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CLIVE PALMER, SECTION 92, AND COVID-19: WHERE 'ABSOLUTELY FREE' IS ABSOLUTELY NOT: *PALMER V WESTERN AUSTRALIA* (2021) 388 ALR 180

I Introduction

The World Health Organization officially declared the outbreak of SARS-CoV-2 ('COVID-19') a pandemic on 11 March 2020.[1] Global travel rapidly halted as countries around the world, including Australia, closed their international borders for protection against the spread of the deadly infection.[2] Tasmania was the first Australian state to impose interstate border restrictions on 20 March 2020,[3] with South Australia and Western Australia following on 24 March.[4] As such restrictions were unprecedented in Australia, many were left wondering — is this even legal in light of s 92 of the *Australian Constitution* ('*Constitution*')?[5] In *Palmer v Western Australia* ('*Palmer*')[6], the High Court unanimously confirmed that it was.[7]

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1 Tedros Adhanom Ghebreyesus, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (Speech, World Health Organization, 11 March 2020).

2 Office of the Prime Minister, 'Border Restrictions' (Media Release, 19 March 2020); Yen Nee Lee, '5 Charts Show Which Travel Sectors Were Worst Hit by the Coronavirus', *Consumer News and Business Channel* (online, 6 May 2020) <https://www.cnbc.com/2020/05/06/coronavirus-pandemics-impact-on-travel-tourism-in-5-charts.html>.

3 'Tasmania to Enforce "Toughest Border Measures in the Country" amid Coronavirus Pandemic', *ABC News* (online, 19 March 2020) <https://www.abc.net.au/news/2020-03-19/coronavirus-tasmanian-premier-announces-border-restrictions/12069764>.

4 'Western Australia, South Australia to Close Borders in Response to Coronavirus Pandemic', *ABC News* (online, 22 March 2020) <https://www.abc.net.au/news/2020-03-22/wa-sa-set-to-close-borders-amid-coronavirus-fight/12079044>.

5 See eg: David Tomkins, 'The Constitutional Challenge to End the COVID Border Closures' (2020) 71 (October) *Law Society of New South Wales Journal* 72, 74; Anne Twomey, 'States Are Shutting Their Borders to Stop Coronavirus: Is That Actually Allowed?', *The Conversation* (online, 22 March 2020) <https://theconversation.com/states-are-shutting-their-bordersto-stop-coronavirus-is-that-actually-allowed-134354>.

6 (2021) 388 ALR 180 ('*Palmer*').

7 Ibid 199 [77] (Kiefel CJ and Keane J, Gageler J agreeing at 218–19 [166], Gordon J agreeing at 232 [212], Edelman J agreeing at 255 [293]).

Section 92 states that '[o]n the imposition of uniform duties of customs, trade, commerce, and intercourse among the States … shall be absolutely free'.[8] The difficulty in defining the content of 'absolutely free' has resulted in s 92 being the most litigated provision of the *Constitution*.[9] Throughout its history, the High Court has struggled to determine just what interstate trade, commerce and intercourse should be absolutely free from, while 'numerous theories … waxed and waned in popularity' over time.[10] *Cole v Whitfield* ('*Cole*')[11] was the beginning of the end to this confusion and is regarded as a 'revolutionary decision'[12] in which the Court decided that 'trade and commerce' were to be 'absolutely free' from discriminatory burdens of a protectionist kind.[13] The cases which followed *Cole* primarily concerned the trade and commerce aspect of s 92.[14] However, just what kind of burdens interstate intercourse must be 'absolutely free' from, would remain yet to be decided.[15]

Palmer ascertained the content and operation of s 92 in three ways. First, the Court rejoined the trade and commerce limb with the intercourse limb, which had been separated by *Cole*, after finding that 'trade, commerce and intercourse' was to be read as a composite expression.[16] All five Justices agreed that it was discrimination that underpins the section.[17] Second, the case confirmed that the approach adopted in *Wotton v Queensland* ('*Wotton*')[18] should be taken when determining the level at which laws should be assessed for constitutional validity.[19] Essentially, where executive action is taken pursuant to a statutory power, the question of constitutional validity falls only to be determined by the provisions of the statute, not the particular

8 *Australian Constitution* s 92 ('*Constitution*').

9 Shipra Chordia, 'Border Closures, COVID-19 and s 92 of the Constitution: What Role for Proportionality (If Any)?', *AUSPUBLAW* (Blog Post, 5 June 2020) <https://auspublaw.org/2020/06/border-closures-covid-19-and-s-92-of-the-constitution/>.

