian Constitutional Law?*

Structured proportionality is typically challenged due to its origins in a legal jurisdiction dissimilar to the Australian context. Gageler J is particularly critical of the tool as one 'forged in a different institutional setting within a different intellectual tradition and social and political milieu where it has been deployed for different purposes'[50]. This criticism is not merely semantic. There are evident inconsistencies in integrating a tool so dependent on value-laden judgments and judicial discretion into the more textualist and legalist Australian constitutional context.[51]

The principal difficulty with structured proportionality is that it overtly requires the Court to make value judgments. The first two stages of the test are not particularly novel, however the third 'balancing' or 'strict proportionality' stage poses the greatest challenge for Australian courts. The first stage, 'suitability', closely resembles compatibility testing under the 'reasonable necessity' test. The second stage, 'necessity', is often applied as 'reasonable necessity' in practice,[52] including in *Palmer*, where the question considered was whether there existed an 'obvious and compelling alternative',[53] rather than whether the law was the single least restrictive means of achieving the desired outcome. Therefore, the most meaningful distinction between the two tests is that structured proportionality's third stage allows the Court to invalidate a law by assessing the relative benefit of the

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47 *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*Betfair (No 2)*').

48 *Palmer* (n 1) 218–9 [166] (Gageler J), 231 [210] (Gordon J).

49 Ibid 218–9 [165]–[166] (Gageler J), 230–1 [208] (Gordon J).

50 Ibid 214 [144] (Gageler J).

51 Aroney et al (n 5) 365; Wesson (n 31) 365–7; Douek (n 31) 555; Stone (n 31) 134 citing Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106, 153–4; James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 6th ed, 2015) 638–50 ('*Zines's the High Court and the Constitution*'); Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 3rd ed, 2010) 575–6 [14.60]; Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the *Australian Constitution*' (2016) 14(1) *International Journal of Constitutional Law* 60, 63.

52 Wojciech Sadurski, 'Reasonableness and Value Pluralism in Law and Politics' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer, 2009) 129, 133–4; *McCloy* (n 34) 217 [81]–[82] (French CJ, Kiefel, Bell and Keane JJ).

53 *Palmer* (n 1) 248 [265] (Edelman J).

competing interests or values.[54] The Court must balance the benefits of the legislation against the costs of infringing the constitutional right or freedom to determine which 'value' ought to be prioritised.[55] The analysis of competing values is extrinsic to the text of the *Australian Constitution* and is highly fact-specific. Consistent with the Australian judiciary's reluctance to take a values-driven approach to resolving constitutional questions,[56] judges have expressed resistance to proportionality for embroiling the judiciary in value judgments and policy decisions.[57] It certainly requires greater scrutiny of legislative burdens,[58] and risks encouraging judicial intrusion into a legislative role without possessing the requisite democratic legitimacy.[59] It must be accepted, however, that the High Court has adopted a particularly cautious approach when applying the balancing stage of structured proportionality in implied freedom cases.[60] Each stage may be applied at higher or lower levels of intensity, reflecting the necessary degree of judicial restraint.[61] This more restrained approach to evaluating legislative policymaking may well have the effect of tempering concern regarding structured proportionality.[62] Edelman J's judgment in *Palmer* reflects this caution, arguing that the use of the balancing stage to invalidate legislation must be exceptional, otherwise the effect may be such that Parliament can never legislate to achieve that legitimate purpose.[63]

An additional criticism of structured proportionality is that it imposes excessively restrictive and rigid stages of reasoning in every case. Gageler J's view is that '[s]tructured proportionality exhaustively defines, and in so doing confines, each of those standardised inquiries.'[64] His Honour's concern is that irrelevant factors will receive 'unwarranted analytical prominence', whereas factors relevant to the inquiry but beyond the scope of structured proportionality will be neglected.[65] Both Gordon and Gageler JJ argue that to treat the existence of alternative means as conclusive would be too rigid and prescriptive.[66] An example is given of a complex legislative scheme, where it is difficult if not impossible to assess the

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54 Aharon Barak, 'Proportionality (2)' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 738, 744–6.

55 Stone Sweet and Mathews (n 30) 75–6.

56 Wesson (n 31) 365–7; Douek (n 31) 555.

57 *Leask v Commonwealth* (1996) 187 CLR 579, 601 (Dawson J), 616 (Toohey J).

58 Stone (n 31) 129.

59 Bernhard Schlink, 'Proportionality (1)' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 718, 733–6.

60 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 510 [85] (Kiefel CJ, Keane and Gleeson JJ), 536 [201]–[202] (Edelman J) ('*LibertyWorks*').

