PALMER v WESTERN AUSTRALIA: REVISITING STATUTORY POWERS AND CONSTITUTIONAL LIMITATIONS

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I INTRODUCTION

Palmer v Western Australia[1] ('*Palmer*'), decided by the High Court on 24 February 2021, represents a significant development in the jurisprudence relating to the freedom of interstate trade, commerce and intercourse in s 92 of the *Constitution*. The decision contains four notable strands of reasoning. First, the Court unanimously integrated the operation of the 'intercourse' limb of s 92 with the 'trade and commerce' limb. Previously, the 'intercourse' limb did not require a 'discriminatory' burden for its operation. Secondly, a bare (3:2) majority of the Court endorsed the tests of structured proportionality for assessing discrimination.[2] Thirdly, a majority affirmed that 'protectionist' discrimination remains the threshold test for invalidity under the trade and commerce limb. Finally, the Court provided guidance on the analytical framework to use in circumstances where an exercise of statutory power is argued to infringe a constitutional limitation, such as s 92.

This note focuses on this last, narrower aspect of the decision. The arguments concerning the integration of the two limbs of s 92, and whether 'protectionist' discrimination should remain the test for invalidity, have been discussed elsewhere.[3] Moreover, the contest between the proponents of structured proportionality and its detractors continues to spill ink.[4] The

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[1] *Palmer v Western Australia* (2021) 95 ALJR 229.

[2] Ibid 244–5 [62] (Kiefel CJ and Keane J).

[3] Jeremy Kirk, 'Section 92 in its Second Century' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law* (Federation Press, 2020) 253.

[4] See Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 131–51; Amelia Simpson, 'Section 92 as a Transplant Recipient?: Commentary on Chapter 8' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law* (Federation Press, 2020) 283. See generally Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92; Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123; Sir Anthony Mason, 'Proportionality and Calibrated Scrutiny: A Commentary' (2020) 48(2) *Federal Law Review* 286.

approach to applying constitutional freedoms to statutory discretions has received comparatively less attention.[5] 'Constitutional' challenges to statutory powers featured in some of the High Court's earliest cases,[6] and in landmark cases since.[7] Despite this, members of the Court in *Palmer* said that 'clarification' regarding the correct analytical framework for resolving such challenges has been 'admittedly recent'.[8]

This note commences, in Part II, by outlining the factual background to the dispute. Part III considers the High Court's current approach to applying constitutional limitations to statutory powers, before analysing, in Part IV, the reasoning in *Palmer*. Part V then considers the broader relevance of the decision to constitutional limitations and statutory powers.

II FACTUAL BACKGROUND

On 25 May 2020, Clive Palmer commenced proceedings in the original jurisdiction of the High Court of Australia challenging Western Australia's border closure. The border closure, a measure in response to the COVID-19 pandemic, was implemented by the *Quarantine (Closing the Border) Directions* (WA) (the 'Directions'). The Directions prevented persons from entering Western Australia unless they met the criteria of an 'exempt traveller'.[9]

The Directions purported to be authorised by ss 56 and 67 of the *Emergency Management Act 2005* (WA) ('EMA'). Under s 56(1) the Minister for Emergency Services is empowered to declare that 'a state of

[5] But see Bret Walker and David Hume, 'Broadly Framed Powers and the Constitution' in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2018) 144; James Stellios, '*Marbury v Madison*: Constitutional Limitations and Statutory Discretions' (2016) 42 *Australian Bar Review* 324.

[6] See, eg, *R v Commonwealth Court of Conciliation and Arbitration* (1910) 11 CLR 1; *Ex parte Nelson [No 1]* (1928) 42 CLR 209.

[7] See especially *Comcare v Banerji* (2019) 267 CLR 373 ('*Comcare*'); *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*'); *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 ('*Betfair*'); *Coleman v Power* (2004) 220 CLR 1; *Levy v Victoria* (1997) 189 CLR 579; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Cole v Whitfield* (1988) 165 CLR 360: the essential issue was whether regs 31(1)(d)(ix) and 31(1)(d)(x) of the *Sea Fisheries Regulations 1962* (Tas) made under *Fisheries Act 1959* (Tas) were constitutionally valid.

[8] *Palmer* (n 1) 245 [67] (Kiefel CJ and Keane J).

