

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

CLIVE FREDERICK PALMER & ANOR PLAINTIFFS

AND

THE STATE OF WESTERN AUSTRALIA & ANOR DEFENDANTS

Palmer v Western Australia

[2021] HCA 5

Date of Hearing: 3 & 4 November 2020

Date of Order: 6 November 2020

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B26/2020

ORDER

The questions stated for the opinion of the Full Court in the special case filed on 22 September 2020 be answered as follows:

- (a) *Are the Quarantine (Closing the Border) Directions (WA) and/or the authorising Emergency Management Act 2005 (WA) invalid (in whole or in part, and if in part, to what extent) because they impermissibly infringe s 92 of the Constitution?*

Answer:

On their proper construction, ss 56 and 67 of the Emergency Management Act 2005 (WA) in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic comply with the constitutional limitation of s 92 of the Constitution in each of its limbs.

The exercise of the power given by those provisions to make paras 4 and 5 of the Quarantine (Closing the Border) Directions (WA) does not raise a constitutional question.

No issue is taken as to whether the Quarantine (Closing the Border) Directions (WA) were validly authorised by the statutory provisions so that no other question remains for determination by a court.

(b) *Who should pay the costs of the special case?*

Answer:

The plaintiffs.

Representation

P J Dunning QC with R Scheelings and P J Ward for the plaintiffs (instructed by Jonathan Shaw)

J A Thomson SC, Solicitor-General for the State of Western Australia, with J D Berson for the defendants (instructed by State Solicitor's Office (WA))

P J F Garrisson SC, Solicitor-General for the Australian Capital Territory, with H Younan SC and A M Hammond for the Attorney-General for the Australian Capital Territory, intervening (instructed by ACT Government Solicitor)

M E O'Farrell SC, Solicitor-General for the State of Tasmania, with S K Kay for the Attorney-General for the State of Tasmania, intervening (instructed by Solicitor-General of Tasmania)

G A Thompson QC, Solicitor-General of the State of Queensland, with F J Nagorcka and K J E Blore for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M J Wait SC, Solicitor-General for the State of South Australia, with F J McDonald for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

P J Hanks QC with P P Thiagarajan and T M Wood for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor's Office)

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Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Palmer v Western Australia

Constitutional law (Cth) – Freedom of interstate trade, commerce, and intercourse – Where s 56 of *Emergency Management Act 2005* (WA) ("EM Act") empowered Minister to declare state of emergency – Where s 67 empowered authorised officer to direct or prohibit movement of persons into emergency area – Where Minister for Emergency Services declared state of emergency in Western Australia in respect of COVID-19 pandemic – Where State Emergency Coordinator issued *Quarantine (Closing the Border) Directions* (WA) ("Directions") – Where paras 4 and 5 of Directions prohibited persons from entering Western Australia unless exempt traveller – Whether EM Act or Directions impermissibly infringed constitutional limitation in s 92 of *Constitution* – Whether infringement determined by reference to authorising provisions of EM Act – Whether provisions of EM Act imposed impermissible burden on interstate trade, commerce or intercourse – Whether exercise of power to make Directions raised constitutional question.

Words and phrases – "burden", "COVID-19", "differential", "discrimination", "emergency", "emergency management", "freedom of interstate trade, commerce, and intercourse", "hazard", "intercourse", "interstate movement", "plague or epidemic", "protectionist", "reasonable necessity", "state of emergency", "structured proportionality", "trade and commerce".

Constitution, s 92.

Emergency Management Act 2005 (WA), ss 56, 58, 67, 72A.

Quarantine (Closing the Border) Directions (WA), paras 4, 5, 27.

1 KIEFEL CJ AND KEANE J. On 11 March 2020 the World Health Organization declared COVID-19 a pandemic. On 15 March 2020 the Minister for Emergency Services for Western Australia declared a state of emergency with effect from 16 March 2020 in respect of the pandemic pursuant to s 56 of the *Emergency Management Act 2005* (WA) ("the EM Act"). The area to which the state of emergency declaration was to apply was Western Australia. The Commissioner of Police, as the holder of the office of State Emergency Coordinator¹, issued the *Quarantine (Closing the Border) Directions* (WA) ("the Directions"), which took effect from 5 April 2020.

The EM Act

2 Section 56 of the EM Act, in relevant part, provides:

- "(1) The Minister may, in writing, declare that a state of emergency exists in the whole or in any area or areas of the State.
- (2) The Minister must not make a declaration under this section unless the Minister –
 - (a) has considered the advice of the State Emergency Coordinator; and
 - (b) is satisfied that an emergency has occurred, is occurring or is imminent; and
 - (c) is satisfied that extraordinary measures are required to prevent or minimise –
 - (i) loss of life, prejudice to the safety, or harm to the health, of persons or animals".

3 An "emergency" is defined² to mean "the occurrence or imminent occurrence of a hazard which is of such a nature or magnitude that it requires a significant and coordinated response". The meaning of "hazard" includes "a plague or an epidemic".

4 A state of emergency declaration (an "emergency declaration") remains in force for three days after the time it first has effect if it is not extended by a

1 EM Act, s 10.

2 EM Act, s 3.

declaration made by the Minister under s 58³. Section 58(4) relevantly provides that an emergency declaration may be extended for a period not exceeding 14 days. It may be further extended from time to time⁴. The original emergency declaration of 15 March 2020 was so extended and further extended and remained current at the time of the hearing.

5 There is no dispute that the Directions were authorised by the EM Act. The EM Act contains general powers such as those in s 72A(2), whereby an authorised officer may "take, or direct a person or a class of person to take, any action that the officer considers is reasonably necessary to prevent, control or abate risks associated with the emergency". But s 67 is most clearly directed to the border restrictions here in question. Its relevant parts were included in the EM Act as passed and provide:

"For the purpose of emergency management during an emergency situation or state of emergency, a[n] ... authorised officer may do all or any of the following –

- (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".

6 The State Emergency Coordinator (the Commissioner of Police) is an authorised officer⁵. The emergency area according to the emergency declaration is Western Australia. The words "emergency management", which appear in s 67, mean "the management of the adverse effects of an emergency" and relevantly include "prevention" ("the mitigation or prevention of the probability of the occurrence of, and the potential adverse effects of, an emergency") and "response" ("the combating of the effects of an emergency, provision of emergency assistance for casualties, reduction of further damage, and help to speed recovery")⁶. It is an offence to fail to comply with a direction⁷.

7 The effect of the Directions is to close the border of Western Australia to all persons from any place unless they were the subject of exemption under the Directions. Paragraph 4 of the Directions provides that "[a] person must not enter

3 EM Act, s 57, s 58(1).

4 EM Act, s 58(1).

5 EM Act, s 3 (definition of "authorised officer").

6 EM Act, s 3 (definition of "emergency management" (a) and (c)).

7 EM Act, s 86(1).

Western Australia unless the person is an exempt traveller". The term "exempt traveller", defined in para 27, refers to a person falling within certain categories such as officials or personnel concerned with national and State security and governance, persons providing health services or persons whose entry is approved on compassionate grounds, and who complies with any specified terms or conditions. Paragraph 5 of the Directions states that in certain circumstances even exempt travellers must not enter Western Australia, for example where they have certain defined symptoms or have been identified as a close contact with a person who has COVID-19.