10 Ibid.

11 (1988) 165 CLR 360 ('*Cole*') (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

12 Justice 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) 26, 26.

13 *Cole* (n 11) 394.

14 See, eg: *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 ('*Castlemaine Tooheys*'); *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 ('*Betfair [No 1]*'); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 ('*Betfair [No 2]*'); *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298.

15 *Palmer* (n 6) 201 [92] (Gageler J).

16 Ibid 187–8 [27] (Kiefel CJ and Keane J), 223 [182] (Gordon J), 241–2 [246] (Edelman J).

17 Ibid 192 [48] (Kiefel CJ and Keane J), 202 [97] (Gageler J), 227–8 [197] (Gordon J), 242–3 [248] (Edelman J).

18 (2012) 246 CLR 1.

19 *Palmer* (n 6) 196 [63] (Kiefel CJ and Keane J), 210 [127] (Gageler J), 229–30 [201]–[202] (Gordon J), 234–5 [225] (Edelman J).

exercise of the power.[20] Third, in deciding what level of justification is required for laws that burden the s 92 freedoms, three Justices took the opportunity to introduce structured proportionality,[21] reigniting the debate between members of the Bench regarding the appropriateness of this test in the Australian context. These aspects will be discussed in Part IV following an introduction to the background of this case and a discussion of each judgment in Parts II and III respectively.

II Background

A *Facts*

In response to the spread of COVID-19 in Australia, the Minister for Emergency Services for Western Australia declared a state of emergency pursuant to s 56 of the *Emergency Management Act 2005* (WA) ('*EM Act*') on 15 March 2020. The emergency declaration applied to the whole of Western Australia effective from 16 March 2020. On 5 April, the *Quarantine (Closing the Borders) Directions* (WA) ('*Directions*') came into force, effectively closing the Western Australian borders to all persons other than those specifically exempt.[22] The *Directions* were made by the Commissioner of Police acting as the State Emergency Coordinator pursuant to s 67 of the *EM Act*.

On 18 May 2020, the first plaintiff, Clive Palmer, was refused entry to Western Australia.[23] As a result, he and a privately held company under his personal management commenced proceedings in the original jurisdiction of the High Court on 25 May 2020 seeking a declaration that the *Directions* were invalid by the operation of s 92 of the *Constitution*.[24]

The plaintiffs challenged the *Directions* on two grounds. First, that the *Directions* impermissibly burdened the freedom of interstate intercourse 'by prohibiting cross-border movement of persons'.[25] Second, and in the alternative, that the *Directions* infringed the freedom of interstate trade and commerce by imposing a discriminatory burden of a protectionist kind as the border closures would favour businesses that were managed locally.[26] In reply, the defendants, the State of Western Australia and the Commissioner of Police for Western Australia contended that the laws did not impermissibly infringe s 92 because they were 'reasonably necessary' for the legitimate purpose of protecting the health of the population of Western Australia against the risks of COVID-19.[27]

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20 See above n 19.

21 *Palmer* (n 6) 196 [62] (Kiefel CJ and Keane J), 247 [264] (Edelman J).

22 Ibid 183 [1] (Kiefel CJ and Keane J).

23 Clive Frederick Palmer and Mineralogy Pty Ltd, 'Plaintiffs' Submissions', Submission in *Palmer v Western Australia*, B26/2020, 22 September 2020, 4 [20].

24 Ibid 19 [55].

25 *Palmer* (n 6) 185 [13] (Kiefel CJ and Keane J).

26 Ibid.

27 Ibid 185 [14] (Kiefel CJ and Keane J).

B *Legislation*

Under s 56 of the *EM Act*, the Minister may declare that a state of emergency exists in the whole or any part of Western Australia. However, such a declaration can only be made where the Minister has: considered the advice of the State Emergency Coordinator; is satisfied that an emergency has occurred, is occurring or is imminent; and is satisfied that extraordinary measures are required to limit harm.[28]

Once a state of emergency has been initially declared, it remains in effect for only three days unless extended under s 58.[29] Section 58 provides that an emergency declaration cannot be extended for more than 14 days. The Minister must be satisfied of the jurisdictional facts in s 56(2) each time an extension is declared.[30] The *Directions* were made by the Commissioner of Police as the authorised officer pursuant to s 67(a) of the *EM Act*, which permits a hazard management officer or authorised officer to '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'.

