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'MR MCGOWAN, TEAR DOWN THIS WALL!': SECTION 92 AFTER PALMER V WESTERN AUSTRALIA

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INTRODUCTION

At the 1858 Republican State Convention in Springfield, Illinois, Abraham Lincoln famously declared, 'A house divided against itself, cannot stand'. Lincoln's words, however, were not his own. The concept of a 'house divided' is old as the Bible itself,[1] and can even be found in Thomas Hobbes' seminal work, Leviathan.[2] While Australia's federation was not born out of war or revolution, our founding fathers were well-aware of this ancient principle, agreeing to unite the States 'in one indissoluble Federal Commonwealth'.[3] Indeed, at the 1891 National Australasian Convention, Henry Parkes proclaimed:

> Australia, as Australia, shall be free – free on the borders, free everywhere – in its trade and intercourse between its own people; that there shall be no impediment of any kind – that there shall be no barrier of any kind between one section of the Australian people and another; but, that the trade and the general communication of these people shall flow from one end of the continent to the other ... To my mind it would be futile to talk of union if we keep these causes of disunion.[4]

Enacting Parkes' vision of a free, prosperous, and united Commonwealth, the founders included in the *Constitution* section 92 – one of Australia's few express constitutional freedoms.[5] Section 92 'emphatically and imperatively declares that "trade, commerce, and intercourse among the States ... shall be absolutely free"'.[6] Its inclusion in the *Constitution* was undoubtedly central to the 'Australian federal project'.[7] However, since federation, section 92 has proven to be a

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[1] Matthew 12:25. 'But Jesus knew their thoughts, and said to them: "Every kingdom divided against itself is brought to desolation, and every city or house divided against itself will not stand"'. Mark 3:25: 'If a house is divided against itself, that house cannot stand'.
[2] 'A kingdome divided in it selfe cannot stand': Thomas Hobbes, *Leviathan* (Lerner Publishing Group, 2018) 172.
[3] *Australian Constitution* preamble.
[4] *Official Report of the National Australasian Convention Debates* (Sydney), 4 March 1891, 24.
[5] John La Nauze, 'A Little Bit of Lawyer's Language: The History of "Absolutely Free" 1800-1900' in Allan Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1969) 57.
[6] *Palmer v Western Australia* [2021] HCA 5, [83] (Gageler J) ('*Palmer*') (emphasis added).
[7] Ibid [104].

divisive provision, 'subject to over 140 High Court cases; far more than any other single provision in the *Constitution*'.[8] While it was less litigated after the High Court's landmark decision in *Cole v Whitfield*,[9] section 92 has returned to the spotlight because Australia is currently 'a house divided' by the closure of some States' borders.

Last year, during height of the pandemic, Clive Palmer unsuccessfully challenged the constitutional validity of Western Australia's hard border under section 92. However, the recent refusal by some State Premiers to commit to reopening their borders when the nation hits an 80 per cent double dose vaccination level has raised fresh concerns about the interpretation of section 92.[10] Accordingly, this paper will assess the current state of jurisprudence under section 92 of the *Constitution,* including the High Court's decision in *Palmer v Western Australia*. This paper will probe three important doctrinal developments: first, the re-integration of section 92's 'intercourse' or 'interstate movement' limb; second, the entrenchment of the *Wotton* approach for assessing constitutional validity; and third, the expansion of proportionality testing in Australian judicial review.

Ultimately, it is our view that section 92 is now at its most fragile point since *Cole v Whitfield,* with the Court potentially divided both on its scope and the relevant standard of scrutiny it requires. With border restrictions continuing to persist in lieu of high vaccination rates, the High Court's renovation of section 92 might not yet be complete. Indeed, it may be tested again by another non-government party before the pandemic is out.[11]

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[8] 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/>.

[9] (1988) 165 CLR 260 (*'Cole v Whitfield*').

[10] Richard Ferguson and Geoff Chambers, 'Michaelia Cash: State Border Powers Fall at 80 per cent Vaccination', *The Australian* (online, 1 September 2021) <https://www.theaustralian.com.au/nation/michaelia-cash-states-border-powers-fall-at-80-per-cent-vaccination/news-story/ccef193b3c20e3d91283864a6446528f>.

[11] Chris Merritt, 'Vaccine Program Means Closed Borders May Face High Court Challenge', *The Australian* (online, 27 August 2021) <https://www.theaustralian.com.au/business/legal-affairs/vaccine-progress-means-closed-borders-may-face-high-court-challenge/news-story/36e24ca5a8965aa172af1a2b486e8f76>; Richard Ferguson, 'Flight Centre Preparing Legal Challenge to COVID-19', *The Australian* (online, 30 September 2021) <https://www.theaustralian.com.au/nation/politics/flight-centre-preparing-legal-challenge-to-covid19-state-border-closures/news-story/620a6aa45893f251a842aac190a1fc0d>.