61 Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21(1) *Melbourne University Law Review* 1, 54 ('Constitutional Guarantees'); *McCloy* (n 34) 216 [77] (French CJ, Kiefel, Bell and Keane JJ); Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021) 111.

62 Gabrielle Appleby and Anne Carter, 'Parliaments, Proportionality and Facts' (2021) 43(3) *Sydney Law Review* 259.

63 *Palmer* (n 1) 248 [267] (Edelman J).

64 Ibid 214 [143] (Gageler J).

65 Ibid 214 [146] (Gageler J).

66 Ibid 228 [198] (Gordon J); 214 [144]–[146] (Gageler J). See also *Murphy* (n 33) 123 [299] (Gordon J); *Brown v Tasmania* (2017) 261 CLR 328, 477 [476] (Gordon J); *McCloy* (n 34) 234 [140] (Gageler J).

appropriateness of alternatives.[67] However, this is not a particularly persuasive justification for rejecting structured proportionality, especially when accounting for the benefits to judicial legitimacy of a clearly articulated and justified reasoning process.[68] Proponents of structured proportionality have argued that value judgments are inevitable, but that structured proportionality exposes a court's reasoning rather than obscuring the underlying decision-making process.[69] Judges must consider each element in turn, rather than intuiting or flexibly applying them at their discretion. Edelman J contends in *Palmer* that the language of 'appropriate and adapted' leaves 'a vast area for the exercise of discretion and subjective preference'.[70] The requirement for judges to methodically justify their conclusions may improve judicial legitimacy and produce greater consistency of outcomes when applied in an appropriate context.[71] On the whole, the High Court has demonstrated that structured proportionality testing can be effectively tailored to Australian constitutional law in relation to the implied freedom, and resistance to the test is more muted in that context.[72]

D *Structured Proportionality in the Context of Section 92*

Further issues arise in relation to the tool's application to s 92 of the *Australian Constitution*, justifying the view that structured proportionality is not an appropriate analytical tool for s 92 freedoms. In particular, s 92 is incompatible with the balancing stage of structured proportionality. Chordia, cited for her commentary on proportionality in Australian law in three judgments in *Palmer*,[73] contends that the application of structured proportionality requires the existence of a balancing inquiry. This occurs where:

(1) there are two conflicting sets of rights or interests in consideration;

(2) each of which operates on the same normative plane;

(3) neither of which is absolute; and

(4) at least one of which cannot be defined in the abstract.[74]

Applying this framework illuminates the difficulty in adopting structured proportionality in relation to s 92. With respect to the third requirement in Chordia's analysis, s 92 is an absolute constitutional prohibition, which militates against the need for a balancing stage.

In *Palmer*, Kiefel CJ and Keane J attempted to frame structured proportionality as an extension of existing authority on s 92, ostensibly drawing on the analysis of Stephen and Mason JJ in *Uebergang v Australian Wheat Board*[75] and

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67 *Palmer* (n 1) 228 [198] (Gordon J).
68 Sadurski (n 52) 139; Kirk, 'Constitutional Guarantees' (n 61) 13–20.
69 *Palmer* (n 1) 194 [55] (Kiefel CJ and Keane J).
70 Ibid 247 [263] (Edelman J).
71 *McCloy* (n 34) 216 [76] (French CJ, Kiefel, Bell and Keane JJ).
72 See *LibertyWorks* (n 60) 517 [119] (Gageler J).
73 *Palmer* (n 1) 194 [54], 195 [58] (Kiefel CJ and Keane J); 227 [197], 229 [199] (Gordon J); 247 [264] (Edelman J).
74 Chordia, *Proportionality in Australian Constitutional Law* (n 5) 150–1.
75 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 304–6 ('*Uebergang*').

the majority in *Castlemaine Tooheys Ltd v South Australia*.[76] Their Honours argued that strict proportionality reasoning 'simply explicates the tests for justification',[77] rather than deviating from *Cole* and discarding 'reasonable necessity'. This is consistent with Kirk's view that structured proportionality reasoning is implicit in s 92 jurisprudence since *Uebergang*, prior even to *Cole* being decided.[78] However, Chordia states in response that though there appears to be a superficial alignment between 'reasonable necessity' and the balancing stage of proportionality testing, they have two different purposes. The prohibition against a 'discriminatory burden' determines absolutely the limits of legislative power, even though balancing is relevant in determining whether a specific restriction is protectionist.[79] Discussion of 'balancing' in the context of reasonable necessity is ultimately a deferential test, applied to detect a disguised improper purpose rather than to balance competing legislative interests and constitutional rights.[80] Where the means exceed the ends in reasonable necessity analysis, it becomes possible to 'smoke out' a hidden protectionist purpose.[81] On this analysis, 'reasonable necessity' is directed at the question of characterising a discriminatory burden as 'protectionist', rather than applied to determine whether a law is justified by balancing constitutional values or interests.[82] Structured proportionality is not suited to replace the test of reasonable necessity, and its application in *Palmer* does not demonstrate a natural progression in s 92 jurisprudence.