8 At the time this matter was heard, the Chief Health Officer for Western Australia had given advice to the Premier of Western Australia concerning easing of the border controls. The Premier and the Minister for Health had announced publicly that the "existing hard border exemption system will be removed and replaced with an updated nationwide health-based threshold that allows for safe travel into Western Australia" from interstate on conditions. Subject to the latest available health advice, it was planned to enact the new interstate border measures under the EM Act on 14 November 2020. The plaintiffs nevertheless proceeded with the hearing of their matter because, they contended, the Premier's announcement was highly conditional and there was an important, justiciable controversy to be resolved.

The plaintiffs' challenge

9 The first sentence of s 92 of the *Constitution* provides that:

"On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

10 The first plaintiff is a resident of the State of Queensland and the Chairman and Managing Director of the second plaintiff. He travels to and from Western Australia for purposes associated with the second plaintiff and for other purposes, and whilst in Perth stays at a residence maintained by the second plaintiff. He has not, to his knowledge, suffered any symptoms of COVID-19. His application to enter Western Australia as an "exempt traveller" was refused.

11 The second plaintiff is a company with interests in iron ore projects in Western Australia and is engaged in litigation and arbitration in that State. It has offices and personnel in Perth, where many of its records are held. Other personnel, including professional advisers who would normally work in both Brisbane and Perth, are likewise unable to enter Western Australia. It contended that its business and other interests are harmed or inhibited.

12 In proceedings commenced on 25 May 2020 in the original jurisdiction of
this Court the plaintiffs claim a declaration that "either the authorising Act and/or
the Directions are invalid, either wholly or in part ... by reason of s 92 of the
Constitution". The plaintiffs' claims to invalidity and the particulars provided of
them refer to the Directions and their effects.

13 The plaintiffs claim that the Directions impose an effective burden on the
freedom of intercourse among the Australian people in the several States by
prohibiting cross-border movement of persons, backed by a criminal sanction.
Alternatively, they allege that the freedom of trade and commerce guaranteed by
s 92 is contravened because the Directions impose an effective discriminatory
burden with protectionist effect.

14 The defendants, the State of Western Australia and the Commissioner of
Police for Western Australia, deny the plaintiffs' allegations. In their defence they
plead that s 67 and other provisions of the EM Act do not have the purpose of
economically protecting the State of Western Australia, rather they have the
legitimate purpose of protecting the population of Western Australia against risks
arising from emergency situations. The continuation in force of the Directions,
pursuant to the EM Act, does not have a protectionist purpose and is reasonably
necessary to achieve, and is compatible with, the legitimate purpose of protecting
the Western Australian population against the health risks of COVID-19 where
there are no other equally effective means available to achieve that purpose which
would impose a lesser burden on interstate trade or commerce. Likewise, it is
pleaded that intercourse among the States, whether by movement or
communication, is prevented only to the extent that is reasonably necessary and
that there are no other, equally effective means which impose a lesser burden on
that intercourse.

15 No agreement could be reached between the parties as to the facts necessary
to determine the defendants' claim of the reasonable need for and efficacy of the
measures contained in the Directions, which would have enabled an earlier hearing
of the matter by this Court. By order made on 16 June 2020, that issue was remitted
to the Federal Court of Australia for hearing and determination pursuant to s 44 of
the *Judiciary Act 1903* (Cth). On 25 August 2020 Rangiah J of that Court made
findings of fact.

The findings on remitter

16 After hearing evidence from a number of witnesses, including the Chief
Health Officer for Western Australia and experts in public health medicine,
epidemiology, and infectious diseases, Rangiah J found that certain facts relating

to COVID-19 and SARS-CoV-2, which had been pleaded by the defendants as particulars of the justification for the Directions, had been proved⁸.

17 The facts so found included the following. COVID-19 is a disease caused by the coronavirus SARS-CoV-2. Clinical and epidemiological knowledge about them is relatively uncertain, their being a new pathogen and disease. SARS-CoV-2 may be transmitted by a person who is asymptomatic and unaware that they have the disease. Where there is community transmission of SARS-CoV-2 its natural growth rate is exponential and must be minimised through certain measures. The risk of community transmission is substantially increased if measures of the kind contained in the Directions are removed. There are no known testing measures which are themselves sufficient to prevent community transmission.

18 The consequences of community transmission of SARS-CoV-2 and the development of COVID-19 are substantial, including the increased risk of death – particularly for members of the population who are over 70 years of age, members of the population with pre-existing medical conditions or members of the Aboriginal or Torres Strait Islander population – and the risk that the hospital system in Western Australia will be unable to cope. There is no known vaccine, and no treatment presently available to mitigate the risks of severe medical outcomes or mortality for a person who contracts COVID-19.

19 At the conclusion of his detailed reasons his Honour summarised the overall findings he had made⁹. His Honour considered that the risk to the health of the Western Australian population is a function of two factors: the probability that COVID-19 would be imported into the population and the seriousness of the consequences if it were imported. Whilst the existing border restrictions do not eliminate the potential for importation of COVID-19 from other States or Territories, because they allow "exempt travellers" to enter Western Australia, they have been effective to a "very substantial extent" to reduce the probability of COVID-19 being imported into Western Australia from interstate.

20 His Honour explained that the uncertainties involved in predicting all relevant factors are such that the probability of persons infected with COVID-19 entering Western Australia in the hypothetical situation where border restrictions are removed cannot be accurately quantified. His Honour therefore undertook qualitative assessments of the probability that persons infected with COVID-19 would enter Western Australia if the border restrictions were completely removed. His Honour assessed the risk of persons coming from Australia as a whole and from Victoria as high; from New South Wales as moderate; from South Australia,

8 *Palmer v Western Australia [No 4]* [2020] FCA 1221 at [363]-[364].

9 *Palmer v Western Australia [No 4]* [2020] FCA 1221 at [366].

the Australian Capital Territory and the Northern Territory as low; from Tasmania as very low; and from Queensland as uncertain, due to the recent reintroduction of the disease in that State. It is evident that there have been some changes in the circumstances of the States since his Honour's assessments. The plaintiffs contended that Queensland would now be regarded as a low, rather than uncertain, risk and the situation in Victoria has changed. It will not be necessary to come to a concluded view about these contentions. They are not determinative of any issue in the proceedings.

21 His Honour considered that if persons entered the Western Australian community whilst infectious there would be a high probability that the virus would be transmitted into the Western Australian population and at least a moderate probability that there would be uncontrolled outbreaks. If there were uncontrolled outbreaks, the consequences would include the risk of death and hospitalisation, particularly for the vulnerable groups mentioned above. In a worst-case scenario, the health consequences could be "catastrophic".

22 His Honour observed that Western Australia had not had any cases of community transmission since 12 April 2020 as a result of the combination of the border restrictions and other measures. Western Australia could not safely manage the number of people in hotel quarantine if it were sought to replace the border restrictions with mandatory hotel quarantine for all entrants to the State. If the restrictions were replaced by a suite of measures including exit and entry screening, the wearing of face masks on aeroplanes and for 14 days after entry into the State, and testing at intervals, they would be less effective than the border restrictions in preventing the importation of COVID-19. A combination of that suite of measures together with a "hotspot" regime, involving either quarantining or banning persons entering from designated areas in the other States or Territories, would also be less effective than the border restrictions.