I SECTION 92 – A BRIEF HISTORY

Before turning to a full consideration of the High Court's decision in *Palmer*, it is important to first place section 92 in context. To reiterate, section 92 requires that 'trade, commerce, and intercourse among the States ... shall be absolutely free'. While the words 'absolutely free' appear relatively straightforward and definitive on their face, the phrase has long given rise to a range of intensely competing interpretations by the High Court.[12] The principal issue arises from the difficulty in giving the words 'absolutely free' a literal meaning in light of conflicting legislative powers over trade and commerce[13] and quarantine.[14] As a consequence, the Parliaments are provided with legislative power over similar subject matter to section 92. Thus, the words 'absolutely free' have 'occasioned the greatest problems in relation to s 92'.[15] This begs the question: what do the words 'absolutely free' really mean?[16]

A *Section 92 as an Individual Right*

From federation, the High Court has grappled with whether the words 'absolutely free' are to take their colour and meaning 'from the philosophy of individualism and liberalism or from the economic theory of free trade'.[17] Early on, this distinction was neatly embodied in the opposing views of Justice Evatt, 'who strongly supported a free trade interpretation' of section 92, and Justice Dixon, who on the other hand 'approved the "individual right" approach'.[18] According to Leslie Zines, by the late 1930s, the High Court's reasoning more closely resembled the approach propounded by Justice Evatt than that of Justice Dixon.[19] However, in 1948, the High Court affirmed the individual rights approach to section 92 in the *Bank Nationalisation Case*.[20] In an act of irony, it was Doc Evatt, then Attorney-General in the Chifley Government, who argued the case for the Commonwealth against future High Court Justices Garfield Barwick

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[12] See especially James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) chs 6-8 ('*Zines*').
[13] *Australian Constitution* s 51(i).
[14] Ibid s 51(ix). S 112 of the *Constitution* also 'expressly recognises that States may have inspection laws to examine goods before they are let into the State': see Anne Twomey, 'Federal and State Powers to Deal with Pandemics: Cooperation, Conflict and Confusion' in Belinda Bennet and Ian Freckelton (eds) *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 63.
[15] William Wynes, *Legislative, Executive and Judicial Powers in Australia* (Lawbook, 5th ed, 1976) 260.
[16] *Palmer* (n 6) [83] (Gageler J), quoting *Wilcox Moffin Ltd v New South Wales* (1952) 85 CLR 488, 539.
[17] Stellios, *Zines* (n 12) 133.
[18] Ibid 137.
[19] Ibid 140.
[20] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 ('*Bank Nationalisation Case*'). Affirmed by the Privy Council in *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.

and Frank Kitto. Broadly speaking, section 92 under the individual rights approach was regarded as:

> guaranteeing individuals a right to engage in trade, commerce and intercourse across State borders free from legal restriction, unless such restriction could be regarded as 'reasonable regulation' of that freedom. In other words, any governmental restriction on interstate trade and commerce would be constitutionally suspect, regardless of whether discriminatory or not.[21]

However, there continued to be dissenting voices on the free trade side. When he retired in 1952, Sir John Latham appeared to hold to his preference to the free trade approach, professing that, 'when he died, s 92 would be found written on his heart'.[22] Nevertheless, while section 92's interpretation had 'waxed and waned over the course of the 20th century,' by the 1980s the individual rights view had found favour with a majority of the Court.[23]

B *Section 92 as a Free Trade Provision*

However, the individual rights approach was also eventually put to the sword, with the free trade view returning to ascendency in the landmark case of *Cole v Whitfield*, which has aptly been described as the section 92 'revolution'.[24] In *Cole v Whitfield*, the Court unanimously declared that section 92 requires that interstate trade and commerce be free of discriminatory burdens of a protectionist kind.[25] The focus of the provision, their Honours held, was on preventing protectionism rather than promoting personal freedom.[26] Former Chief Justice Barwick later described the reasoning in *Cole v Whitefield* as 'really laughable' and 'terrible tosh'.[27] At this society's launching address in 1992, another former Chief Justice, Sir Harry Gibbs, rightly posed the question: 'Who, in 1901, could have predicted the course of interpretation of section 92?'.[28] As such, the overall effect of *Cole v Whitfield* was to largely render section 92 as a free trade provision.