[9] *Quarantine (Closing the Border) Directions* (WA) para 4.

emergency exists' where certain conditions are met. Relevantly, the Minister must have been satisfied that (i) an emergency had occurred, and (ii) extraordinary measures were required to prevent or minimise, among other things, loss of people's lives or harm to their health.[10] The Minister's 'state of emergency declaration' under s 56(1) was a precondition for the exercise of the powers in s 67.[11] Section 67 relevantly provided:

> For the purpose of emergency management during an emergency situation or state of emergency, a hazard management officer or authorised officer may … (a) direct or, by direction, prohibit, the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area …

It was under this section that the State Emergency Coordinator, an 'authorised officer' within the meaning of s 67, purported to issue the Directions. Failure to comply with the Directions constituted an offence.[12]

Mr Palmer, a resident of Queensland, wished to travel to Western Australia for various business and personal reasons. After Mr Palmer unsuccessfully applied for 'exempt traveller' status, he was denied entry into Western Australia. Mr Palmer sought a declaration that the Directions were invalid on the grounds that it impermissibly infringed s 92 of the *Constitution*. Section 92 provides that 'trade, commerce, and intercourse among the States ... shall be absolutely free'. As Mr Palmer's challenge was levelled at the Directions, rather than the primary legislation, both parties assumed that the Directions were lawfully authorised by the EMA. However, Western Australia subsequently adopted the submission of Victoria, intervening, that the constitutional question should be answered by reference to the authorising legislation. In oral argument, the Court's eagerness to discuss the validity of the authorising legislation rather than the Directions was apparent from the very first parley.[13]

[10] *Emergency Management Act 2005* (WA) s 56(2)(b)–(c) ('EMA').

[11] Ibid s 65.

[12] Ibid s 86(1).

[13] Transcript of Proceedings, *Palmer v Western Australia* [2020] HCATrans 72–123 (Kiefel CJ, Edelman J and Mr Dunning QC).

III CONSTITUTIONAL LIMITATIONS AND STATUTORY EXECUTIVE POWER

In *Wotton v Queensland*[14] (‘*Wotton*’), the High Court set out the approach for testing whether discretionary statutory powers comply with constitutional limitations. Although *Wotton* concerned the constitutional limitation effected by the implied freedom of political communication, the antecedents of the Court’s approach in that case lie in the jurisprudence on s 92.[15] What follows is a brief outline of the *Wotton* approach, which the Court applied in *Palmer*.

The starting point of this approach is that the validity of an executive act depends upon the source of power.[16] Where there is a challenge to an executive act authorised by statute, it is the limits of that statute which determine the validity of the exercise of power. To adapt an aphorism used in a different constitutional context, ‘a stream cannot rise higher than its source’.[17] *Wotton* dictates that where an exercise of statutory power is argued to transgress a constitutional limit, such as s 92, the first question is whether the authorising legislation is constitutionally valid.[18] If the authorising legislation is valid, then the only remaining question is whether the exercise of power was authorised by the statute. Hence constitutional constraints do not generally apply directly to actions taken under the statute — for example, directions, by-laws, regulations.[19]

The *Wotton* approach, as Professor Stellios points out,[20] gives rise to three categories of statutory powers:

[14] *Wotton v Queensland* (2012) 246 CLR 1, 14 [21]–[22] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (‘*Wotton*’).

[15] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 593 (Brennan J) (‘*Miller*’); *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488, 522 (Dixon, McTiernan and Fullagar JJ).

[16] Justice James Edelman, ‘Foreword’ in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) v, v.

[17] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J).

[18] *Wotton* (n 14) 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ) applying *Miller* (n 15) 613–4 (Brennan J).

[19] *Comcare* (n 7) 395–6 [20] (Kiefel CJ, Bell, Keane and Nettle JJ), 408 [51] (Gageler J), 458–9 [208]–[209] (Edelman J).

[20] James Stellios, ‘*Marbury v Madison*: Constitutional Limitations and Statutory Discretions’ (2016) 42 *Australian Bar Review* 324, 335–40.

1. First, a statutory power may be incapable of being exercised consistently with the constitutional limit in *every* application. This may arise where the purpose of the statutory power is unconstitutional, or because the decision-maker is required to consider mandatory considerations which are unconstitutional. Such a law will be entirely invalid. A discretion vested in a Minister to prevent the movement of goods across state borders for the purpose of protecting intrastate trade is a clear example of a discretion that is incapable of being exercised consistently with s 92.