23 His Honour concluded that in view of the uncertainties involved in determining the probability that COVID-19 would be imported into Western Australia from elsewhere in Australia, and the potentially serious consequences if it were imported, "a precautionary approach should be taken to decision-making about the measures required for the protection of the community".

The questions reserved

24 The parties subsequently agreed a Special Case pursuant to which the following questions were stated for the opinion of the Full Court of this Court:

- "(a) Are the *Quarantine (Closing the Border) Directions* (WA) and/or the authorising *Emergency Management Act 2005* (WA) invalid (in whole or in part, and if in part, to what extent) because they impermissibly infringe s 92 of the *Constitution*?"

7.

(b) Who should pay the costs of the special case?"

25 On 6 November 2020 the Court answered the questions as follows:

"(a) On their proper construction, ss 56 and 67 of the *Emergency Management Act 2005* (WA) in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic comply with the constitutional limitation of s 92 of the *Constitution* in each of its limbs.

The exercise of the power given by those provisions to make paras 4 and 5 of the *Quarantine (Closing the Border) Directions* (WA) does not raise a constitutional question.

No issue is taken as to whether the *Quarantine (Closing the Border) Directions* (WA) were validly authorised by the statutory provisions so that no other question remains for determination by a court.

(b) The plaintiffs."

26 These are our reasons for joining in the answers given.

What s 92 precludes

27 Although it is sometimes convenient to refer to s 92 as having two limbs – the trade and commerce limb and the intercourse limb – the words "trade, commerce, and intercourse" are stated in the section as a composite expression. The observation that until *Cole v Whitfield*¹⁰ decisions of this Court did not treat the two limbs as substantially different¹¹ is clearly correct. Section 92 has been regarded as concerned with all kinds of movement across State borders¹².

Cole v Whitfield

28 It is well understood that *Cole v Whitfield* marked a turning point in s 92 jurisprudence. Prior to that decision, s 92 had been regarded by many as

10 (1988) 165 CLR 360.

11 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 456 [400] per Hayne J.

12 *Bank of New South Wales v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 381-382 per Dixon J.

guaranteeing the right of individuals to engage in trade, commerce and intercourse. The broad effects of such an approach were mitigated by the "criterion of operation" doctrine, by which s 92 was applied only to laws directed to an essential attribute of interstate trade, commerce or intercourse¹³. These interpretations were rejected in *Cole v Whitfield*¹⁴, where the Court instead adopted an approach which had regard to the character of a law and its effects upon freedom of interstate trade and commerce.

29 In *Cole v Whitfield*¹⁵ the Court said that the guarantee in s 92, that interstate trade, commerce and intercourse be "absolutely free", was not to be taken literally. The section should not be construed as precluding an exercise of legislative power which would impose *any* barrier or restriction on interstate trade or commerce¹⁶ or interstate intercourse¹⁷. This view of s 92 had consistently been applied in cases which preceded *Cole v Whitfield*¹⁸ and it was to be confirmed in subsequent cases¹⁹.

30 *Cole v Whitfield* explained that so far as s 92 concerned interstate trade and commerce it should be understood to preclude particular types of burdens on that trade or commerce, such as discriminatory burdens of a protectionist kind. It held that a law will relevantly discriminate if on its face it subjects interstate trade or commerce to a disability or disadvantage or if the operation of the law in fact

13 See *Gratwick v Johnson* (1945) 70 CLR 1 at 20 per Dixon J.

14 (1988) 165 CLR 360 at 400-402.

15 (1988) 165 CLR 360 at 394.

16 *Cole v Whitfield* (1988) 165 CLR 360 at 398.

17 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

18 See, eg, *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 110 per Barton J; *Gratwick v Johnson* (1945) 70 CLR 1 at 13 per Latham CJ.

19 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 56 per Brennan J; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 192-193 per Dawson J; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178] per Gummow J.

produces such a result²⁰. The freedom which s 92 guarantees is freedom from discriminatory burdens which have a protectionist effect²¹.

31 Discrimination in a legal sense involves a comparison of relative equals by which one is treated unequally, or of unequals treated equally²². It involves the notion of effecting a disadvantage to one²³. So understood, for the purposes of s 92, a law discriminates when it treats interstate trade or commerce differently, as compared with intrastate trade or commerce, and effects a disadvantage to interstate trade or commerce.

32 Not all laws which apply differentially so as to effect a discriminatory burden on interstate trade or commerce will infringe s 92. This possibility arises because the guarantee of freedom is not absolute, as previously discussed. Where such a law has a purpose which is evidently not of a protectionist kind it may, subject to a further requirement, be valid. The law in *Cole v Whitfield* was of this kind.

33 The respondents in *Cole v Whitfield* sought to bring crayfish to Tasmania from South Australia in the course of their interstate trade. The regulation in question prohibited the possession of crayfish less than a particular size in Tasmania. The law was seen as burdening interstate trade²⁴. It was protectionist in purpose, but in a sense different from protectionism in trade. Its purpose was to protect and conserve a valuable natural resource, namely the stock of Tasmanian crayfish. This purpose, the Court said, is not a form of protection which gives a market advantage²⁵. It concluded that the law could not be described as discriminatory and protectionist in the sense referable to s 92²⁶.

20 *Cole v Whitfield* (1988) 165 CLR 360 at 394, 399.

21 *Cole v Whitfield* (1988) 165 CLR 360 at 394-395.

22 See *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478, 480 per Gaudron and McHugh JJ.

23 See *Cole v Whitfield* (1988) 165 CLR 360 at 399.

24 *Cole v Whitfield* (1988) 165 CLR 360 at 409.

25 *Cole v Whitfield* (1988) 165 CLR 360 at 409.

26 *Cole v Whitfield* (1988) 165 CLR 360 at 410.

34 The law's character as non-protectionist was not the only feature which saved it from invalidity. It is important to observe what was said in *Cole v Whitfield* concerning the need for the law. The Court said²⁷ that the extension of the prohibition beyond crayfish in Tasmania to imported interstate crayfish was necessary to prevent undersized crayfish being caught in Tasmanian waters. It was necessary because it was not possible for the State to undertake inspections other than random inspections and it could not determine which were and which were not Tasmanian crayfish. The Court may be understood to say that there was no real alternative to the prohibition on the sale and possession of undersized crayfish imported from interstate if the statutory objective of protection of crayfish stock in Tasmania was to be achieved.

35 The purpose of the law in *Cole v Whitfield* may be contrasted with the purposes identified with respect to the laws in question in *Castlemaine Tooheys Ltd v South Australia*²⁸. It was accepted in the joint judgment of Mason CJ, Brennan, Deane, Dawson and Toohey JJ²⁹ that there were "rational and legitimate" grounds for the apprehension that non-refillable bottles contribute to the problem of litter and decrease the State's energy resources. If the legislative measures were "appropriate and adapted" to the resolution of those problems, their Honours said, they would be consistent with s 92. That would be so if the burden imposed on interstate trade "was incidental and not disproportionate" to the achievement of those purposes.

36 The joint judgment in *Castlemaine Tooheys* concluded³⁰ that neither purpose provided "an acceptable explanation or justification for the differential treatment" given to the plaintiffs' products. *Betfair Pty Ltd v Western Australia* ("*Betfair No 1*")³¹ was more clearly to articulate that the justification required of a discriminatory law which burdened interstate trade was that it be reasonably necessary to achieve its non-protectionist purpose.