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[21] Jeremy Kirk, 'Section 92 in its Second Century' in John Griffiths and James Stellios (eds), Current Issues in Australian Constitutional Law (Federation Press, 2020) 254 (citations omitted), citing *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, 201.
[22] 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) 27.
[23] Kirk (n 21), citing Stellios, *Zines* (n 12) chs 6-7.
[24] Gageler (n 22), quoting Michael Coper, 'Section 92 of the Australian Constitution since Cole v Whitfield' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book, 1992) 131.
[25] *Cole v Whitfield* (n 9) 399.
[26] *Palmer* (n 6) [30] (Kiefel CJ and Keane J) (citations omitted), citing *Cole v Whitfield* (n 9) 399.
[27] Ibid 30.
[28] Harry Gibbs, 'Re-Writing the Constitution' (Speech, Samuel Griffith Society Conference, 1992).

Nevertheless, for those supportive of the individual rights view, there remained some hope, with the Court leaving 'the content of the 'distinct' intercourse limb to be decided for another day'.[29] In this context, 'intercourse' refers to the physical movement and communication of people and goods across State borders.[30] While this limb was not impugned in *Cole v Whitfield*, there were 'clear hints' in the Court's reasoning that 'restrictions on interstate intercourse would be harder to justify than those on trade and commerce'.[31] For example, the Court referred to interstate movement as a 'guarantee of personal freedom to pass to and fro among the States without burden, hindrance or restriction'.[32]

C *Proportionality Considerations*

One final development emerging post-*Cole v Whitfield* was the relevant level of judicial scrutiny applied to the 'trade and commerce' limb. In *Castlemaine Tooheys v South Australia* the Court accepted that legislative burdens on section 92 could be justified if they were reasonably appropriate and adapted to a legitimate public policy purpose.[33] In *Betfair v Western Australia,*[34] the Court further refined the standard into one of reasonable necessity,[35] that is: are the measures reasonably necessary for the enactment of some constitutionally legitimate public policy purpose? This standard of review is reflective of a loose form of proportionality analysis which is found elsewhere in Australian constitutional law.[36]

The position of section 92 pre-*Palmer v Western Australia* can therefore be summarised as follows:

1. Interstate 'trade and commerce' is to be free of discriminatory burdens of a protectionist kind, reflecting the free trade view of the provision;
2. Burdens on interstate 'trade and commerce' can be justified if they conform to the standard of 'reasonable necessity' – a fairly high level of judicial scrutiny involving proportionality considerations; and
3. 'Intercourse' or 'interstate movement' is a separate and distinct limb to 'trade and commerce', bearing some resemblance to a personal freedom or individual right.

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[29] Rob Hutchings and Felicity Nagorcka, 'Palmer v Western Australia [2021] HCA 5', *Crown Law* (Web page) <https://www.crownlaw.qld.gov.au/about/news/palmer-v-western-australia-2021-hca-5>.
[30] *Palmer* (n 6) [41] (Kiefel CJ and Keane J).
[31] Hutchings and Nagorcka (n 29).
[32] *Cole v Whitfield* (n 9) 393, quoting *Gratwick v Johnson* (1945) 70 CLR 1, 17.
[33] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473, 477.
[34] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 477 [102]-[103].
[35] *Palmer* (n 6) [131] (Gageler J).
[36] See generally Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020).

Put simply, absolutely free does not mean what the man or woman on the street might expect it to.

II PALMER V WESTERN AUSTRALIA

A *The Facts*

Last year, after being rejected a border pass exemption, Clive Palmer challenged the constitutional validity of Western Australia's hard border closure, arguing that it infringed the freedom of interstate movement provided for in section 92.[37] Importantly, before the case was fully heard in the High Court, part of the proceeding was remitted to the Federal Court for fact finding.[38] The significance of this part of the process should not be underestimated. Justice Rangiah was tasked with assessing the 'reasonable need and efficacy' of the border closure – essentially an analysis of its proportionality. Notably though, Justice Rangiah was confined to an analysis of 'health risks' only, and was therefore unable to consider any 'economic or social risks' posed by State border closures.[39] His Honour concluded that alternative measures, such as mandatory testing, a period of quarantine, or the imposition of a targeted hotspot regime, 'would be less effective than border restrictions in preventing the importation of COVID-19',[40] particularly given that a vaccine was not available at the time. Reading that conclusion, I can't help but be reminded of Justice Deane's famous piece of obiter from the *Tasmanian Dams* case, where his Honour quipped that a law requiring all sheep to be slaughtered would of course be an effective means of combating the spread of some obscure sheep disease. Significantly, Justice Rangiah held that 'a precautionary approach' towards the border measures should be adopted.[41]

Consequently, Mr Palmer's challenge was unanimously rejected by a five-member Bench of the High Court – with Chief Justice Kiefel and Justice Keane writing together, and Justices Gageler, Gordon and Edelman writing separately. Their Honours all found that Western Australia's hard border closure did not infringe section 92 of the *Constitution*. As canvassed at the beginning of this paper, there are three areas of doctrinal significance coming out of the court's reasoning 'both for constitutional law in general and for s 92 in particular'.[42]

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[37] *Palmer* (n 6) [9]-[15] (Kiefel CJ and Keane J).
[38] *Palmer v Western Australia (No 4)* [2020] FCA 1221 (*'Palmer No 4'*).
[39] Ibid [23].
[40] Ibid [366].
[41] Ibid [366].
[42] David Townsend, 'Constitutional Algebra: Palmer v Western Australia [2021] HCA 5' *Barnews* (Web page) <https://barnews.nswbar.asn.au/autumn-2021/32-constitutional-algebra/>.