The defendant contended that these provisions were necessary for the protection of the health and life of the citizens of Western Australia against the risks associated with COVID-19.[31] However, the extent of the risks posed by COVID-19 and the efficacy of border closures in mitigating these risks were contested facts that needed to be resolved in order to answer the constitutional question.[32] Accordingly, Kiefel CJ ordered that part of the proceedings be remitted to the Federal Court of Australia.[33] Notably, the Attorney-General for the Commonwealth intervened in support of the plaintiffs and the Attorney-General for Queensland intervened in support of the defendants, with both interveners actively participating in the hearing.[34] Following the conclusion of the hearing, however, the Commonwealth withdrew from the litigation.[35]

C *The Findings on Remitter*

Justice Rangiah made significant findings following evidence from the Chief Health Officer for Western Australia and other experts.[36] These findings on remitter were important in the High Court's ultimate decision as to the proportionality of

28 *Emergency Management Act 2005* (WA) ss 56(1), (2)(a)–(c).

29 Ibid s 57(b).

30 *Palmer* (n 6) 217–18 [159] (Gageler J).

31 Ibid 185 [14] (Kiefel CJ and Keane J).

32 Ibid 185 [15].

33 Ibid. Pursuant to s 44 of the *Judiciary Act 1903* (Cth).

34 *Palmer v Western Australia [No 4]* [2020] FCA 1221, [6] (Rangiah J).

35 Ibid [8]. See also Tomkins (n 5) 72.

36 Including experts in public health medicine, epidemiology, and infectious diseases: *Palmer* (n 6) 185–6 [16] (Kiefel CJ and Keane J).

the measures imposed by the *EM Act*. In summary, clinical and epidemiological knowledge regarding COVID-19 was relatively uncertain at the time of hearing.[37] The ability to quantify the probability of persons infected with COVID-19 entering Western Australia proved difficult given such uncertainties.[38] In the event a person entered Western Australia whilst infectious, the probability of the disease spreading would be high.[39] Alternative measures, such as entry and exit screening, mandatory face mask regulations on airplanes and/or following entry for two weeks, testing on relevant days, or hotspot regimes would be less effective compared to the relevant border restrictions.[40] Justice Rangiah concluded a 'precautionary approach' should be followed.[41]

III Decision

While the High Court accepted that an exercise of power pursuant to the *EM Act* could impose a differential burden between intrastate and interstate intercourse,[42] it held that this differential burden was justified.[43] So far as an impediment to interstate trade and commerce was argued, Kiefel CJ and Keane J dismissed this in the absence of any evidence demonstrating a discriminatory burden on trade or commerce.[44] The Court did not resolve the question of whether the nature of discrimination, which would render laws unconstitutional, differs between the two limbs of s 92. According to *Cole*, interstate trade and commerce are to be absolutely free from discrimination which is *protectionist*,[45] however this qualification was not endorsed by all of the Justices in *Palmer*.[46] What *Palmer* did confirm, however, is that interstate *intercourse* is to be absolutely free from discriminatory burdens of *any* kind.[47]

Further, the Court diverged in its approach to justification, raising yet another 'abstracted debate'[48] within its constitutional jurisprudence.

37 *Palmer v Western Australia [No 4]* (n 34) [95].

38 Ibid [241], [366].

39 Ibid [298].

40 Ibid [308]–[317], [366].

41 Ibid [245], [366] discussed in *Palmer* (n 6) 187 [23], 199 [79] (Kiefel CJ and Keane J).

42 *Palmer* (n 6) 197–8 [72] (Kiefel CJ and Keane J), 218–19 [166] (Gageler J), 230 [204] (Gordon J), 233–4 [222] (Edelman J).

43 Ibid 199 [81] (Kiefel CJ and Keane J), 218–19 [166] (Gageler J), 231 [209]–[210] (Gordon J), 254–5 [288]–[293] (Edelman J).

44 Ibid 199 [82] (Kiefel CJ and Keane J).

45 *Cole* (n 11) 393–4.

46 See below Part IV(A).

47 *Palmer* (n 6) 192 [47] (Kiefel CJ and Keane J), 203 [99], 207 [114] (Gageler J), 223–4 [184] (Gordon J), 243–4 [250]–[252] (Edelman J).