Unlike the implied freedom, which is tied to the maintenance of a system of representative and responsible government and is not an absolute right,[83] s 92 as an absolute prohibition cannot be upheld to varying degrees on a case-by-case basis, rendering it incompatible with the third factor in Chordia's framework. It is therefore difficult to envision a scenario in which a law would be invalidated at the balancing stage of the test. In *Palmer*, Kiefel CJ and Keane J minimised the impact of the third stage by emphasising that it will only invalidate a law 'in absolutely exceptional cases',[84] where the 'legitimate, but trivial, purpose [is outweighed by the] high constitutional purpose' of s 92.[85] This description is likely correct, but for the reason that structured proportionality's balancing analysis is not suitable for s 92.

A further complication is that the High Court has held that s 92 functions as an express limitation on legislative and executive power,[86] rather than an

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76 *Castlemaine Tooheys* (n 25) 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

77 *Palmer* (n 1) 195 [58] (Kiefel CJ and Keane J).

78 Kirk, 'Constitutional Guarantees' (n 61) 13–15.

79 Shipra Chordia, 'Border Closures, COVID-19 and s 92 of the Constitution — What Role for Proportionality (if any)?', *Australian Public Law (AUSPUBLAW)* (Blog Post, 1 October 2020) <https://auspublaw.org/2020/06/border-closures-covid-19-and-s-92-of-the-constitution/>.

80 Chordia, *Proportionality in Australian Constitutional Law* (n 5) 148–9.

81 Ibid.

82 Ibid.

83 *Lange* (n 42) 561–2; Chordia, *Proportionality in Australian Constitutional Law* (n 5) 170–1; Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374.

84 *Palmer* (n 1) 248 [265] (Kiefel CJ and Keane J).

85 Ibid.

86 *Cole* (n 2) 394; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 150 (Brennan J) ('*ACTV*'); *Betfair (No 2)* (n 47) 258–9 [14] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

empowering provision or one that confers a personal right.[87] This is an unusual context in which to apply structured proportionality, which is more apposite to the balancing of personal rights than the weighing of constitutional limitations against legislated-for benefits. Even the tool's application to the implied freedom had attracted criticism for this reason.[88] In the context of the implied freedom, Gageler J has described structured proportionality as requiring the judiciary to enhance political outcomes to 'achieve some notion of Pareto-optimality',[89] which is particularly problematic in relation to s 92 freedoms that cannot be optimised in this manner as the prohibition against discrimination is absolute.[90] Gageler J's comment alludes to the criticism made of structured proportionality that it requires the weighing of incommensurable and intangible values, in effect comparing proverbial apples and oranges.[91]

Scepticism regarding the appropriateness of structured proportionality remains strong both in relation to s 92 and Australian constitutional law more broadly.[92] As highlighted by Gageler J, the 'march' of structured proportionality in Australian law has been stymied in the past, in relation to assessing the compatibility of electoral procedures with the system of representative government.[93] A more practical question is whether the introduction of structured proportionality will make a profound difference to the outcome of s 92 cases. Though the bench in *Palmer* was highly divided in their approach, it arrived at the same outcome unanimously. This has been a hallmark of several Australian cases applying structured proportionality.[94] Stone contends that the adoption of structured proportionality will simply make the Court's implicit reasoning explicit, rather than dramatically altering legal outcomes.[95] Regardless, structured proportionality may make a real difference in borderline cases, where a law could be invalidated at the balancing stage. The ongoing debate regarding structured proportionality requires further development before this methodological question can be resolved, and the future of structured proportionality in relation to s 92 more clearly defined.

IV The Unification of Section 92

A second significant finding in *Palmer* is the High Court's reinterpretation of s 92 of the *Australian Constitution* as a composite expression, with both the 'trade and commerce' and 'intercourse' limbs of the section invalidating legislation that imposes a 'discriminatory' burden on the freedoms.[96] In *Cole*, the Court had

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87 *Palmer* (n 1) 198 [73] (Kiefel CJ and Keane J), 204–5 [105] (Gageler J), 222 [180] (Gordon J), 240 [241] (Edelman J).