B *Re-integration of the 'Intercourse' Limb*

First, the High Court unanimously discarded the distinction drawn in *Cole v Whitefield* between 'trade and commerce' and 'intercourse', reintegrating the two limbs of section 92.[43] Accepting submissions made by the Attorney-General of Queensland, the Court held that the distinction drawn in *Cole v Whitfield* 'is not consistent with a modern approach to constitutional interpretation'[44] as there is 'no textual basis for separating the components of s 92'.[45] The Court emphasised that the phrase 'trade, commerce, and intercourse' is a 'composite expression',[46] and to subject the words of a composite expression to different tests would result in constitutional 'incoherence'.[47]

While there is force in arguments for consistency, there can be no denying that the reunification of the two limbs has ultimately weakened Australians' rights of free movement, bringing to an end the individual rights approach. Rather than providing a personal freedom of interstate movement, 'intercourse' is now subject to the same level of scrutiny as 'trade and commerce'. Therefore, despite Parkes' vision for free movement throughout the federation, section 92 now provides a very limited form of protection.

So where does this leave free movement rights in Australia?

Last year in *Gerner v Victoria*,[48] the High Court unanimously determined that the *Constitution* does not contain an implied freedom of movement. Their Honours held that such a right is not sustained by the text or structure of the *Constitution*; nor Australia's system of representative and responsible government; nor as an incident of section 92.[49] Likewise, in *Cotterill v Romanes*,[50] the Supreme Court of Victoria determined that Victorian's lockdown restrictions did not breach the implied freedom of political communication.[51]

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[43] *Palmer* (n 6) [40]-[46]) (Kiefel CJ and Keane J), [96]-[114] (Gageler J), [181]-[189] (Gordon J), [235]-[241] (Edelman J).
[44]Ibid [45] (Kiefel CJ and Keane J).
[45] Ibid [182] (Gordon J).
[46] Ibid [27], [45] (Kiefel CJ and Keane J), [181]-[189] (Gordon J), [246], [248] (Edelman J).
[47] Ibid [45] (Kiefel CJ and Keane J).
[48] [2020] HCA 48.
[49] Ibid.
[50] [2021] VSC 498.
[51] The Supreme Court of Victoria also upheld curfew restrictions under the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic): see *Loielo v Giles* [2020] VSC 722.

Earlier this year in *Newman v Minister for Health and Aged Care*,[52] Justice Thawley of the Federal Court declared that Australian citizens possess a 'fundamental common law right' to re-enter Australia – a finding not disputed by Commonwealth.[53] However, fundamental common law rights are subject to the principle of legality and may be abrogated by legislation if there are clears words of intention.[54] In this case, Justice Thawley held that the *Biosecurity Act*[55] effectively abrogated the common law right of re-entry.[56] As such, Australians' re-entry rights are equally limited.[57]

While some from the academy have argued that the High Court should imply this right of re-entry into *Constitution*,[58] we respectfully disagree. It is one thing to declare that Australians *should* have a right to re-enter their country of citizenship; it another thing entirely to *imply* that right into the *Constitution*, even if such a right is desirable in free society.[59] Indeed, the proper mechanism for constitutional alteration is through the referendum process provided for in section 128 of the *Constitution*,[60] and by democratically elected legislatures making laws respectful of its citizens fundamental rights. It should not be effected by undemocratic judicial activism. To imply rights into the *Constitution* in the absence of clear textual or structural hooks is, as Justice Dawson has said, to 'slide into uncontrolled judicial law-making'. [61] It is highly concerning that the High Court has been so willing to read down section 92 – one of the *Constitution*'s few express rights – while at the same time giving an expansive operation to