48 Ibid 213 [140] (Gageler J).

A *Chief Justice Kiefel and Justice Keane*

Chief Justice Kiefel and Keane J began by reconciling s 92 as a composite expression, affirming observations which preceded *Cole*.[49] Their Honours held:

> Section 92 may be understood to preclude a law which burdens any of the freedoms there stated, as subjects of constitutional protection, where the law discriminates against interstate trade, commerce or intercourse and the burden cannot be justified as proportionate to the non discriminatory, legitimate purpose of the law which is sought to be achieved.[50]

The joint judgment criticised the distinction drawn in *Cole* between the two 'limbs' of s 92, suggesting 'incoherence' and 'incompatibility' with the modern approach to constitutional interpretation.[51] Their Honours questioned the feasibility of extending the guarantee of interstate intercourse to a *personal* freedom 'to pass to and fro among the States without burden, hindrance or restriction'.[52] Consistent with a legalistic approach, the distinction failed to derive support from the text of s 92.[53] The joint judgment went further by drawing upon remarks by Hayne J in *APLA Ltd v Legal Services Commissioner (NSW)* ('*APLA*'), rejecting the requirement for different tests to be applied to three elements of a composite expression.[54]

While considering the approach to justification in both *Cole* and *Betfair Pty Ltd v Western Australia* ('*Betfair [No 1]*') as instructive,[55] the joint judgment favoured structured proportionality as the appropriate, albeit imperfect methodology to employ.[56] Sections 56 and 67 of the *EM Act* could not be held to discriminate by their terms, however discrimination was accepted to the extent that s 67 hindered interstate movement in its *application*.[57] Accordingly, their Honours needed to determine if this burden could be justified. For Kiefel CJ and Keane J, preventing

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49 Ibid 187–8 [27], citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 456 [400] (Hayne J) ('*APLA*'); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 381–2 (Dixon J).

50 *Palmer* (n 6) 196 [62].

51 Ibid 191–2 [45].

52 Ibid 191 [41]–[42], quoting *Gratwick v Johnson* (1945) 70 CLR 1, 17 (Starke J) ('*Gratwick*'); *Cole* (n 11) 393.

53 *Palmer* (n 6) 191–2 [45].

54 Ibid 192 [47]. See *APLA* (n 49) 456–7 [402] (Hayne J).

55 *Palmer* (n 6) 193 [50]–[52] (Kiefel CJ and Keane J), citing *Cole* (n 11) 408–10; *Betfair [No 1]* (n 14) 479–80 [110]–[112] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

56 *Palmer* (n 6) 194 [56].

57 Ibid 197–8 [72].

the spread of the highly infectious COVID-19 disease was a legitimate purpose,[58] and the restrictions imposed by the *Directions* were undoubtedly *suitable* to that purpose.[59] The statutory conditions and the shortness of an emergency declaration were considered indicative of proportionality.[60] The plaintiffs' argument that less burdensome means could be deployed was rejected, given the uncertainties found by Rangiah J.[61] In answering whether the *EM Act* was adequate in its balance, Kiefel CJ and Keane J held that the protection of health and life justified the severity of the restrictions, which were authorised by the *EM Act*.[62]

B *Justice Gageler*

Justice Gageler invoked the observations of Sir Henry Parkes to elucidate original thought regarding the constitutional guarantee of free movement.[63] His Honour opined that the harmonisation of both limbs would eliminate concerns raised in preceding cases, such as *Nationwide News Pty Ltd v Wills*,[64] and *APLA*.[65] In line with this reinterpretation, each element of s 92 invokes the same legal notion of discrimination as in 'the unequal treatment of equals, and, conversely, in the equal treatment of unequals'.[66]

Justice Gageler refrained from adopting structured proportionality, voicing concern regarding the standardised three-stage test and its 'rigidity'.[67] His Honour explained:

> Factors having no, or little, bearing on the true inquiry thrown up by the facts and the law in a particular case that are required by the standardised verbal formulae to be considered in sequence end up receiving unwarranted analytical prominence. Factors bearing on the true inquiry thrown up by the facts and the law in a particular case that do not readily fit within any of the standardised verbal formulae end up suffering one or more of a number of possible fates.[68]

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58 Ibid 198 [74]. The joint judgment distinguished provisions of the *EM Act* from those in *Gratwick*, which were held to directly restrict interstate movement: *Gratwick* (n 52) 14 (Latham CJ), 16 (Rich J), 17 (Starke J), 20 (Dixon J), 22 (McTiernan J).

59 *Palmer* (n 6) 199 [77].

60 Ibid.

61 See above Part II(C).

62 *Palmer* (n 6) 199 [81].

63 Ibid 203–5 [102]–[105].

64 (1992) 177 CLR 1 ('*Nationwide News*').

65 *Palmer* (n 6) 207–8 [115], citing ibid 83–4 (Deane and Toohey JJ); *APLA* (n 49) 390–1 [162]–[165] (Gummow J).

66 *Palmer* (n 6) 202 [98] (Gageler J), quoting *Castlemaine Tooheys* (n 14) 480 (Gaudron and McHugh JJ). This legal notion of discrimination was also cited by Kiefel CJ and Keane J: *Palmer* (n 6) 188 [31], quoted by Gordon J at 224 [184]. See also at 238 [236] (Edelman J).