88 Douek (n 31); Stone (n 31).

89 *Murphy* (n 33) 74 [110].

90 Ibid 73–4 [109]–[110].

91 Chordia, *Proportionality in Australian Constitutional Law* (n 5) 57–62.

92 Carter (n 38) 76 citing *Leask v Commonwealth* (n 57) 600–1 (Dawson J); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–9 [17] (Gleeson CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 172–3 [431]–[433] (Heydon J).

93 *Murphy* (n 33); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333.

94 Stone (n 31) 147.

95 Ibid.

96 *Palmer* (n 1) 207 [114] (Gageler J), 223–4 [184] (Gordon J), 240 [241] (Edelman J).

bifurcated the freedoms as being 'quite distinct'[97] to resolve decades of contention by adopting a free trade interpretation for the trade and commerce limb alone.[98] The intercourse limb was regarded as having a wider operation and as being a personal right.[99] The broader scope afforded to the second limb included application to general laws that did not impose, in law or in fact, a discriminatory burden on interstate intercourse.[100] Discrimination relevantly arises in 'the unequal treatment of equals, and, conversely, in the equal treatment of unequals'.[101] The reason for the distinction between the two limbs was not fully explained or justified in *Cole*, and lacks a basis in the text or drafting of the *Australian Constitution*.[102]

Cole was followed by a lack of clarity regarding the precise nature and scope of the freedom of intercourse. The freedom was not limited solely to invalidating statutes imposing discriminatory burdens,[103] nor did it impose a prohibition against all restrictions on intercourse across state borders.[104] Neither did the High Court resolve in subsequent cases the question of how to address statutory burdens on intercourse that also burden the freedom of trade and commerce, and which test to apply.[105] The relationship between the two limbs of s 92 remained unclear.[106] *Palmer* resolves this uncertainty by departing from the position in *Cole* and limiting the scope of the freedom of intercourse in line with the freedom of trade and commerce.[107] The freedom of intercourse provides absolute freedom only from 'discriminatory' burdens on intercourse between States.[108] The Court held unanimously that the bifurcation of s 92 has no textual or literalist basis, and that the two provisions should be given the same scope. The drafters' intention to create a composite expression was identified in *Palmer* as militating against separate operation of the two limbs of s 92.[109]

The reunification of the two limbs of s 92 was adopted unanimously and is likely to be uncontroversial, having improved the coherence of the Court's approach to s 92 freedoms. Stellios is one of several critics of the Court's earlier, bifurcated approach, remarking that 'all, or nearly all, acts of trade and commerce are also

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97 *Cole* (n 2) 388.

98 *Palmer* (n 1) 191–2 [44]–[45] (Kiefel CJ and Keane J), 223 [182] (Gordon J), 241–2 [246] (Edelman J); Jeremy Kirk, 'Section 92 in its Second Century' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) 253, 256; Aroney et al (n 5) 335–8.

99 Stellios, *Zines's the High Court and the Constitution* (n 51) 191; *Cole* (n 2) 393.

100 Kirk, 'Section 92 in its Second Century' (n 98) 269–75.

101 *Castlemaine Tooheys* (n 25) 480 (Gaudron and McHugh JJ).

102 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 456–7 [401] (Hayne J) ('*APLA*').

103 *Nationwide News* (n 25) 55–6 (Brennan J); *ACTV* (n 86) 192, 194 (Dawson J).

104 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307 (Mason CJ), 333 (Brennan J), 346–7 (Deane J), 366 (Dawson J), 384 (Toohey J), 392 (Gaudron J), 395 (McHugh J) ('*Cunliffe*').

105 *Palmer* (n 1) 200 [86] (Gageler J); *Cunliffe* (n 104); *ACTV* (n 86); *Nationwide News* (n 25); *APLA* (n 102); *AMS v AIF* (1999) 199 CLR 160.

106 William Gummow, 'Unity' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 405, 411.

107 *Palmer* (n 1) 187–8 [27] (Kiefel CJ and Keane J); Kirk, 'Section 92 in its Second Century' (n 98) 279.

108 *Palmer* (n 1) 207 [114] (Gageler J), 223–4 [184] (Gordon J), 240 [241] (Edelman J).