[52] [2021] FCA 517 ('*Newman*').
[53] Ibid [69]-[75]. See also *Air Caledonie International v Commonwealth* (1988) 165 CLR 462; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 193 CLR 273; *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* (2013) 215 FCR 35; *Re Canavan* (2017) 263 CLR 284; *Love v Commonwealth* (2020) 94 ALJR 198.
[54] *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[55] *Biosecurity Act 2015* (Cth).
[56] *Newman* (n 52) [82].
[57] An administrative law challenge to Australia's outgoing international travel ban also failed in the Federal Court: see *LibertyWorks Inc v Commonwealth* [2021] FCAFC 90.
[58] See especially Helen Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30(1) *Sydney Law Review* 131; See generally Kim Rubenstein, *Australian Citizenship Law* (Thompson Reuters, 2nd ed, 2017).
[59] See *LibertyWorks Inc v Commonwealth* [2021] HCA 18, [249] (Steward J): 'it is one thing to proclaim the necessity of a freedom of political discourse given the type of representative and responsible government created by the *Constitution*; it an another thing entirely to make an implication about when and how that freedom may be legitimately limited.'
[60] *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 549-50 (McHugh J); *Singh v Commonwealth* [2004] HCA 34 [6] (Gleeson CJ), [295] (Callinan J).
[61] Alison Hughes, 'The High Court and Implied Constitutional Rights: Exploring Freedom of Communication (1994) 1(2) *Deakin Law Review* 173, 188.

'implied' rights which can scarcely be found in the text of the *Constitution*.[62] It is perhaps a contradictory approach to constitutional interpretation to adopt an expansive view of implied rights while at the same time such a narrow view of express rights.

In any event, *Palmer v Western Australia* 'is now the leading case on the freedom of intercourse protected by s 92'.[63] We suggest that as a result, section 92 now unfortunately provides Australians with weaker rights of free movement throughout the federation.

C *The Wotton Approach*

The second important doctrinal development in *Palmer* stems from the Court's application of the *Wotton* approach for assessing constitutional validity.[64] In *Wotton v Queensland*,[65] a majority of the Court determined that questions of constitutional validity are to be directed towards empowering statutory provisions, rather than any executive directions made under a statute.[66] For example, if statutory provisions are found to be constitutionally permissible, then the validity of any instruments made under those provisions is a matter for administrative law, rather than constitutional law.[67]

Applying this approach in *Palmer*, their Honours all found that sections 56 and 67 of Western Australia's *Emergency Management Act*[68] did not infringe section 92 of the *Constitution*.[69] As a result, Mr Palmer was wrong to directly challenge the *Quarantine (Closing the Border) Directions*. As David Hume has argued, the '*Wotton* approach works powerfully in favour of the validity of statutes' as the Court 'does not assess the validity of an exercise of power by looking at its effect on a particular individual – for example, in assessing whether there has been an infringement of the implied freedom of political communication, one does not ask how the law has affected the particular plaintiff'.[70]

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[62] See generally *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *Brown v Tasmania* (2017) 261 CLR 328; *Unions NSW v New South Wales* [2019] HCA 1.
[63] 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)' *AUSPUBLAW* (Blog post, 23 June 2021) <https://auspublaw.org/2021/06/palmer-v-western-australia-2021-95-aljr-229-2021-hca-5/>.
[64] *Palmer* (n 6) [63]-[68] (Kiefel CJ and Keane J), [117]-[128] (Gageler J), [200]-[202] (Gordon J), [223]-[228] (Edelman J).
[65] (2012) 246 CLR 1.
[66] Hume (n 63).
[67] Twomey (n 14) 64.
[68] *Emergency Management (2005)* WA.
[69] Kiefel CJ and Keane J at [63]-[68], Gageler J at [117]-[128], Gordon J at [200]-[202], Edelman J at [223]-[228].
[70] Hume (n 63).

This line of authority undoubtedly weakens the vitality of Australia's relatively few constitutional freedoms by depriving plaintiffs of the type of fact-sensitive analysis that may be required to reach invalidity.[71] Consequently, the 'effect of *Palmer* is to further entrench' the *Wotton* approach towards constitutional validity, which certainly increases the difficulty of any future, hypothetical section 92 challenges.[72]

D *The 'March' of Structured Proportionality*

Thirdly, by a slim majority of 3-2, structured proportionality was endorsed as the new level of judicial scrutiny for burdens on section 92, displacing the older 'reasonable necessity' standard.[73] Justices Gageler and Gordon dissented on this point, maintaining their strong opposition to the use of structured proportionality.[74] Instead, their Honours respectively preferred tests of 'reasonable necessity'[75] and 'reasonable regulation', which are ostensibly lower levels of judicial scrutiny.[76]

Structured proportionality involves asking whether a law satisfies the following three sequential questions:[77]

1. Is the law *suitable* as having a rational connection to its *legitimate* purpose?;
2. Is the law *necessary* in the sense that there are no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which have a less restrictive effect?; and
3. Is the law *adequate in its balance*? A criterion requiring a value judgement, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes.[78]

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[71] See generally Kieran Pender, 'Comcare v Banerji: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131.
[72] Hume (n 63)
[73] *Palmer* (n 6) [62] (Kiefel CJ and Keane J), [261]-[268] (Edelman J). See generally Amelia Simpson, 'Section 92 as a Transplant Recipient' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Leslie Zines* (Federation Press, 2020) 283; 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/>; Hume (n 63).
[74] See especially *Clubb v Edwards* [2019] HCA 111.
[75] *Palmer* (n 6) [131]-[140] (Gageler J).
[76] Ibid [192]-[193] (Gordon J).
[77] *McCloy v New South Wales* (2015) 257 CLR 178, 194-5 [2] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').
[78] See also Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 3.