27 *Cole v Whitfield* (1988) 165 CLR 360 at 409-410.

28 (1990) 169 CLR 436.

29 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-474.

30 (1990) 169 CLR 436 at 477.

31 (2008) 234 CLR 418.

Betfair No 1 – justifying a burden

37 In the joint judgment in *Betfair No 1*³² it was said that considerations to which weight must be given in an assessment of the "proportionality" between the differential burden imposed by the laws on an out-of-State producer, compared with the position of in-State producers, suggested the application of a criterion of "reasonable necessity" to the law in question. In *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*³³, Mason J had said that "[a]s the defendant has failed to show that the discriminatory mode of regulation selected is necessary for the protection of public health, it is in my judgment not a reasonable regulation of the interstate trade in pasteurized milk". That view of the matter, it was said in *Betfair No 1*, "should be accepted as the doctrine of the Court"³⁴. It was, their Honours observed, consistent with the explanation given in *Cole v Whitfield* of the justification of the total prohibition on sale of undersized crayfish.

38 The first plaintiff in *Betfair No 1* conducted a betting exchange in Tasmania through the use of the internet and telephone call centres. Legislation in Western Australia made it an offence for a person to use a betting exchange and an offence to make available information as to the field of a horse or greyhound race in Western Australia, without authorisation. The first-mentioned law effected a discriminatory burden of a protectionist kind; the second operated to the competitive disadvantage of interstate operators such as the first plaintiff, imposing a discriminatory burden of a protectionist kind³⁵.

39 Western Australia argued that the measures were necessary to protect the integrity of the racing industry in that State. In the section of the joint judgment headed "Acceptable explanation or justification?"³⁶, it was said that even allowing for the presence of some such threat to the racing industry, to which the legislative provisions might be directed, the prohibitions could not be justified. They could not be justified if there was the prospect of an alternative method of countering the

32 (2008) 234 CLR 418 at 476-477 [101]-[103] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

33 (1975) 134 CLR 559 at 608.

34 (2008) 234 CLR 418 at 477 [103].

35 *Betfair No 1* (2008) 234 CLR 418 at 481 [118], [120].

36 *Betfair No 1* (2008) 234 CLR 418 at 479 [110].

threat and that method was "effective but non-discriminatory regulation"³⁷. The joint judgment accepted that different legislative measures taken by Tasmania with respect to betting exchanges fulfilled these criteria. The prohibitions effected by the legislation in Western Australia could not therefore be said to be "necessary". Their Honours concluded that "the prohibitory State law is not proportionate; it is not appropriate and adapted to the propounded legislative object"³⁸.

Interstate movement – a distinction?

40 The guarantee of freedom of interstate intercourse may be taken to refer to both physical movement and communication across State borders, and to be directed to the circumstance where borders are used as barriers to freedom of movement between States. Until now there has been no occasion since *Cole v Whitfield* fully to consider the distinction drawn in that case between this freedom and that respecting interstate trade and commerce.

41 Consistently with the rejection of the individual rights approach with respect to interstate trade and commerce, the Court in *Cole v Whitfield* regarded s 92 as effecting a limit on laws which may be made affecting those subjects. But in discussion about interstate intercourse it took quite a different approach. It regarded the guarantee of freedom of interstate movement as extending to a "guarantee of personal freedom 'to pass to and fro among the States without burden, hindrance or restriction'"³⁹, drawing in part on what had been said by Starke J in *Gratwick v Johnson*⁴⁰.

42 It is understandable why it was thought necessary in *Cole v Whitfield* to make plain that s 92 was not intended as a protection of individual interstate traders. It was concerned more generally with effects on interstate trade and commerce. It is not entirely clear why it was thought necessary to retain the notion of a right of persons to pass between the States. It was not fully explained. The matter in *Cole v Whitfield* engaged only the trade and commerce limb. Having distinguished the intercourse limb, no further discussion about it was engaged in. It was put to one side.

37 *Betfair No 1* (2008) 234 CLR 418 at 479 [110].

38 *Betfair No 1* (2008) 234 CLR 418 at 479-480 [109]-[112].

39 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

40 (1945) 70 CLR 1 at 17.

43 A basis given in *Cole v Whitfield* for distinguishing between the two limbs was that some forms of interstate intercourse are likely of their nature to be immune from legislative or executive interference. If a like immunity were accorded to trade and commerce "anarchy would result"⁴¹. Since s 92 had never been understood to guarantee freedom to this extent, there is no reason, the Court said, for insisting on a strict correspondence between the freedoms⁴².

44 Some support for the distinction drawn in *Cole v Whitfield* was said to arise from history. It may be accepted that interstate movement was not adopted at a later point in the course of the Convention Debates and that it was no mere afterthought⁴³. But as earlier observed⁴⁴, prior decisions of this Court respecting s 92 did not meaningfully distinguish between the two limbs. The nature of the guarantee provided with respect to them was not regarded as different. In its application to either of the freedoms it was not regarded as absolute. This hardly suggests that interstate movement should be favoured with some kind of immunity.

45 The distinction drawn in *Cole v Whitfield* has the obvious consequence that guarantees of freedoms appearing in the one provision of the *Constitution* are to be treated differently. This might suggest incoherence, which is not regarded as a desirable outcome for constitutional interpretation. More importantly, the distinction drawn in *Cole v Whitfield* is not consistent with a modern approach to constitutional interpretation. The distinction does not derive any support from the text of s 92. The text does not provide a basis for treating one of three elements of the composite expression "trade, commerce, and intercourse among the States" as connoting or requiring that some different test be applied to them⁴⁵.

46 *Cole v Whitfield* did not discuss whether the approach there taken to discriminatory burdens imposed by a law on freedom of interstate trade and commerce, shorn of its economic aspects, might be applied to the freedom of interstate intercourse. It is that prospect which should now be addressed.

41 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

42 *Cole v Whitfield* (1988) 165 CLR 360 at 393-394.

43 *Cole v Whitfield* (1988) 165 CLR 360 at 387-388.

44 At [27] above.

45 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 456-457 [402] per Hayne J.

Interstate movement and discrimination

47 It must be accepted that protectionist discrimination and its economic effects are not likely to be relevant to interstate movement. Further, a law which differentiates between interstate movement and intrastate movement may not advantage the latter to any real extent. Nevertheless it is possible to compare the effects of a law on interstate movement with its effects on intrastate movement. That is to say the test of discrimination which is applied to the trade and commerce limb could be applied to the intercourse limb. Moreover, as Hayne J observed in *APLA Ltd v Legal Services Commissioner (NSW)*⁴⁶, the text of s 92 does not suggest that some different test be applied to the two limbs.

48 Queensland, intervening, submitted that a law may be taken to burden freedom of interstate movement for the purposes of s 92 where it discriminates against that movement⁴⁷. Discrimination should be required for both limbs of s 92 as a matter of construction, because textually s 92 does not disclose a basis for requiring discrimination for one limb and not the other; the intercourse limb may otherwise largely subsume the trade and commerce limb; and general laws that burden interstate movement may be held invalid. Queensland submitted that a law which burdens interstate movement should be subject to a requirement of justification, in the same way as is required where interstate trade and commerce is burdened. These submissions should be accepted.

Burdens on interstate movement as reasonably necessary?