109 Ibid 191–2 [44]–[45] (Kiefel CJ and Keane J); 241–2 [246] (Edelman J).

intercourse'.[110] Despite this, the High Court in *Cole* had rejected the individual-rights approach in relation to the freedom of trade and commerce, while preserving it for the freedom of intercourse.[111] The consequence was that a lower threshold for contravening the intercourse limb risked that limb subsuming the trade and commerce limb and reasserting an individual-rights approach to interstate intercourse that occurs in the course of trade and commerce.[112] The application of 'discriminatory burden' as the touchstone for determining a breach of either limb of the section resolves this inconsistency and prevents one limb of s 92 operating with greater scope and effect than the other. The High Court in *Palmer* was also in agreement that the right to freedom of intercourse is not a personal right.[113] Gageler J highlighted the greater coherency achieved by unifying the two limbs, with the test for both now requiring identifying unequal treatment when comparing interstate activity against intrastate activity, justification for the differential treatment, and applying the same measure of justification for differential treatment.[114]

This approach is also consistent with the overarching purpose of s 92, to ensure that Australia remains an integrated free trade area and national polity without the Commonwealth or States imposing barriers to freedom of movement or trade.[115] Edelman J was in agreement with the remainder of the bench, but also indicated that discrimination between interstate and intrastate trade and commerce need not necessarily be 'protectionist'[116] in order to contravene s 92.[117] His Honour argued that it is more appropriate to apply the same requirements for legislation governing intercourse and trade and commerce by removing the requirement of protectionism, given that interstate trade and commerce will almost always involve intercourse.[118] This approach relies on economic analyses that indicate free trade is not defined merely by the absence of protectionism.[119] There is also a body of academic writing that supports this proposition, including extra-curial writings of Kiefel CJ.[120]

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110 Stellios, *Zines's the High Court and the Constitution* (n 51) 194; Kirk, 'Section 92 in its Second Century' (n 98) 275–81; *Nationwide News* (n 25) 54–5, 59 (Brennan J).

111 Kirk, 'Section 92 in its Second Century' (n 98) 277; *Betfair (No 2)* (n 47) 266–8 [42]–[50] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

112 *Palmer* (n 1) 192 [48] (Kiefel CJ and Keane J), 207–8 [115] (Gageler J), 225 [187] (Gordon J); Kirk, 'Section 92 in its Second Century' (n 98) 270; Aroney et al (n 5) 338.

113 *Palmer* (n 1) 191–2 [42]–[45] (Kiefel CJ and Keane J), 204–5 [105] (Gageler J), 222 [180] (Gordon J), 240 [241] (Edelman J).

114 Ibid 202–3 [98]–[99].

115 David J Townsend, 'Constitutional Algebra: *Palmer v Western Australia* Reunites the Broken Parts of s 92' (2021) 76 *Law Society of NSW Journal* 84, 85; *Palmer* (n 1) 223 [182]–[183] (Gordon J), 241–3 [246]–[249] (Edelman J).

116 *Palmer* (n 1) 232 [214].

117 Ibid 232 [216].

118 Ibid 243–4 [252]–[253] (Edelman J).

119 Ibid 243 [251] (Edelman J); *Betfair (No 2)* (n 47) 293 [127] (Kiefel J); Kirk, 'Section 92 in its Second Century' (n 98) 253.

120 See Susan Kiefel, 'Section 92: Markets, Protectionism and Proportionality — Australian and European Perspectives' (2010) 36(2) *Monash University Law Review* 1 ('Section 92'); Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85 ('Proportionality'); Gonzalo Villalta Puig, 'Intercolonial Free Trade: The Drafting History of Section 92 of the *Australian Constitution*' (2011) 30(2) *University of Tasmania Law Review* 1; Gonzalo Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution: A Critique of the Cole v Whitfield Test* (Lawbook, 2008); Christopher Staker, 'Section 92 of the *Constitution* and the European Court of Justice' (1990) 19(3–4) *Federal Law Review* 322; Stellios, *Zines's the High Court and the*

It remains to be seen whether Edelman J's approach of dispensing with the requirement for protectionist discrimination is adopted in future cases. By unanimously giving 'trade and commerce' and 'intercourse' the same scope of operation, the High Court has made a sensible departure from the incoherence of the prior position in *Cole*.[121] The intercourse limb of s 92 has historically provoked less debate than the trade and commerce limb, and with the Court in *Palmer* further narrowing its application to discriminatory burdens, it is likely to remain relatively uncontroversial.