An answer of 'no' to any of these questions will result in invalidity. Structured proportionality has arguably been 'the most important doctrinal tool in constitutional rights law around the world for decades',[79] despite only being received into Australian jurisprudence quite recently.[80] It currently has two accepted uses in Australian judicial review, both of which arise under constitutional law. First, it is the standard of scrutiny for legislative or executive acts which purportedly burden the implied freedom of political communication.[81] Second, it is now used to test burdens on 'interstate trade, commerce and intercourse' under section 92. As mentioned, its reception into Australian constitutional law has been met with fierce resistance by some members of the judiciary and academy.[82] While we accept that structured proportionality has some role to play in constitutional law due to its ability to make judicial reasoning more transparent and predictable, there are two aspects of the approach we find somewhat troubling.

First, structured proportionality takes judges perilously close to the role of a legislator. Speaking directly to this important distinction, US Supreme Court Justice Neil Gorsuch has stated:

> legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But ... judges should do none of these things in a democratic society... Judges should instead strive ... to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history – not their own moral convictions or the policy consequences they believe might serve society best.[83]

Structured proportionality therefore sits very uncomfortably with this distinction, often inviting judges to step directly into the shoes of a legislator by allowing them to pick and choose policy prescriptions. In *Momcilovic v The Queen*,[84] Justice Heydon echoed this sentiment, stating that

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[79] Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 709.

[80] However, various loose notions of proportionality have long been employed in the characterisation of purposive powers and as a way to test burdens on constitutional guarantees: see generally Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21(1) *Melbourne University Law Review* 1.

[81] *McCloy* (n 77).

[82] See generally Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47(4) *Federal Law Review* 551; Rosalind Dixon, 'Calibrated Proportionality' (2020) 481(1) *Federal Law Review* 92; Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123; Carlos Bernal, 'The Migration of Proportionality to Australia' (2020) 48(2) *Federal Law Review* 288; Anne Carter, 'Bridging the Divide? Proportionality and Calibrated Scrutiny' (2020) 48(2) *Federal Law Review* 282; Anthony Mason, 'Proportionality and Calibrated Scrutiny: A Commentary' (2020) 48(2) *Federal Law Review* 286; Murray Wesson, 'The Reception of Structured Proportionality in Australian Constitutional Law' (2021) 49(3) *Federal Law Review* 352.

[83] Neil Gorsuch, *A Republic, If You Can Keep It* (Crown Forum, 2019) 48.

[84] (2011) 245 CLR 1, 366 [431].

proportionality inquiries 'are not tasks for judges. They are tasks for a legislature'. In particular, these concerns are elevated by structured proportionality's final criterion of adequacy in balance, which inevitably involves polycentric decision-making. Indeed, Justice Edelman, a proponent of structured proportionality,[85] has indicated that he is reluctant to invalidate a law at this final stage, highlighting that it has been 'effectively abandoned' in some jurisdictions.[86] In *LibertyWorks Inc v Commonwealth*,[87] Justice Steward also suggested that this limb 'should be approached with very considerable trepidation'. As such, unless structured proportionality, like other forms of proportionality, 'is kept strictly in check, there is a risk that courts will transgress their legitimate function'.[88]

Second, the ongoing use of structured proportionality by the Hight Court in constitutional cases raises the prospect of its eventual migration into administrative law, where it would clearly be an inappropriate standard of review in light of the important distinction between merits and legality.[89] Unfortunately, notions of proportionality have already begun to seep across into administrative law, principally through the reasonableness ground of review.[90] One recent, high-profile example of this is Justice Rares' judgement in the Federal Court in *Brett Cattle Company Pty Ltd v Minister for Agriculture*.[91]

In that case, Justice Rares used structured proportionality to determine that the Gillard Government's six month ban on live cattle exports was unlawful on the grounds of unreasonableness.[92] In doing so, his Honour held that the Minister should have introduced a closed-loop supply chain, rather than a total moratorium.[93] This novel use of structured proportionality outside the constitutional context undeniably amounts to a new, radical