2. Second, a statutory power may comply with the constitutional limit 'across the range of its potential operations'.[21] If the scope of the power is, expressly or impliedly, confined so as to ensure that it only authorises decisions that are constitutionally permissible, and judicial review is available to enforce these constraints, then the law is valid. Generally, discretionary powers are interpreted in a manner that confines rather than enlarges the power.[22] An exercise of discretionary power may be subject to what is 'reasonably necessary',[23] in the 'public interest',[24] or a 'good reason'.[25] Such express limitations may also be coupled with implied ones. A statutory discretion that is not exercised reasonably,[26] for the purpose for which it was conferred,[27] or with procedural fairness,[28] may give rise to a ground for administrative review. These limitations may ensure that every exercise of the discretion is constitutional. In such a case, the only remedy available to a challenger lies in administrative review where the

[21] *Comcare* (n 7) 421 [96] (Gageler J), 458–9 [209]–[211] (Edelman J).

[22] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 366, 366–8 [85]–[89] (Hayne J).

[23] *Wotton* (n 14) 16 [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[24] *Hogan v Hinch* (2011) 243 CLR 506, 526 [5] (French CJ), 548–9 [70]–[72] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Hogan*').

[25] *Wainohu v New South Wales* (2011) 243 CLR 181, 231 [113] (Gummow, Hayne, Crennan and Bell JJ) ('*Wainohu*').

[26] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 348–9 [23]–[24] (French CJ), 364 [68] (Hayne Kiefel and Bell JJ) ('*Li*').

[27] *Comcare* (n 7) 57–8 [40] (Kiefel CJ, Bell, Keane and Nettle JJ) citing *Li* (n 26) 352 [30] (French CJ), 366 [73]–[74] (Hayne, Kiefel and Bell JJ).

[28] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ) ('*S10*').

decision-maker has exceeded the boundaries of what the statute authorised. An example in the context of s 92 might include a discretion in a biosecurity officer to exclude interstate produce where it is a biosecurity risk.

3 Third, a statutory discretion may be so 'broad and general'[29] or 'open-textured'[30] that it may appear to authorise exercises of power that are inconsistent with a constitutional limit. Express constraints may be absent. Administrative review may be limited and, in certain circumstances, a requirement of procedural fairness may be excluded.[31] Such a law is '*susceptible*'[32] or *capable* of being applied consistently with the constitutional limit but neither its terms, nor the implied constraints of administrative law, are sufficient controls. The law will be 'read down' as authorising only decisions that are within the constitutional limit, and valid only to this extent. Any conferral of power beyond the constitutional limit is disapplied, or put differently, excluded from the ambit of the legislation. A speculative example might be an 'absolute discretion' in a transport official to limit the number of flights into an airport 'in the State's interest'.

Applying the approach in *Wotton*, the principal issue in *Palmer* was whether ss 56 and 67 of the EMA infringed the freedoms in s 92. Chief Justice Kiefel and Keane J, along with Gageler and Gordon JJ writing separately, found that ss 56 and 67 of the EMA fell into the second category above and were thus entirely valid.[33] Justice Edelman's approach was somewhat more qualified; his Honour found the authorising provisions fell into category 3 but were nonetheless valid in their application to the facts before the Court.[34]

[29] *Palmer* (n 1) 245 [68] (Kiefel CJ and Keane J). See also *Palmer* (n 1) 254 [122] (Gageler J); *Comcare* (n 7) 458–9 [209] (Edelman J).

[30] *Palmer* (n 1) 275 [227] (Edelman J).

[31] *S10* (n 28) 648–9 [30] (French CJ and Kiefel J).

[32] *Wotton* (n 14) 14 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (emphasis added).

[33] *Palmer* (n 1) 247 (Kiefel CJ and Keane J), 262 [166] (Gageler J), 272 [210] (Gordon J).

[34] Ibid 277 [234] (Edelman J).