67 *Palmer* (n 6) 214 [144].

68 Ibid 214 [146].

Justice Gageler instead adhered to the test of 'reasonable necessity' determined in *Betfair [No 1]*.[69] In applying this test, Gageler J characterised the *non-discriminatory legislative end* of the *EM Act* as 'managing the adverse effects of … [an] epidemic'.[70] The *constitutionally permissible means* of pursuing that legislative end — the ministerial power to declare a state of emergency — was justified with reference to two limitations. First, the jurisdictional limitation, including both the express preconditions to the exercise of power[71] and the implicit formation of a *reasonable* state of mind by the Minister.[72] Second, the temporal limitation on the initial declaration, and the implied requirement for the preconditions to be satisfied upon extending the declaration.[73]

C *Justice Gordon*

Justice Gordon conceptualised s 92 as most prominently concerned with unjustified differential burdens impeding upon interstate trade, commerce and intercourse.[74] Her Honour declared that reading s 92 as a composite expression would align with the purpose of s 92, which is to 'create a free trade area throughout the Commonwealth'.[75]

Justice Gordon rejected structured proportionality due to its apparent rigidity and inappropriate vesting of judicial power.[76] Her Honour explained the test to apply to s 92 in a similar vein as Gageler J, notwithstanding slight linguistic differences. A similar analysis was therefore apparent, where the confined discretionary powers of the Minister, and the time constraints on the emergency declaration, were relevant factors in determining whether the differential burden was *reasonably necessary*.[77] Sections 56 and 67 of the *EM Act* were held not to permit discretion to be exercised in 'a manner obnoxious to the freedom guaranteed by s 92'.[78]

D *Justice Edelman*

Justice Edelman identified three strands to the reasoning in *Cole* which had not since been resolved.[79] First, and of the least controversy, the alignment of the intercourse

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69 Ibid 202 [94].

70 Ibid 216 [153]. See also the discussion on the standard to be met for a differential burden at 200 [85].

71 Ibid 217 [157].

72 Ibid 217 [158] (emphasis added).

73 Ibid 217–18 [159].

74 Ibid 222–3 [181].

75 Ibid 223 [183], quoting *Cole* (n 11) 391.

76 *Palmer* (n 6) 228–9 [198]–[199].

77 Ibid 230–1 [206]–[208].

78 Ibid 230–1 [208], citing *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614 (Brennan J).

79 *Palmer* (n 6) 232 [215]–[217].

limb with the trade and commerce limb.[80] His Honour noted many transactions will constitute trade and commerce while also constituting intercourse, mentioning the term used prior to federation, 'commercial intercourse'.[81] Second, his Honour stated the qualification of a protectionist purpose when analysing interstate trade and commerce, but not interstate intercourse, reflects 'incongruity' and hence a broader conceptualisation of discrimination should apply to both.[82] Third, a burden upon trade, commerce, or intercourse should be justified by an analysis of structured proportionality.[83]

Justice Edelman was the most vocal supporter of structured proportionality,[84] despite his Honour's previous indifference to the matter.[85] His Honour detailed structured proportionality in a sequential manner, invoking its adherence to the rule of law and adaptability to 'virtually every effective system of constitutional justice in the world'.[86] In assessing whether the *EM Act* was adequate in balance, Edelman J held the objective of both ss 56 and 67 was 'plainly sufficient to justify even the deep and wide burden' that the application of such public health provisions placed upon the guarantees prescribed by s 92.[87]

IV Comment

A *Absolutely Free from What? Re-Joining the Limbs of Section 92*

It was unfortunate that the intercourse limb was excluded from the 's 92 revolution' in *Cole*.[88] While it was not necessary for determination on the facts,[89] the unanimous judgment in that case effectively set it to one side by finding no 'correspondence between the freedom guaranteed to interstate trade and commerce and that guaranteed to interstate intercourse'.[90] This was primarily on the basis that the freedom of intercourse among the states was viewed as attracting a wider ambit of immunity from legislative intervention to the extent that if 'a like immunity were accorded to trade and commerce, anarchy would result'.[91]

80 Ibid 240–1 [241]–[243].

81 Ibid 240–1 [242].

82 Ibid 243–4 [252]–[253].

83 Ibid 247 [264].

84 Ibid 246–251 [261]–[276].

85 See, eg, *Brown v Tasmania* (2017) 261 CLR 328, 479–508 [484]–[568].

86 *Palmer* (n 6) 247 [263]–[264] (Edelman J), quoting Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) *Columbia Journal of Transnational Law* 72, 74.