[85] For example, see his Honour's novel use of structured proportionality in a Ch III context: *Minister for Home Affairs v Benbrika* [2021] HCA 4, [226]. See generally James Stellios, 'Minister for Home Affairs v Benbrika [2021] HCA 4', *AUSPUBLAW* (Blog post, 14 April 2021) <https://auspublaw.org/2021/04/minister-for-home-affairs-v-benbrika-2021-hca-4/>.
[86] *Clubb* (n 74) [498].
[87] *LibertyWorks Inc v Commonwealth* [2021] HCA 18, [293].
[88] *Vanstone v Clark* (2005) 147 FCR 299, 399 [149] (Weinberg J).
[89] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35 (Brennan J).
[90] See especially Janina Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43 *Federal Law Review* 59 ('The Reasonableness of Proportionality').
[91] *Brett Cattle Company Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCA 337 (*'Brett Cattle*'). While a decision concerning the exercise of a discretionary, delegated law-making power, the unreasonableness standard is also shared with judicial review of administrative decisions: see Janina Boughey, 'Brett Cattle: New Limits on Delegated Law-Making Powers?' (2020) 31(4) *Public Law Review* 437, 439.
[92] Ibid 411 [300].
[93] Ibid 423 [355].

approach towards legal unreasonableness,[94] going much further than the more general notions of proportionality introduced in *Minister for Immigration v Li*.[95] While I am a fervent supporter of our live cattle export industry, this sort of judicial activism reminds me of a famous statement made by the late US Supreme Court Justice, Antonin Scalia. He says, '[i]f you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you are probably doing something wrong'.[96]

As such, there is an active risk that the continued expansion of structured proportionality by the High Court will invite judicial activism by lower court judges, providing a licence to engage in merits review of administrative decisions and delegated law-making powers. Chief Justice French and Justice Bell were right to warn that structured proportionality must not come to 'reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law'.[97]

Nevertheless, returning to *Palmer v Western Australia*, every Justice of the Court found that Western Australia's hard border closure was a proportionate response to the pandemic.[98] This determination was 'no doubt assisted' by the factual findings of Justice Rangiah, who on remittal found that the border closure was reasonably necessary and the most effective measure available at the time to combat the spread of COVID-19.[99] His Honour's 'precautionary principle was mentioned with apparent approval' in the joint judgement,[100] and 'was not the subject of criticism from any other Justice'.[101]

However, the decision in *Palmer* came long before the emergence of a vaccine.[102] As Chief Justice Kiefel and Justice Keane noted at the time, '[t]here is no known vaccine, and no other treatment presently available to mitigate the risks of severe medical outcomes or mortality for

[94] Boughey, The Reasonableness of Proportionality (n 90).
[95] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 322, 351-2 (French CJ), 365-6 (Hayne, Kiefel and Bell JJ). See also Grant Hooper, 'Judicial Review and Proportionality: Making a Far-Reaching Difference to Administrative Law in Australia or a Misplaced and Injudicious Search for Administrative Justice?' (2016) 88 *AIAL Forum* 29.
[96] Quoted in Gorsuch (n 83).
[97] *Murphy v Electoral Commissioner* [2016] HCA 36, [37].
[98] *Palmer* (n 6) [77]-[82] (Kiefel CJ and Keane J), [166] (Gageler J), [210] (Gordon J), [277]-[279] (Edelman J).
[99] Townsend (n 42).
[100] *Palmer* (n 6) [23], [79].
[101] Townsend (n 42).
[102] See Merritt (n 11).

a person who contracts COVID-19'.[103] This is no longer the case. Not only are vaccines now available, but more than 1.8 million Australians are being vaccinated every week. As more Australians become vaccinated, State border closures become less proportionate – a point that's been made by a number of prominent constitutional scholars, including Greg Craven, Anne Twomey and George Williams.[104] Yet Premiers Mark McGowan and Anastacia Palaszczuk have both threatened to keep their borders closed after 80 per cent of their citizens are vaccinated. In other words, we are now faced with the absurd prospect that some Australians will soon be able to travel from Sydney to London and Paris before they can go to Townsville and Cairns.

The cruelty of these border closures is plain – particularly in light of scant epidemiological evidence of their long-term effectiveness. In my home State of Queensland, we've seen diggers from Afghanistan refused entry to their home state; interstate Queenslanders told to go to homeless shelters when they run out of money paying for motels while they wait long periods for their application to be assessed by the bureaucracy; 3-year-old children kept away from their parents; relatives unable to be with each other in a loved one's final moments; families unable to mourn together at funerals, and the tourism sector brought to its absolute knees. Despite not being under lockdown, Queensland has the second highest unemployment rate in the nation. Now the Queensland government is attempting to use the State border closure to shake down the federal government for more funding – despite it being at record levels – using federation politics as a cover for Queensland Labor's entrenched mismanagement and incompetence. In a health system where the number of administrators approximately equals the number of frontline nurses, we would suggest money is not the problem. In any event, the Commonwealth picks up 50% of the bill on all COVID related costs.