49 In some judgments concerning the intercourse limb it has been suggested that the measure taken by the law should be no more than is "reasonably required" to achieve the object of the law⁴⁸. In another case it was said that a law should be

46 (2005) 224 CLR 322 at 456-457 [402].

47 Referring to *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 58-59 per Brennan J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 333 per Brennan J, 384 per Toohey J; Kirk, "Section 92 in its Second Century", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 253 at 279-280.

48 *AMS v AIF* (1999) 199 CLR 160 at 179 [45] per Gleeson CJ, McHugh and Gummow JJ, 232-233 [221] per Hayne J; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 353 [38] per Gleeson CJ and Heydon J, 393-394 [177], [179] per Gummow J.

"reasonably necessary" to a legitimate purpose⁴⁹ or "necessary or appropriate and adapted"⁵⁰ to that. The former test would seem to be more readily capable of justification; however, it is not necessary to discuss the differences between the tests or state a preference. These cases predate the acceptance by this Court in *Betfair No 1*⁵¹ of a test of reasonable necessity as explaining or justifying a burden on the freedom of interstate trade and commerce. Since a law which discriminates against interstate movement will prima facie be invalid because it burdens the freedom, logically it should be capable of being justified in the same way. There is good reason in principle why the tests for justification of both limbs should be the same.

50 It should therefore be accepted that a law which is directed to discriminating against, or in fact discriminates against, interstate movement is invalid as contrary to s 92 unless it is justified by reference to a non-discriminatory purpose. It may be justified if it goes no further than is reasonably necessary to achieve a legitimate object, as this Court held in *Betfair No 1*.

51 It is important to bear in mind what this test requires. The approaches taken by this Court in *Cole v Whitfield* and *Betfair No 1* are instructive. The test of reasonable necessity is not a conclusion to be stated after an impression is gained about a law's purpose and how that purpose is sought to be achieved. It requires more than a view that there exists a need to which it is the statute's purpose to respond and the measures taken are reasonable. The test is to be applied in a concrete way to determine whether the measures which the law permits are themselves reasonably necessary. It is obviously logically relevant to, if not demanded by, that enquiry whether there may be alternative, effective measures available to achieve the same object but which have less restrictive effects on the freedom. If there are, the law in question cannot be said to be reasonably necessary. This is what those cases teach⁵².

49 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 307-308 per Mason CJ, 396 per McHugh J.

50 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 346 per Deane J.

51 At [37] above.

52 *Cole v Whitfield* (1988) 165 CLR 360 at 408-410; *Betfair No 1* (2008) 234 CLR 418 at 479-480 [110]-[112] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ; see also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 51 per Brennan J.

52 In some cases which preceded *Betfair No 1*, and which concerned both the intercourse limb and the implied freedom of political communication, it was said that a legislative measure which incidentally burdens a freedom (which is to say has that unintended, collateral effect) needs to be "appropriate and adapted"⁵³, "neither inappropriate nor disproportionate", "proportionate"⁵⁴ or reasonably proportionate⁵⁵ for the law to be valid. It may be said that at the least *Betfair No 1* recognised the connection between the test of reasonable necessity and the concept of proportionality. It is possible to go further. The content given to the test in its application in that case, namely that there was a practicable alternative, clearly aligns it with the second test in structured proportionality, as discussed in *McCloy v New South Wales*⁵⁶.

53 The origins of structured proportionality are well known, as is its acceptance by many courts, including common law courts, around the world. It has been the subject of much academic discussion. Sir Anthony Mason⁵⁷ has described structured proportionality as a "very good illustration" of one of the advantages of comparative law, namely that one "can learn from how other people go about things". The test of structured proportionality, he observed, had been advocated in Canada in *R v Oakes*⁵⁸, and applied in the United Kingdom in *Bank Mellat v Her*

53 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 57 per Brennan J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 346 per Deane J.

54 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 195 per Dawson J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 307-308 per Mason CJ, 366 per Dawson J, 396 per McHugh J.

55 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 195 per Dawson J.

56 (2015) 257 CLR 178 at 210 [57], 216 [76] per French CJ, Kiefel, Bell and Keane JJ.

57 Winkelmann et al, "Panel Discussion: Judging", in Mount and Harris (eds), *The Promise of Law: Essays Marking the Retirement of Dame Sian Elias as Chief Justice of New Zealand* (2020) 471 at 478.

58 [1986] 1 SCR 103.

*Majesty's Treasury [No 2]*⁵⁹, in New Zealand in *R v Hansen*⁶⁰ and in Australia in *McCloy*. He said:

"The structured proportionality approach is something that courts have learnt, not only from *Oakes* but from Professor Barak in his book on proportionality⁶¹. It is a prime example of how you can learn from others."

54 Whilst structured proportionality has its origins elsewhere, it is capable of being applied and must be applied in a particular constitutional context. Its adaptability in part accounts for its adoption globally. And as has been observed⁶², the joint reasons in *McCloy* sought to explain structured proportionality as an "indigenous progression of the law rather than an example of explicit 'borrowing' from other jurisdictions".

55 It is not difficult to discern why courts have favoured its application. It reflects a rational approach to the question of whether a law which burdens a right or freedom can be justified, which requires the courts to make something of a value judgment. It discourages conclusory statements, which are apt to disguise the motivation for them, and instead exposes a court's reasoning. It is not obvious that the fact the same questions are to be applied in each case, albeit to different statutory contexts, is a bad thing. It might be said that it reflects the certainty to which the law aspires.

56 It has not been suggested in any case since *McCloy* that a line of argument otherwise available as a means of justifying a law has been foreclosed. No one could doubt that proportionality is necessary to justification. This Court has repeatedly said so. It cannot be suggested that structured proportionality is a perfect method. None is, but some method is necessary if lawyers and legislators are to know how the question of justification is to be approached in a given case. Structured proportionality certainly seems preferable to its main competitors. It has been said⁶³ that calibrated scrutiny will ultimately end up as a rules-based

59 [2014] AC 700.

60 [2007] 3 NZLR 1.

61 Barak, *Proportionality: Constitutional Rights and their Limitations* (2012).

62 Chordia, *Proportionality in Australian Constitutional Law* (2020) at 164.

63 Sir Anthony Mason, "Foreword", in Chordia, *Proportionality in Australian Constitutional Law* (2020) v at vi, summarising Chordia, *Proportionality in Australian Constitutional Law* (2020), ch 5.

approach, even though it seeks to avoid that outcome, and that the problem with tiered scrutiny is that the court's task becomes one merely of categorising the case.

57 Long before *McCloy* it had been suggested by Jeremy Kirk that the stages of structured proportionality are discernible in judgments regarding s 92, albeit not expressly acknowledged by the Court as such⁶⁴. The author gives as an example the judgment of Stephen and Mason JJ in *Uebergang v Australian Wheat Board*⁶⁵. Their Honours said that validity could depend on whether there were alternative, practicable means of achieving the legitimate end with less effect on interstate trade. Their Honours also said that the test to be applied is that the legislation be "no more restrictive than is reasonable in all the circumstances, due regard being had to the public interest", which is to say balancing with the "need which is felt for regulation". This reasoning, Kirk considers, includes strict proportionality and is directed to assessing the justification of an impugned law's infringement of the s 92 freedom.