87 *Palmer* (n 6) 255 [291].

88 See generally Gageler (n 12).

89 *Palmer* (n 6) 232 [215] (Edelman J).

90 *Cole* (n 11) 394.

91 Ibid 393.

However, in *Palmer*, it was found that there was no basis in either the text or purpose of the provision for this separation.[92] The expression 'trade, commerce, and intercourse' is composite and should be read as a whole. The protection against discrimination should therefore apply to both limbs as a matter of textual construction.[93] Furthermore, the purpose of s 92 is 'to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries'.[94] Accordingly, intercourse among the states should be 'absolutely free' from laws that impose differential burdens on interstate movement compared with intrastate movement, in either their legal operation or practical effect, that are not justified as a 'constitutionally permissible means of pursuing non-discriminatory legislative ends'.[95]

While the protectionist element was retained for the trade and commerce limb of s 92 by two Justices,[96] it was unanimously held that intercourse should be free from discriminatory burdens of *any* kind.[97] Justice Edelman went further. His Honour opined that, with respect to the trade and commerce limb, to retain the protectionism element was incongruous with the reunification of the limbs.[98] Protectionism only came to be an accepted requirement as to the nature of discrimination with regard to trade and commerce as this was the most common form of discrimination.[99] However, a law may not be protectionist but relevantly discriminate between interstate trade and commerce in a manner that was intended to be prohibited according to the purposes of s 92.[100]

Justice Edelman reasoned a broad interpretation of discrimination would align more closely with statements made during the Convention Debates and the ideals surrounding 'free trade' apparent at that time.[101] This line of argument can be traced

92 *Palmer* (n 6) 191–2 [45] (Kiefel CJ and Keane J), 207 [114] (Gageler J), 223 [182] (Gordon J), 243–4 [252] (Edelman J).

93 Ibid 222–3 [181] (Gordon J), 242–3 [248] (Edelman J).

94 *Cole* (n 11) 391.

95 *Palmer* (n 6) 202 [97] (Gageler J).

96 Ibid 207 [114] (Gageler J), 223–4 [184] (Gordon J). There is difficulty in delineating a clear position from the plurality judgment on this point.

97 Matthew Stubbs, 'Legal Perspectives on Border Closures and Freedom of Movement in Australia's COVID-19 Response' (2021) 32(2) *Public Law Review* 106, 110.

98 *Palmer* (n 6) 244 [253].

99 Ibid 244 [254].

100 Ibid 245 [256].

101 Ibid. Support for this proposition can also be found in Gonzalo Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution: A Critique of the Cole v Whitfield Test* (Thomson Lawbook, 2008). Removing the qualification of protectionism would reflect a European-style approach to justification: Christopher Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19(4) *Federal Law Review* 322.

back to *Betfair Pty Ltd v Racing NSW* ('*Betfair [No 2]*'), where the Court questioned whether s 92 could apply to markets conducted without reference to state boundaries, hence removing the qualification of protectionism.[102] While it was not necessary to decide in *Betfair [No 2]*, nor in the present case, this ultimately leads one back to the riddle of s 92: what does 'absolutely free' mean? It has long been accepted that s 92 is subject to 'some reservation' which is often spoken of with regard to 'reasonable regulation' as being an exception to a discriminatory burden.[103] While this is one exception, removing the qualification of protectionism would be going a substantial step further.

Statements in the Australasian Federal Convention Debates described the freedom of interstate trade from 'everything in the nature of an obstruction placed in the way of intercolonial trade'.[104] While early interpretations of a unitary free trade area attract praise, adopting a broad conceptualisation of discrimination would arguably lead back to an 'individual rights' approach[105] and require the Courts to engage further in the unresolved justification stage of analysis.[106] In *Cole*, the Court specifically examined the Convention Debates as a means to elucidate the intended meaning and historical merits of 'free trade'.[107] The Court noted the individual rights approach created 'protectionism in reverse', whereby s 92 became a source of preferential treatment for interstate trade.[108] While adopting a broad interpretation of discrimination would reduce the arguably ill-suited role of courts assessing economic impacts in particular markets[109] and truly revise s 92 as a composite guarantee of freedom, this interpretation does not seem warranted by the text of s 92 or the established reference to 'free trade' which signifies an absence of protectionism.[110] The invitation was clearly opened for argument in a future case, but since it was not argued here, there was no need to finally decide the matter.

102 *Betfair [No 2]* (n 14) 293 [127] (Kiefel J, Heydon J agreeing at 271 [57]).