V Validity and *Wotton v Queensland*

The third issue addressed by the High Court in *Palmer* concerned the measures in relation to which the question of validity should be determined. On this issue, the bench was united in accepting the submissions made by the Attorney-General for Victoria, and ultimately adopted by the defendants, that validity should be determined at the level of the Act rather than the Directions.[122] Following its decision in *Wotton*, the High Court in *Palmer* unanimously held that it is the terms of the statute that raise a constitutional question, though the exercise of statutory power may be subject to administrative review.[123] The *Wotton* principle provides that where the statutory discretion conferred under the authorising Act is susceptible to being exercised in accordance with the relevant constitutional limitations, the Act will be valid in respect of that limitation. This approach was first proposed by Brennan J in *Miller v TCN Channel Nine Pty Ltd*.[124] His Honour stated, in dissent, that where a broad discretion can only be lawfully exercised within certain limits, the conferral of the discretion is construed as being subject to those limits.[125] This principle was then adopted by the plurality in *Wotton*[126] before its application in implied freedom cases,[127] and now unanimously in *Palmer*.

In *Wotton*, a challenge was made to conditions attached to a parole order, however the question of constitutional validity was determined by reference to the

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Constitution (n 51) ch 8. Cf Kirk, 'Section 92 in its Second Century' (n 98) 253, 269; Naomi Oreb, 'Betting across Borders — *Betfair Pty Limited v Western Australia*' (2009) 31(4) *Sydney Law Review* 607, 612–4; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

121 Kirk, 'Section 92 in its Second Century' (n 98) 277–81; Stellios, *Zines's the High Court and the Constitution* (n 51) 194.

122 *Palmer* (n 1) 196 [63] (Kiefel CJ and Keane J), 210 [127] (Gageler J), 229–30 [201]–[202] (Gordon J), 234–5 [225] (Edelman J); 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, 17–20 [47]–[53]; Transcript of Proceedings, *Palmer v Western Australia* [2020] HCATrans 178, 3675–3730 (JA Thomson SC); Transcript of Proceedings, *Palmer v Western Australia* [2020] HCATrans 179, 3915–4025 (JA Thomson SC).

123 *Palmer* (n 1) 196 [65] (Kiefel CJ and Keane J), quoting *Wotton* (n 3) 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Palmer* (n 1) 208 [119], 210 [127] (Gageler J), 229 [201] (Gordon J), 234–5 [224]–[226] (Edelman J).

124 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614 (Brennan J) ('*Miller*') quoting *Inglis v Moore [No 2]* (1979) 46 FLR 470, 476 (Brennan and St John JJ).

125 *Miller* (n 124) 614 (Brennan J).

126 *Wotton* (n 3) 14 [22]–[23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

127 *Comcare v Banerji* (n 34); *Wainohu v New South Wales* (2011) 243 CLR 181; *Gaynor v Chief of the Defence Force (No 3)* (2015) 237 FCR 188 ('*Gaynor (No 3)*'); Kieran Pender, '"Silent Members of Society"? Public Servants and the Freedom of Political Communication in Australia' (2018) 29(4) *Public Law Review* 327, 336–7 ('Silent Members of Society').

authorising statute, rather than the conditions themselves. The *Wotton* principle therefore distinguishes between the constitutional question of statutory validity, and the administrative law question of whether the executive action is authorised.[128] The principle was further developed in *Attorney-General (SA) v Corporation of the City of Adelaide*, where the joint judgment contended that *Wotton* only presupposed the validity of a statutory discretionary power where its scope for exercise is confined to constitutional limitations.[129] The exercise of the discretion in *Wotton*, for example, was calibrated to a standard of reasonable necessity, unlike the by-law in *City of Adelaide*. However, the High Court in *Palmer* determined that the *Wotton* principle applies even in instances where the discretionary power is not qualified in its own terms.[130] In *Palmer*, the Court identified several limitations on power that appropriately constrained the discretionary power in question. Section 56 of the *EM Act* required that the Minister satisfy several requirements before making a declaration, including: considering the advice of the State Emergency Coordinator; being satisfied that an emergency 'has occurred, is occurring or is imminent'; and being satisfied that extraordinary measures are required to prevent or minimise loss of life, harm to health or damage to or destruction of property or the environment.[131] A declaration was only effective for three days, and required periodic extension for no more than 14 days at a time.[132] Section 67 then empowered an 'authorised officer' to direct or prohibit the movement of persons within, into, out of or around the vicinity of the emergency area, for the purpose of emergency management. The Court's orders noted that no issue was raised as to whether the Directions were authorised by the statutory provisions, and therefore no constitutional question was raised.[133]

The *Wotton* principle, in effect, implies a legislative intention that a statutory discretion is to be constrained by constitutional limitations.[134] A challenge to an exercise of power under the statute 'does not raise a constitutional question, as distinct from a question of the exercise of statutory power'.[135] Exercises of discretion may, instead, be subject to administrative challenge, and can be held invalid without affecting the validity of the authorising Act. This finding is likely to impede attempts by litigators to overturn administrative regimes by challenging their statutory basis, instead limiting applicants to overturning a single instance of executive action. The inability to strike down a statute by reference to the nature or effect of the executive action is particularly favourable to a finding of statutory validity where a statute is drafted in broad terms, and capable of general application.[136] In *Palmer*, Gageler J

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128 *Palmer* (n 1) 208 [119] (Gageler J).