IV The High Court's Reasons

A *Chief Justice Kiefel, Keane, Gageler and Gordon JJ*

As outlined above, there were two relevant discretionary powers in the EMA. The first was the power of the Minister to declare a 'state of emergency' under s 56(1). The second was the power of an 'authorised officer' to issue a direction prohibiting the movement of persons into or out of an emergency area in s 67(a), which depended for its operation on s 56(1). Although the operative power was s 67(a), the restraints on s 56(1) were clearly relevant the scope of s 67(a).[35]

After referring to the approach in *Wotton*,[36] Kiefel CJ and Keane J acknowledged that 'difficult questions' may arise in the context of 'broad and general' conferrals of statutory power.[37] Their Honours did not consider *Palmer* to be such a case. While Kiefel CJ and Keane J accepted that s 67(a) could discriminate against interstate movement and thus burden the freedom in s 92,[38] their Honours concluded that the discretion was confined such that any burden was justified according to the tests of structured proportionality. The purpose of the Act, which impliedly limited the scope of lawful decisions,[39] was to protect the health of Western Australian residents. In a more recent case, their Honours said that 'a powerful public, protective purpose assumes a special importance'.[40] Further, an emergency declaration under s 56 was in effect only for a short duration.[41] Their Honours then concluded the entire area of discretion under s 67(a) to be within constitutional limits.

Like Kiefel CJ and Keane J, Gageler J found that any burden imposed on s 92 by s 67(a) 'meets the requisite standard of justification across the range

[35] See, eg, ibid 271 [206] (Gordon J), 275–6 [229] (Edelman J).

[36] Ibid 245 [64].

[37] Ibid [68].

[38] Ibid 246 [72].

[39] See, eg, *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 12 (Stephen J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J), 56 (Brennan J).

[40] *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 510 [85] (Kiefel CJ, Keane and Gleeson JJ).

[41] *Palmer* (n 1) 245 [70] (Kiefel CJ and Keane J).

of potential outcomes'.[42] However, his Honour unsurprisingly[43] disagreed that structured proportionality was the correct test for justification, preferring instead the standard of 'reasonable necessity'[44] — the test adopted in *Betfair v Western Australia*.[45]

His Honour identified a number of 'critical constraints' with 'constitutional significance' 'built into the scheme of the Act which sustained the Directions'.[46] First, an emergency declaration under s 56 was in effect only for a short duration.[47] Second, s 56 required that the Minister be satisfied that there is an emergency and that extraordinary measures are required to prevent or minimise loss of human life or harm to health.[48] It was implied that the Minister must form that subjective state of mind reasonably.[49] Further, his Honour found the power to issue directions prohibiting movement in s 67(a) could only be exercised for its stated purpose — 'emergency management' — and was limited by a requirement of reasonableness such that s 67 was entirely valid.[50]

Justice Gordon, like Gageler J, applied the standard of reasonable necessity to find the power was 'so constrained that its exercise cannot be obnoxious to the freedom'.[51] After noting the legitimate end to which the scheme was directed,[52] her Honour appeared to place particular weight on the requirements imposed by s 56, identified by Gageler J.

Chief Justice Kiefel, Keane and Gageler JJ acknowledged that ss 56 and 67(a) were textually broad and contained no express terms which ensured

[42] Ibid 255 [127].

[43] Justice Gageler's disquiet regarding structured proportionality has been expressed in a long line of cases: see, eg, *McCloy v New South Wales* (2015) 257 CLR 178, 235 [142]; *Brown* (n 7) 376–7 [160]–[161].

[44] Ibid 249 [97].

[45] *Betfair* (n 7) 477 [102]–[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[46] *Palmer* (n 1) 255 [126].

[47] Ibid 261 [159].

[48] Ibid [157].

[49] Ibid [158]. See also *Graham Border Protection* (2017) 263 CLR 1, 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[50] *Palmer* (n 1) 262 [164].

[51] Ibid 271 [202].

[52] Ibid [205].

compliance with the constitutional freedom.[53] As such, unlike in *Wotton*,[54] *Wainohu v New South Wales*[55] or *Hogan v Hinch*,[56] where statutory criteria expressly limited the scope of the discretions, ss 56 and 67(a) could not be said to be internally calibrated to only authorise decisions consistent with s 92. On the face of the statutory text alone, it is possible to interpret s 67(a) as permitting directions restricting interstate movement without regard to whether this is reasonably necessary for, or proportionate to, the statutory purpose.