58 There may not be universal acceptance of the application of the three tests of structured proportionality to s 92, although it is difficult to comprehend what criticism could be levelled at a requirement that a law be suitable to its non-discriminatory purpose. This is a question which is invariably addressed in the process of construing the statute in question. One view which has been expressed⁶⁶ is that the rule stated in *Cole v Whitfield* with respect to the trade and commerce limb leaves no room for questions of balancing. On the other hand, notions of balancing have been said by Professor Leslie Zines⁶⁷ to be evident in *Castlemaine Tooheys*, which was decided after *Cole v Whitfield*. An acceptance of the tests of structured proportionality does not affect what was said in *Cole v Whitfield*. It simply explicates the tests for justification, as *Betfair No 1* did.

59 Once it is accepted that *Betfair No 1*, in its application to all the freedoms protected by s 92, requires that a discriminatory law must be justified as reasonably necessary, in the sense that it is understood in proportionality analysis, there seems

64 Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 *Melbourne University Law Review* 1 at 13-16, referred to in Chordia, *Proportionality in Australian Constitutional Law* (2020) at 147.

65 (1980) 145 CLR 266 at 304-306.

66 Chordia, *Proportionality in Australian Constitutional Law* (2020) at 151; see also at 143, referred to in Sir Anthony Mason, "Foreword", in Chordia, *Proportionality in Australian Constitutional Law* (2020) v at vi.

67 Zines, *The High Court and the Constitution*, 5th ed (2008) at 59.

no reason why it should not be justified as adequate in its balance. It may be shown that there is no real alternative to the law, but in some cases the burden on a freedom will be very great and the measures permitted by the law of evidently little importance, which is to say the burden is out of proportion to the need for it. Why should the burden not be said to be unjustified? *Castlemaine Tooheys* was a case of this kind. Proportionality in the strict sense has been considered to be appropriate by a majority of this Court in implied freedom cases⁶⁸. It is a justification which the defendants sought to make out in this case. It should be understood to reflect the proper role of this Court as the guardian of constitutionally protected freedoms.

60 This method of justification of a law may assume special importance where the law has a powerful public, protective purpose. The example given by the Commonwealth in *McCloy*⁶⁹, when it sought to invoke this justification, was the object of protecting security of the nation at a time of war. Similar metaphors have been applied in public discussion about the crisis affecting the health of persons during the COVID-19 pandemic.

61 The plaintiffs, the defendants and at least three of the intervenors accepted that proportionality analysis which includes an analysis of this kind is appropriate to be utilised in considering whether a burden on s 92 is justified. No relevant distinction can be drawn as between the implied freedom of political communication and the s 92 freedoms in this regard. Each are the subject of a constitutional guarantee which has been held not to be absolute. If a burden is effected on a freedom it may be justified by any rational means. The balancing exercise is one such means and it is likely to assume special importance where statutory measures have a purpose as important as the protection of health and life.

Section 92 precludes

62 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

68 *McCloy v New South Wales* (2015) 257 CLR 178 at 218-220 [84]-[89] per French CJ, Kiefel, Bell and Keane JJ; *Clubb v Edwards* (2019) 267 CLR 171 at 208-209 [96]-[102] per Kiefel CJ, Bell and Keane JJ, 266-269 [270]-[275] per Nettle J, 341-345 [491]-[501] per Edelman J; *Comcare v Banerji* (2019) 93 ALJR 900 at 914-915 [38]-[42] per Kiefel CJ, Bell, Keane and Nettle JJ, 944-945 [202]-[206] per Edelman J; 372 ALR 42 at 57-59, 98-99.

69 (2015) 257 CLR 178 at 218 [84].

cannot be justified as proportionate to the non-discriminatory, legitimate purpose of the law which is sought to be achieved. Whether it is proportionate is to be determined by the tests of structured proportionality as explained by this Court.

A constitutional limitation

63 Victoria, intervening, submitted that the principal question reserved for this Court can and should be answered by reference to the authorising provisions of the EM Act rather than by reference to any particular exercise of those statutory powers, namely the Directions. The defendants adopted these submissions. The submissions should be accepted. They accord with what was said by this Court in *Wotton v Queensland*⁷⁰.

64 In *Wotton*, the *Corrective Services Act 2006* (Qld) conferred a discretion to attach such conditions to a parole order as a parole board reasonably considered necessary to ensure the prisoner's good conduct or to prevent the prisoner committing an offence. The discretionary power, in its application to prisoners on parole, could effect a burden on the implied freedom of political communication and the conditions which were attached to the plaintiff's parole order did just that. Although argument was directed to the validity of those conditions, the question of the constitutional limitation effected by the implied freedom was determined by reference to the statute.

65 Drawing upon what Brennan J said in *Miller v TCN Channel Nine Pty Ltd*⁷¹, the joint judgment in *Wotton*⁷² explained that the exercise of the statutory power to condition the parole order might be subject to judicial review under the *Judicial Review Act 1991* (Qld), but the question of compliance with the constitutional limitation is answered by the construction of the statute. This is consistent with an understanding that constitutionally guaranteed freedoms operate as limits on legislative and executive power. Their Honours accepted that⁷³:

"if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case, such

70 (2012) 246 CLR 1.

71 (1986) 161 CLR 556 at 613-614.

72 (2012) 246 CLR 1 at 9-10 [10], 13-14 [21], [24] per French CJ, Gummow, Hayne, Crennan and Bell JJ; see also at 29-30 [74] per Kiefel J.

73 *Wotton v Queensland* (2012) 246 CLR 1 at 14 [22].

as that in this litigation concerning the conditions attached to the Parole Order, does not raise a constitutional question, as distinct from a question of the exercise of statutory power".

66 The provisions of the *Corrective Services Act* were held to comply with the constitutional limitation on State legislative power because they were reasonably necessary or reasonably appropriate and adapted to a legitimate purpose, as *Lange v Australian Broadcasting Corporation*⁷⁴ requires, which is to say they were proportionate⁷⁵.

67 The clarification of where the constitutional question involving freedoms resides is admittedly recent. The delay in stating it may in part be explained by difficulties which attended administrative law and its remedies⁷⁶ for some time and which have only been resolved relatively recently. In any event the approach taken in *Wotton* is that which should now be followed.

68 In some cases difficult questions may arise because the power or discretion given by the statute is broad and general. No such question arises in this matter. As will be seen, the power to prohibit or restrict entry into a declared emergency area, which may be the whole of Western Australia, is largely controlled by the EM Act itself and is proportionate to its purposes.

Discrimination, burden and justification

69 The power provided by s 56(1) of the EM Act to make an emergency declaration is controlled by s 56(2), which requires that there be an "emergency" or that one is imminent and that extraordinary measures are necessary to protect the life and health of persons. The definitions of "emergency" and "hazard" identify an epidemic as subject to such measures.

70 When an emergency declaration is made it remains in effect for only a short period. Its extension for a longer period requires a further declaration by the Minister. Whilst a state of emergency exists action for the purpose of management of the emergency may be taken, including for the prevention of the occurrence of a plague or an epidemic. By s 67, the prohibition of the movement of persons into a declared emergency area is such an action.

74 (1997) 189 CLR 520.

75 *Wotton v Queensland* (2012) 246 CLR 1 at 16 [31]-[33] per French CJ, Gummow, Hayne, Crennan and Bell JJ; see also at 33-34 [89]-[92] per Kiefel J.