103 *Palmer* (n 6) 226–7 [193]–[194] (Gordon J), citing *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 640–1 (Lord Porter for the Court) (Privy Council). See generally *Castlemaine Tooheys* (n 14) 472–3 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

104 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 237 (Alfred Deakin), quoted in *Palmer* (n 6) 244 [254] (Edelman J).

105 Jeremy Kirk, 'Section 92 in its Second Century' in Justice John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law* (Federation Press, 2020) 253, 269. For an early interpretation of the individual rights approach see *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 554 (Knox CJ, Isaacs and Starke JJ).

106 Kirk (n 105) 269.

107 *Cole* (n 11) 392–3.

108 Ibid 403.

109 Staker (n 101) 344–5. Cf Kirk (n 105) 269.

110 *Cole* (n 11) 392–3.

B *Constitutional Analysis: What Law?*

The plaintiffs in *Palmer* challenged the validity of the *Directions* without bringing a challenge to the authorising provisions of the *EM Act*.[111] This position may reflect the fact that where executive action is taken pursuant to a broadly expressed statutory power, it may be appropriate to confine the question of validity to the particular action before the Court.[112] However, in this case, as identified by Edelman J, there is a difference between determining the constitutional validity of an 'open-textured' piece of legislation by reference to the particular exercise of power and determining the constitutional validity of the exercise of the power itself.[113] The latter form of analysis, as adopted by the parties, 'simplified the constitutional question to the point of obscuring the manner of its answer' as it failed to take into consideration the important limitations on the exercise of the powers under the *EM Act*.[114]

Constitutional limitations operate on executive and legislative action, however, where executive action is taken under a statutory power, the constitutional question is limited to the empowering provisions of the Act according to the approach taken in *Wotton* and now adopted in *Palmer*.[115] This is because if the empowering provisions are constitutionally valid, the exercise of power under them will also be valid unless the action does not comply with the conditions imposed by the statute. Hence, whether the action 'falls within that source or is ultra vires' is question of a statutory nature — no constitutional issue remains.[116] Therefore, arguments raised by the plaintiffs that a range of other measures were open to the Minister, including to take a more calibrated response to the risk levels in the various Australian jurisdictions,[117] go more to whether the Minister had jurisdiction under s 56(2)(c) of the *EM Act* than to whether the *Directions* were reasonably necessary in the constitutional sense.[118]

C *Justification: Which Test?*

On the eve of the decision in *Palmer*, many speculated as to whether s 92 would provide new constitutional territory for the 'structured proportionality' test.[119] It was argued that using this test in the context of s 92 would introduce 'unnecessary

111 *Palmer* (n 6) 219–20 [171] (Gordon J).

112 Ibid 209 [123] (Gageler J).

113 Ibid 237 [231] (Edelman J).

114 Ibid 210 [126] (Gageler J).

115 Ibid 196 [63] (Kiefel CJ and Keane J), 210 [127] (Gageler J), 229–30 [202] (Gordon J), 234–5 [225] (Edelman J).

116 Ibid 234–5 [225] (Edelman J).

117 Ibid 199 [78] (Kiefel CJ and Keane J).

118 Ibid 196 [64] (Kiefel CJ and Keane J).

119 Chordia (n 9); Michael Douglas and Charles Dallimore, 'Section 92 of the Constitution and the Future of Our Federation' (2020) 47(7) *Law Society of Western Australia Brief* 16; Twomey (n 5).

confusion' to the section.[120] Chief Justice Kiefel and Keane J, however, readily asserted that structured proportionality should be the test of justification by drawing an analogy between it and the detail of the 'reasonable necessity' test applied in *Betfair [No 1]*.[121] Justice Edelman also argued that structured proportionality analysis was a more 'transparent and concise test'.[122] Justice Gageler and Gordon J remained strongly opposed to the application of structured proportionality in the Australian context citing well-trodden arguments that the test is too rigid,[123] and encumbers the proper exercise of judicial discretion.[124]

The purpose of articulating clear tests of principle is so that 'lawyers and legislators' can have a level of certainty in their practice as to how the law will likely operate under a unique set of circumstances.[125] The tests are not exclusive of each other since the infringement of constitutional guarantees that have 'been held to not be absolute' may be justified by 'any rational means'.[126] In applying the respective tests in this case, each judgment considered broadly the same factors in reaching its conclusion, which were: the presence of a legitimate purpose;[127] and, the extent to which the burden was confined such that it went no further than was necessary to achieve its purpose.[128] In terms of the balancing stage in the structured proportionality test, Edelman J contended that it would only be in extreme circumstances where laws would not be found 'adequate in the balance'.[129] It is arguable the reasonable necessity test may also respond to these extreme cases by characterising the 'true purpose' of a disproportionately burdensome provision as being illegitimate.[130] Therefore, it may be that both tests are reconcilable;[131] since they are likely to yield similar outcomes, issues between them for practical purposes may be predominantly a matter of mere 'nomenclature'.[132]

120 Douglas and Dallimore (n 119) 17.

121 *Betfair [No 1]* (n 14). See *Palmer* (n 6) 193 [52].