In upholding validity, Kiefel CJ, Keane, Gageler and Gordon JJ placed emphasis on the implied statutory requirements that a discretion must be exercised reasonably and for the purpose for which it was conferred.[57] Yet the content of the concept of legal unreasonableness is notoriously difficult to pin down.[58] Following *Minister for Immigration and Citizenship v Li* ('*Li*'),[59] it appears uncontroversial that unreasonableness will invalidate decisions which lack an evident and intelligible justification.[60] However, the degree to which the concept of proportionality inheres in reasonableness, and tests for determining an unreasonable outcome, remain unsettled.[61] Since *Li*, the High Court has emphasised that that the operation of legal unreasonableness is 'extremely confined'.[62] In first-instance and

[53] Ibid 246–7 [76] (Kiefel CJ and Keane J), 262 [162] (Gageler J).

[54] *Wotton* (n 14).

[55] *Wainohu* (n 25).

[56] *Hogan* (n 24).

[57] *Palmer* (n 1) 247 [77], [80] (Kiefel CJ and Keane), 262 [164] (Gageler J); s 67(a) was 'so confined that any exercise of the power is *reasonably necessary* for the object of managing a state of emergency': 271–2 [207] (Gordon J) (emphasis added).

[58] See, eg, John Basten, 'Construing Statutes Conferring Powers – A Process of Implication or Applying Values?' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 54, 62. In *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 3–4 [5] ('*Stretton*'), Allsop CJ listed 10 distinct tests, or 'bodies of principle', which inhere in the legal reasonableness standard.

[59] *Li* (n 26).

[60] Ibid 367 [76] (Hayne, Kiefel and Bell JJ); *Graham* (n 49) 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[61] *Stretton* (n 58); *DBP16 v Minister for Home Affairs* [2020] FCA 781, [99] (Banks-Smith J) cf *Brett Cattle Company Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337; *Angel Flight Australia v Civil Aviation Safety Authority* [2021] FCA 469.

[62] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 551 [11] (Kiefel CJ).

intermediate appellate courts, this has been interpreted to mean that applying 'proportionality as a criterion' in unreasonableness review is not supported by authority.[63]

Therefore, it seems at least questionable whether disproportionate exercises of statutory power which infringe constitutional limitations can be restrained by the legal unreasonableness ground for review. In the absence of a distinct ground of administrative review where an exercise of statutory power exceeds a constitutional limitation, it is unclear whether the assessment of administrative unreasonableness would perform the function as the test for constitutional validity. This difficulty is amplified by the structured proportionality analysis endorsed by a majority of the Court.[64] With respect, the majority's reliance on implied constraints — the content of which is ill-defined — goes close to the error identified by Kiefel and Crennan JJ in an earlier implied freedom case. There, their Honours said that the 'obligation to act in accordance with constitutional requirements' should not create an assumption that the 'discretionary power will be valid because the obligation would be fulfilled'.[65]

B *Justice Edelman*

Only Edelman J found that the discretion was so 'open-textured' as to allow exercises of power beyond what was constitutionally permissible under s 92. Accordingly, his Honour reasoned that it was 'not appropriate' to affirm the validity of ss 56 and 67 in every possible application.[66] Rather, it was appropriate to analyse the provisions at 'a more particularised level of application'.[67] The question for his Honour was whether ss 56 and 67, in their application 'to facts falling within a category based upon circumstances of the same general kind as those before [the Court]', were within the constitutionally permissible range of applications.[68]

[63] *DBP16 v Minister for Home Affairs* [2020] FCA 781, [99] (Banks-Smith J); *Ogawa v Carter* [2021] FCAFC 16, [46]–[47] (Logan, Katzmann and Jackson JJ); *Kaye v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 604, [46]–[47] (Logan J).

[64] *Palmer* (n 1) 244–5 [62] (Kiefel CJ and Keane J), 273 [217] (Edelman J).

[65] *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 88 [215] ('*Adelaide City*').

[66] *Palmer* (n 1) 275 [226].

[67] Ibid 277 [234].

[68] Ibid 276 [230].