129 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 87–8 [214]–[216] (Crennan and Kiefel JJ) ('*City of Adelaide*'); Pender, 'Silent Members of Society?' (n 127) 327, 344.

130 *City of Adelaide* (n 129) 88 [216] (Crennan and Kiefel JJ).

131 *Palmer* (n 1) 183 [2]; *EM Act* (n 6) s 58(4).

132 *EM Act* (n 6) ss 57(b), 58(4).

133 *Palmer* (n 1) 256.

134 James Stellios, '*Marbury v Madison*: Constitutional Limitations and Statutory Discretions' (2016) 42(3) *Australian Bar Review* 324, 344–6 ('*Marbury v Madison*'); Kieran Pender, '*Comcare v Banerji*: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131, 142 ('Public Servants').

135 *Wotton* (n 3) 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Gaynor (No 3)* (n 127) 240 [211] (Buchanan J).

136 *Wotton* (n 3) 14 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

acknowledged that the statutory question and constitutional question can converge where a provision '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'.[137] This process of construction is assisted by the principle that statutory powers can be read as subject to constitutional limitations such as the implied freedom and s 92.[138] Kiefel CJ and Keane J jointly identified the development of administrative law in the period since the decision in *Wotton* as overcoming a prior barrier to adoption of this approach.[139] Presumably, a greater range of grounds of review and greater availability of remedies for administrative error have led the High Court to view administrative review as a suitable mechanism for reviewing executive action.[140]

The *Wotton* principle represents an important evolution in the High Court's approach to challenges to statutes based on constitutional limitations. Under the *Australian Constitution*, freedoms are not held individually, but rather function as limitations on legislative power.[141] Allowing applicants to contest the validity of legislation on a case-by-case basis would amount to enforcing s 92 freedoms as individual rights.[142] The Court's affirmation of *Wotton* in *Palmer* ensures that statutes are not invalidated based on isolated executive decisions that breach the relevant constitutional limitation. Nevertheless, plaintiffs may avail themselves of administrative review remedies where executive action is undertaken pursuant to a valid statutory grant of authority, but nevertheless contravenes s 92. Exceeding the statutory grant of power will constitute an ultra vires act by the decision-maker.[143] This approach in *Palmer* also provides a unanimous rejection of Gageler J's alternative approach in *Tajjour v New South Wales*,[144] which proposed a more limited analysis of statutory validity than *Wotton*, based on the burden at hand rather than assessing the validity of the statute in all contexts.[145] The High Court in *Palmer* did not, however, address the unresolved questions of how constitutional limitations are to be integrated with administrative grounds of review, and what framework or test is to be used when determining whether the executive action is ultra vires for non-compliance with constitutional limitations.[146] The effect of the approach in *Wotton* is that contraventions of constitutional freedoms will be assessed in relation to the statute, and executive action is limited to review of whether it is authorised by

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137 *Palmer* (n 1) 209 [122] (Gageler J).

138 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, 1 October 2020). <https://auspublaw.org/2021/06/palmer-v-western-australia-2021-95-aljr-229-2021-hca-5/>.

139 *Palmer* (n 1) 197 [67] (Kiefel CJ and Keane J).

140 Ibid; Stellios, '*Marbury v Madison*' (n 134) 327–8.

141 Hume (n 138); Pender, 'Public Servants' (n 134) 140; Susan Kiefel, 'Standards of Review in Constitutional Review of Legislation' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 488, 489; *McCloy* (n 34) 202–3 [30] (French CJ, Kiefel, Bell and Keane JJ).

142 Warwick Ambrose, '*Wotton v Queensland* (2012) 285 ALR 1' (2012) 33(1) *Adelaide Law Review* 281, 283.

143 *Wotton* (n 3) 13–14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ); Pender, 'Silent Members of Society?' (n 127) 339, 344.

144 *Tajjour v New South Wales* (2014) 254 CLR 508.

145 Pender, 'Silent Members of Society?' (n 127) 346.

146 Ibid 345.

the valid statute, rather than whether it is independently consistent with the constitutional freedom.