122 *Palmer* (n 6) 247 [262].

123 Ibid 214 [144] (Gageler J), 228 [198] (Gordon J).

124 Ibid 214 [146] (Gageler J).

125 Ibid 194 [56] (Kiefel CJ and Keane J).

126 Ibid 195–6 [61].

127 Ibid 199 [82] (Kiefel CJ and Keane J), 216 [153] (Gageler J), 230 [205] (Gordon J), 251 [277] (Edelman J).

128 Ibid 199 [77] (Kiefel CJ and Keane J), 217–18 [166] (Gageler J), 230 [206] (Gordon J), 252–3 [282] (Edelman J).

129 Ibid 254 [288] (Edelman J).

130 Chordia (n 9).

131 Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123, 153.

132 Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27(2) *Public Law Review* 109, 123.

V Conclusion

Palmer consolidated and ascertained the content of s 92 by finding that trade, commerce and intercourse among the states should be absolutely free from laws which effect unjustified discriminatory burdens. While the question did not need to be finally resolved for this case, Edelman J clearly invited future argument on whether or not a law must be 'protectionist' to effectively burden the trade and commerce limb. However, as discussed in Part IV, there are important considerations on both sides of this argument in light of the text of s 92 and its acknowledged purpose to create a 'free trade area',[133] so resolution of this question will await a future case.

The case did confirm that the correct level of analysis for constitutional validity concerning subordinate legislation is the authorising statute according to the approach taken in *Wotton*. This may have come as a surprise to the plaintiffs whose submissions and arguments centred on the *Directions*.[134] While initially contesting the validity of the *Directions* also, the defendants subsequently adopted the submissions of Victoria which had raised the *Wotton* approach.[135] The Court accepted these submissions.[136] Indeed, arguments concerning the necessity of the *Directions* in the context of lower risk areas such as Queensland, may have been of better use in judicial review proceedings alleging that the Minister had not formed the relevant state of mind in relation to s 56(2)(c) of the *EM Act*. This opportunity arose every two weeks when the state of emergency declaration was extended during the period of border closures, however, no such opportunity was taken up.[137]

Palmer signifies the end of an era with the Court finally resolving the remaining part of the constitutional riddle of s 92 by articulating just what is to be 'absolutely free' in the context of intercourse among the states.[138] It has been over 30 years since the s 92 revolution began with *Cole*, from which the intercourse limb was effectively excluded.[139] In *Palmer* the intercourse limb has been reunited with the trade and commerce limb with the Court determining that it was to be discrimination that underpins the section.[140] As pointed out by Gordon J, although the nature of discrimination may differ, 'that does not detract' from the finding that the section is focused on preventing the unequal treatment of equals across state borders.[141] Laws which discriminate in the relevant sense will require justification in the same manner for either

133 *Cole* (n 11) 393.

134 See *Palmer* (n 6) 185 [13], 187 [24] (Kiefel CJ and Keane J), 209 [125] (Gageler J), 219 [167], [169] (Gordon J), 233 [219] (Edelman J).

135 Ibid 196 [63] (Kiefel CJ and Keane J).

136 Ibid 196 [63] (Kiefel CJ and Keane J), 210 [127] (Gageler J), 229–30 [202] (Gordon J), 234–5 [225] (Edelman J).

137 Ibid 231–2 [211] (Gordon J).

138 Ibid 200–1 [87] (Gageler J).

139 Ibid 191 [42] (Kiefel CJ and Keane J); Gageler (n 12).

140 *Palmer* (n 6) 223–4 [184] (Gordon J).

141 Ibid.

limb.[142] While the Court split as to which test would justify discriminatory burdens, the outcome of each respective test involved considerable weight being placed on essentially the same factors. Therefore, the question in this case was answered with both clarity and certainty: the 'absolute' freedom of interstate intercourse does not prevent Australian states from imposing near absolute border closures in the context of a pandemic where the power to do so is sufficiently constrained to its purposes.

142 Ibid 227–8 [197] (Gordon J).