76 Stellios, "*Marbury v Madison*: Constitutional Limitations and Statutory Discretions" (2016) 42 *Australian Bar Review* 324 at 327-328.

71 The plaintiffs submitted that the Directions are directed to preventing interstate movement. Conformably with an approach which has regard to the provisions of the EM Act, the plaintiffs may be understood to submit that those provisions in their application to prevent the entry of persons into Western Australia may be seen as directed to preventing interstate movement. The text of these provisions does not provide support for that submission. They are not directed to the Western Australian border and movement across it. They apply to an emergency area the subject of an emergency declaration, which may be the whole or part of the State, and they may apply to all persons outside the emergency area who seek to enter the area, whether from other States or Territories or from overseas.

72 It cannot therefore be said that by their terms ss 56(1) and 67 of the EM Act discriminate against interstate movement. It must be accepted that in its application to a person coming to the border of Western Australia from the other States and Territories and seeking entry, s 67 will hinder interstate movement and, to that extent, discriminate against it. For the discrimination to occur in this connection it is not necessary that s 67 be seen to favour intrastate movement, as explained earlier in these reasons. But to the extent that s 67 discriminates against interstate movement by preventing it, the provision effects a burden on the freedom.

73 The plaintiffs contended that the decision of this Court in *Gratwick v Johnson*⁷⁷ applies to this case. They did not seek to rely upon the aspect of that decision which gave effect to a personal right to pass freely between the States. The plaintiffs did not contend for such a right in connection with the intercourse limb of s 92. They may be understood to submit that the EM Act provisions are not materially different from the regulations which were held to be invalid in *Gratwick*.

74 The submission cannot be accepted. The regulations in *Gratwick* provided that no person should travel by rail or vehicle between the States without a permit. They were held to be directed against and a direct interference with freedom of intercourse among the States⁷⁸. The regulations in *Gratwick* may readily be distinguished from the provisions of the EM Act, which have a purpose other than to restrict unauthorised movement. The restrictions they authorise are directed to the protection of the health of residents of Western Australia.

77 (1945) 70 CLR 1.

78 *Gratwick v Johnson* (1945) 70 CLR 1 at 14 per Latham CJ, 16 per Rich J, 17 per Starke J, 19-20 per Dixon J, 22 per McTiernan J.

75 It was not necessary for the Court in *Gratwick* to consider whether the law was necessary for a purpose other than to prevent interstate movement since none was suggested. Earlier authority had held that a State law which restricted interstate movement for other, legitimate reasons might be valid. In *R v Smithers; Ex parte Benson*⁷⁹, Barton J, in describing the scope of the freedom assured to citizens by s 92, said that he should not be thought to say that it destroyed the right of States to take "any precautionary measure in respect of the intrusion from outside the State of persons who are or may be dangerous to its domestic order, its health, or its morals". And in *Ex parte Nelson [No 1]*⁸⁰, which concerned prohibitions on the introduction of infected or contagious livestock into a State, it was said that whilst the establishment of freedom of trade between the States is a most notable achievement of the *Constitution*, it would be a strange result if that achievement had the effect of stripping the States of the power to protect their citizens from the dangers of infectious diseases, however those dangers might arise. Mason J's view of the measures in the *North Eastern Dairy Co*⁸¹ case may be seen to proceed from a similar viewpoint, although his Honour concluded they went further than was necessary for the purpose of protecting the public from contaminated milk.

76 The plaintiffs accepted that if the purpose of the restrictions is held to be to prevent infectious diseases such as COVID-19 spreading into the Western Australian community, the question becomes one of justification. They then argued that it cannot be shown that the power to restrict the entry of persons into Western Australia is suitable or necessary to that purpose. The power to restrict should be capable of being adapted or lessened to accommodate the different levels of risk which persons seeking entry into the State might present.

77 There can be no doubt that a law restricting the movement of persons into a State is suitable for the purpose of preventing persons infected with COVID-19 from bringing the disease into the community. Further, the matters necessary to be considered before such restrictions can be put in place, including with respect to an emergency declaration and the shortness of the period of an emergency declaration, suggest that these measures are a considered, proportionate response to an emergency such as an epidemic.

78 The plaintiffs may be understood to contend that there is an alternative to a power of prohibition on persons from outside Western Australia entering the State. Entry could be allowed to persons from States where the disease is largely under control and who present a low risk of bringing it into the community. The

79 (1912) 16 CLR 99 at 110.

80 (1928) 42 CLR 209 at 218 per Knox CJ, Gavan Duffy and Starke JJ.

81 (1975) 134 CLR 559 at 607-608, 616.

underlying premise of this argument is that there is a level of risk which may be regarded as acceptable. This misapprehends Rangiah J's findings.

79 His Honour did not suggest that a low risk of an infected person entering Western Australia was acceptable from a public health perspective. His Honour considered that once a person infected with COVID-19 enters the community there is a real risk of community transmission and that it may become uncontrollable. Because of the uncertainties about the level of risk and the severe, or even catastrophic, outcomes which might result from community transmission, a precautionary approach should be adopted.

80 These findings leave little room for debate about effective alternatives. They provide no warrant for reading the power to prohibit entry into Western Australia during a pandemic down to accommodate some undefined level of risk. Accepting that s 67 must accommodate a requirement that it be exercised proportionately, the defendants' submission that there is no effective alternative to a general restriction on entry must be accepted.

81 The defendants also submitted that once it is accepted that the purpose of the EM Act provisions is a legitimate, non-discriminatory purpose of protecting the public health of residents of Western Australia and that there are no other reasonable means available to achieve that purpose, it follows that they have established that the laws are adequate in the balance. This somewhat misstates the latter justification, proportionality in the strict sense. It requires that the importance of the public health purpose be measured against the extent of the restriction on the freedom. It must be accepted that the restrictions are severe but it cannot be denied that the importance of the protection of health and life amply justifies the severity of the measures.

82 The same conclusions apply to the plaintiffs' case respecting interstate trade and commerce. The plaintiffs did not provide extensive written submissions on this alternative aspect of their case and did not further elaborate on them in oral argument. They did not rely upon evidence as to economic effects such as might be weighed against effects on health, assuming that is possible. The only additional matter that they raised respecting the laws so far as concerns interstate trade is that they have a protectionist purpose in the sense applicable to trade. That is clearly incorrect.

83 GAGELER J. Section 92 of the *Constitution* emphatically and imperatively declares that "trade, commerce, and intercourse among the States ... shall be absolutely free". The "riddle of s 92" lies in the question begged by the constitutional text: "absolutely free from what?"⁸²

84 Cutting through the debris left by some 140 earlier failed judicial attempts to resolve that riddle, *Cole v Whitfield*⁸³ provided a partial resolution. The partial resolution proceeded on the understanding that "[t]he notions of absolutely free trade and commerce and absolutely free intercourse are quite distinct and neither the history of [s 92] nor the ordinary meaning of its words require that the content of the guarantee of freedom of trade and commerce be seen as governing or governed by the content of the guarantee of freedom of intercourse"⁸⁴.