However, there remains a degree of nuance in the High Court's application of the *Wotton* principle in *Palmer*. The *Wotton* principle requires an assessment of whether statutory provisions infringe upon a constitutional freedom 'across the range of their potential operations'.[147] Edelman J argued, in obiter dicta, that the Court should rarely adjudicate upon the validity of every application of the relevant statutory provision, particularly in the present case, which concerned 'open-textured' provisions that could be applied across a wide range of circumstances.[148] His Honour rejected the notion of a court speculating upon whether the provisions are valid even in hypothetical scenarios by giving a conclusive statement of validity. His Honour instead confined the implications of the Court's orders to ss 56 and 67 of the *EM Act* in their limited application to an emergency constituted by a hazard in the nature of a plague or epidemic.[149] Edelman J's analysis drew a distinction between assessing the validity of the legislation by reference to its application, and assessing the validity of the application itself.[150] This approach is measured and responsive to the shortcomings of a more general approach to invalidity.[151] Assessing the law's general application, rather than addressing a specific burdening of the constitutional freedom, would be overly favourable to a finding of validity. Equally, this approach does not require the Court to invalidate a statute because a single option within the range of possible executive actions contravenes a constitutional limitation of power. Regardless, this hypothetical scenario is unlikely to eventuate. In such a case, the Court would likely prefer to find the impermissible exercise of discretion to be in contravention of the statute itself, to ensure that the statute only gives effect to executive action within constitutional limits.[152] Edelman J's proposed approach allows for greater responsiveness to the specific provisions in each case and would be an appropriate revision to the High Court's application of the *Wotton* principle.

VI Conclusion

Palmer is a significant addition to the High Court's jurisprudence on s 92, providing an important modification to the approach to s 92 of the *Australian Constitution* established by consensus in *Cole*. Of the Court's findings in *Palmer*, the adoption of structured proportionality by a bare majority is the most precarious and open to future challenges.[153] Kiefel CJ remains a strong proponent of this analytical approach, both in her judicial role and extra-judicial work.[154] Edelman J is a

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147 *Comcare v Banerji* (n 34) 408 [50] (Gageler J). See also 404–5 [42], 405–6 [44] (Kiefel CJ, Bell, Keane and Nettle JJ), 423–5 [100]–[106] (Gageler J), 439–40 [156]–[161] (Gordon J).

148 *Palmer* (n 1) 235–6 [227]–[228] (Edelman J).

149 Ibid 252–3 [282] (Edelman J).

150 Ibid 237 [231] (Edelman J).

151 Pender, 'Silent Members of Society?' (n 127) 347.

152 *Wotton* (n 3) 9–10 [10], 13–14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ), quoting and citing *Miller* (n 124) 613–14 (Brennan J); *Comcare v Banerji* (n 34) 459 [210]–[211] (Edelman J).

153 Anthony Gray, 'COVID-19, Border Restrictions and Section 92 of the *Australian Constitution*' in Augusto Zimmermann and Joshua Forrester (eds), *Fundamental Rights in the Age of COVID-19* (Connor Court Publishing, 2020) 99.

154 Kiefel, 'Section 92' (n 120); Kiefel, 'Proportionality' (n 120).

relatively new convert to structured proportionality, but a firm advocate for its application in *Palmer*.[155] However, with Keane J and Kiefel CJ approaching retirement, the longevity of structured proportionality may well require the support of Steward and Gleeson JJ. Following *LibertyWorks Inc v Commonwealth*, it appears that both are accepting of structured proportionality in the context of the implied freedom.[156] Nevertheless, for the reasons explored above, structured proportionality is less well-suited to s 92 than it is to the implied freedom, as s 92 applies as an absolute limitation on laws imposing a discriminatory burden on trade, commerce and intercourse. I suggest that the Court's adoption of structured proportionality analysis in the context of s 92 should be revisited in future litigation.

The High Court's reintegration of s 92 as a composite expression and affirmation of the *Wotton* principle are unlikely to ignite significant controversy, having been adopted unanimously. The former has narrowed the application of the intercourse limb of s 92 by requiring burdens to be discriminatory to invalidate statute, and the latter has limited access to judicial review in favour of administrative review of whether executive actions are authorised by statute. For s 92 claims in particular, opportunities to challenge border closures are dwindling as COVID-19 becomes endemic and States embrace the national reopening of borders. The Court's acceptance of stringent border controls in *Palmer* bodes poorly for litigious opponents of closed borders, indicating that there will be no dramatic resurgence in litigation for what was once the most controversial provision in the *Australian Constitution*.

[155] *Palmer* (n 1) 246–51 [261]–[276] (Edelman J).
[156] *LibertyWorks* (n 60) 503–10 [44]–[85] (Kiefel CJ, Keane and Gleeson JJ), 545 [247] (Steward J).