The parameters of this narrower application of ss 56 and 67 relied on the following textual features: (i) a 'state of emergency' under s 56; (ii) where the 'emergency' involved a 'plague or an epidemic'[69] rather than a 'natural disaster'; (iii) the 'emergency' was based on the 'occurrence of a hazard';[70] and (iv) owing to the confinement to a 'plague or an epidemic', the Minister was satisfied that extraordinary measures were required to 'prevent or minimise … loss of life, prejudice to the safety, or harm to the health, of *persons*'.[71] His Honour held that, where the discretion is exercised in factual scenarios that meet these requirements from the legislative text, the discretion is 'consistent with s 92'.[72] For this conclusion, his Honour appeared to rely on the same limiting features identified by the majority, discussed above. However, his Honour held that ss 56 and 67 were constitutionally valid *only* within the narrow band of operation identified, rather than in every operation.

Admittedly, his Honour's approach rests on fine distinctions. However, it is preferable to the majority's approach because it places less reliance on the implied constraints of reasonableness and the obligation to exercise the statutory discretion for its purpose. His Honour's approach of narrowing the application by reference to the text provided an additional means of confining the discretion before the constraints of administrative law were applied.

V SIGNIFICANCE FOR BROADLY-FRAMED STATUTORY POWERS GENERALLY

The question of how constitutional limitations are applied to discretionary powers has wide relevance. It is most likely to arise in implied freedom or s 92 cases, but it is equally applicable to the limitations imposed by Chapter III of the *Constitution*,[73] the prohibition on the preferential treatment of States by the Commonwealth in s 99,[74] the implied intergovernmental

[69] EMA s 3.

[70] Ibid.

[71] Ibid s 56(2)(c)(i).

[72] *Palmer* (n 1) 277 [234].

[73] See, eg, *Commonwealth v AJL20* (2021) 95 ALJR 567; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45

[74] See, eg, *Queensland Nickel Pty Ltd v The Commonwealth* (2015) 255 CLR 252.

immunity principles[75] and the religious freedom in s 116.[76] It may be argued to range across an even larger compass to include the limitations on legislative power demarcated in s 51. Yet, the correct approach has caused difficulties for parties[77] and intermediate courts alike.[78] The Court's reasoning in *Palmer* is thus significant in attempting to provide further clarification.

The following principles are now clear. The first question in every case is whether the statutory power may comply with the constitutional limit 'across the range of its potential operations' (category 2 above). If the power is not sufficiently confined to ensure that every exercise is within the constitutional limit, it is not necessary to affirm every possible application of the power. The court need only to affirm the statutory power's validity as it applies within the narrowed parameters of 'facts falling within a category based upon circumstances of the same general kind as those before [the Court]'.[79] Any grant of statutory power that exceeds what is constitutionally permissible is read down.

The statutory text may provide the parameters for this narrower application of the statutory power. Edelman J suggested, however, in some cases there may be 'no difficulty' in assessing the validity at an even more particularised level of application which 'excludes applications that are irrelevant to the facts before' the Court.[80] This qualification leaves the door open to assessing the application of the legislation at such a level of particularity that would be essentially the same as assessing the exercise of statutory power directly.[81]

[75] *Victoria v Commonwealth* (1996) 187 CLR 416, 502–3 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[76] This list is not necessarily exhaustive.

[77] See, eg, *Comcare* (n 7); *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298.

[78] *Australian Broadcasting Corporation v Kane [No 2]* [2020] FCA 133.

[79] *Palmer* (n 1) 276 [230] (Edelman J).

[80] Ibid 277 [233] (Edelman J).

[81] See generally Bret Walker and David Hume, 'Broadly Framed Powers and the Constitution' in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2018) 144. This appears consistent with, for example, *Adelaide City* (n 65) 88–90 [217]–[222]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 373 [104]; *AMS v AIF* (1999) 199 CLR 160, 179 [45] (Gleeson CJ, McHugh and Gummow JJ); *Levy v Victoria* (1997) 189 CLR 579, 597 (Brennan J); *O'Sullivan v Noarlunga Ltd* (1954) 92 CLR 565, 594 (Fullagar J).

VI Conclusion

The expanding dominion of statutory executive power heightens the importance of the correct approach to imposing constitutional limitations on discretionary power.[82] *Palmer* provides general guidance on the analytical approach in circumstances where a expressed statutory power is argued to infringe a constitutional constraint on legislative power.

[82] See, eg, Janina Boughey, 'Executive Power in Emergencies: Where Is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168.