As of 8 October, over 8,000 Queenslanders are trapped interstate with no indication of when they'll be allowed to return home. My office has been inundated with their pleas for help. But

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[103] *Palmer* (n 6) [18].

[104] Richard Ferguson, 'Legal Experts Back 'Michaelia Cash on State Borders', *The Australian* (online 3 September 2021) <https://www.theaustralian.com.au/nation/politics/legal-experts-back-michael-cash-on-state-borders/news-story/f4bf7802fdefd73d34ce9dac78d331d7>; Anne Twomey, 'Explainer: Do the States Have to Obey the National Plan?', *The Conversation* (online, 7 September 2021) <https://theconversation.com/explainer-do-the-states-have-to-obey-the-covid-national-plan-167357?fbclid=IwAR2HOj_r6SDVcVRtLN5EIkC2P23zmsviZ8qku6PWdEdlB4bSNm92sfZ49Z8>; George Williams, 'Federal Parliament has the Power to Rule on Borders', *The Australian* (online, 3 September 2021) <https://www.theaustralian.com.au/commentary/federal-parliament-has-the-power-to-rule-on-borders/news-story/180d1be838e60cb4a8fba6064f4edd14>.

while Premier Palaszczuk has been rolling out the red carpet for NRL players and their families, requests from regular Queenslanders have fallen on deaf ears. Even Queensland's Human Rights Commissioner has criticised the Palaszczuk Government, calling for a more consistent and transparent approach to border exemptions, indicating that some requests have favoured people with a high media profile.[105]

This kind of disproportionate response is unfortunately nothing new in Australian history. For example, '[d]uring the Spanish flu pandemic of 1919, the attempt to give the Commonwealth control over interstate movement of people quickly collapsed, with States closing their borders to protect their residents from the spread of disease. Western Australia even impounded the transcontinental train'.[106] It seems nothing much has changed in the West.

CONCLUSION

So where does this all leave us? With respect to section 92, the *Palmer* case has reformulated our understanding in these terms:

1. Interstate 'trade, commerce and intercourse' are re-united as a single limb, officially spelling the end of the individual rights approach;
2. Where restrictions on interstate trade, commerce or intercourse arise via directions issued pursuant to a statute, section 92 is only applied to the empowering statutory provisions. The executive directions are otherwise left to administrative law review; and
3. The relevant standard of judicial scrutiny applied is structured proportionality, though only by a slim majority of 3-2. The views of newly appointed Justices Steward and Gleeson will no doubt be decisive in determining which standard of review eventually prevails. A question mark also remains over the ongoing relevance of 'protectionism'.

With respect to public law more broadly, the following issues remain:

1. Whether structured proportionality is an appropriate standard of review in Australian constitutional and administrative law. We suggest it has a small role to play in constitutional law, but no place at all in administrative law;

[105] Ciara Jones, 'Human Rights Watchdog Criticises Queensland Government Over COVID-19 Border Exemptions' ABC (online, 22 September 2021) <https://www.abc.net.au/news/2021-09-22/qld-coronavirus-human-rights-watchdog-slams-border-exemptions/100477126?fbclid=IwAR22uDxExRcVyDdFU_82PcOr8IzbhSSaeYOPj1_G3UKuCO-p83w4pWLGA0E>.
[106] Twomey (n 14) 62.

2. Whether the *Wotton* approach for assessing constitutional validity is correct or desirable when dealing with constitutional freedoms; and
3. Whether ongoing border restrictions fall foul of section 92 or otherwise. In light of the role of structured proportionality, it is the fact-finding process that will inevitably determine the matter. It is hard to imagine, with readily available vaccines and a high and rising vaccination rate, that the finding of fact today would continue to support an assessment that border closures remain proportionate.

I'd like to conclude by reading a short passage from the 1897 Constitutional Convention Debate. There, it was said:

> With most of these things no one State is concerned with the management of the other, but there are certain matters-such as defence, quarantine, and various other things... we as a people say we are concerned, not as residents of Victoria, Tasmania, or any other colony, but because our interests and desires are united. We say there is henceforth to be no distinction between us; let us blot out of our future history and out of our future politics the arbitrary fact that we are residents of different colonies.[107]

I'd urge our Premiers to adopt this spirit of a united and prosperous federation by committing to re-opening our borders and reuniting Australians. Thank you.

[107] *Official Record of the Debates of the Australasian Federal Convention* <https://parlinfo.aph.gov.au/parlInfo/download/constitution/conventions/1897-1056/upload_binary/1897_1056.pdf;fileType=application/pdf#search=%22quarantine%22>.