85 *Cole v Whitfield* authoritatively determined that trade and commerce among the States is guaranteed by s 92 to be absolutely free from "discriminatory burdens of a protectionist kind"⁸⁵. The guarantee of the trade and commerce limb is of absolute freedom from laws imposing differential burdens on interstate trade or commerce (in comparison to intrastate trade or commerce) which cannot be justified as a constitutionally permissible means of pursuing constitutionally permissible non-discriminatory legislative ends and which operate to the competitive advantage of intrastate trade or commerce. Subsequent cases on the trade and commerce limb of the guarantee⁸⁶ eventually settled on the standard to be met for a differential burden on interstate trade or commerce to be justified as a constitutionally permissible means of pursuing a non-discriminatory legislative

82 *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 539.

83 (1988) 165 CLR 360.

84 (1988) 165 CLR 360 at 388.

85 (1988) 165 CLR 360 at 394, 398. See also at 407-408.

86 *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411; *Street v Queensland Bar Association* (1989) 168 CLR 461; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *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.

end. The standard, authoritatively determined in *Betfair Pty Ltd v Western Australia* ("*Betfair [No 1]*"), is that of "reasonable necessity"⁸⁷.

86 What intercourse among the States is guaranteed by s 92 to be absolutely free from, *Cole v Whitfield* left to be resolved on another day. Left also for another day was the associated question of how the "intercourse limb" relates to the "trade and commerce limb" in respect of intercourse that occurs in trade or commerce. Subsequent cases touching on the intercourse limb⁸⁸ have yielded no definitive answer.

87 The occasion for resolution of that part of the riddle of s 92 left unresolved by *Cole v Whitfield* arose in the midst of a pandemic in the context of determining a proceeding brought by a resident of Queensland against the State of Western Australia, in the original jurisdiction conferred on the High Court by s 75(iv) and under s 76(i) of the *Constitution*, challenging directions contained in the *Quarantine (Closing the Border) Directions* (WA) ("the Directions") made under the *Emergency Management Act 2005* (WA) ("the Act").

88 The Act, to the detail of which I will in due course turn, relevantly empowers the Western Australian Minister for Emergency Services to make and periodically renew a declaration that a state of emergency exists in an "emergency area", comprising the whole or any area or areas of Western Australia, in respect of the occurrence of a plague or epidemic of a nature that requires a significant and coordinated response⁸⁹. For so long as a state of emergency declaration is in force, the Act empowers an authorised officer to give a general direction prohibiting movement of persons into or out of the declared emergency area for the purpose of combating the effects of the declared emergency⁹⁰.

89 On 15 March 2020, the Minister for Emergency Services made, and afterwards periodically renewed, a declaration that a state of emergency existed in

87 (2008) 234 CLR 418 at 477 [102]-[103]. See also *Betfair [No 2]* (2012) 249 CLR 217 at 269 [52].

88 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Cunliffe v The Commonwealth* (1994) 182 CLR 272; *AMS v AIF* (1999) 199 CLR 160; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

89 Section 56 of the Act, read with the definitions of "emergency", "emergency area" and "hazard" in s 3 of the Act.

90 Section 67 of the Act, read with the definition of "emergency management" in s 3 of the Act.

the whole of Western Australia in respect of "the pandemic caused by COVID-19". For the express purpose of "limit[ing] the spread of COVID-19"⁹¹, the State Emergency Coordinator soon afterwards made, and then periodically revised, the Directions. The impugned directions were expressed to prohibit entry of persons into Western Australia⁹².

90 On 6 November 2020, I joined in answering questions reserved in the proceeding for the consideration of the Full Court. The answer to the sole substantive question in which I then joined was to the effect that the provisions of the Act which authorised the making of directions of the kind impugned comply with both limbs of s 92 in all their potential applications. The consequence was that the validity of the impugned directions raised no constitutional question. The plaintiffs had disavowed any argument that the impugned directions were not authorised by the Act. The challenge to the impugned directions therefore failed.

91 Now giving reasons for the decision I then reached, I proceed immediately to explain my reasoning on the substantive issues. The structure of my reasoning is as follows.

92 At the outset, I deal with the resolution of that part of the riddle of s 92 left unresolved by *Cole v Whitfield*. I address what it means for intercourse among the States to be absolutely free: it means interstate intercourse must be absolutely free from discriminatory burdens of *any* kind. The guarantee of the intercourse limb is of absolute freedom from laws imposing differential burdens on interstate intercourse (in comparison to intrastate intercourse) which cannot be justified as a constitutionally permissible means of pursuing constitutionally permissible non-discriminatory legislative ends. I explain as well that the guarantees of absolute freedom of trade and commerce and absolute freedom of intercourse each apply to intercourse that occurs in trade or commerce.

93 Next, I explain why compliance with the guarantees of absolute freedom of trade and commerce and absolute freedom of intercourse was appropriately determined by considering whether the provisions of the Act which authorise the making of directions of the kind impugned met the standard of reasonable necessity required to comply with both limbs of s 92 in all their potential applications, rather than by considering whether the impugned directions directly complied with that standard.

94 Next, I turn to "structured proportionality". In short, I reject it. My view is that the standard to be met for a differential burden on interstate trade or commerce or on interstate intercourse to be justified as a constitutionally permissible means

91 Paragraph 1 of the Directions.

92 Paragraphs 4 and 5 of the Directions.

of pursuing a constitutionally permissible non-discriminatory legislative end should remain the standard of reasonable necessity authoritatively determined in *Betfair [No 1]*.

95 Finally, having established the parameters of what I consider to be the appropriate analysis, I explain quite briefly how the relevant provisions of the Act meet the requisite standard of constitutional justification.

Interstate intercourse: absolutely free from what?

96 The resolution of that part of the riddle of s 92 left unresolved by *Cole v Whitfield* was provided by Jeremy Kirk SC in an essay published on the eve of the onset of the pandemic⁹³. The argument presented in the essay was an elaboration of an argument put by the Attorney-General of the Commonwealth intervening in *Cole v Whitfield*⁹⁴. The argument was adopted by the Attorney-General of Queensland intervening in the present proceeding, and was ultimately accepted by the plaintiffs in reply. I am persuaded that the argument is sound.

97 The argument, which I accept, is to the effect that intercourse among the States is guaranteed by s 92 to be absolutely free from all discriminatory burdens. The guarantee of the intercourse limb is of absolute freedom from laws imposing differential burdens on interstate intercourse (in comparison to intrastate intercourse) which cannot be justified as a constitutionally permissible means of pursuing non-discriminatory legislative ends. The standard to be met for a differential burden on interstate intercourse to be justified as a constitutionally permissible means of pursuing a non-discriminatory legislative end, no differently from the standard to be met for a differential burden on interstate trade or commerce to be justified as a constitutionally permissible means of pursuing a non-discriminatory legislative end, is the standard of reasonable necessity.

98 Understood in that way, the guarantee of absolute freedom of interstate intercourse mirrors the guarantee of absolute freedom of interstate trade and commerce to the extent that: each invokes the same essential notion of discrimination as lying in "the unequal treatment of equals, and, conversely, in the equal treatment of unequals"⁹⁵; each posits the same essential comparison between that which is interstate and that which is intrastate; each demands "an acceptable

93 Kirk, "Section 92 in its Second Century", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 253.

94 (1988) 165 CLR 360 at 368.

95 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480.

explanation or justification for [any] differential treatment"⁹⁶; and each imposes, as the measure of justification for differential treatment, satisfaction of the same standard of reasonable necessity.

99 The guarantee of absolute freedom of interstate intercourse differs from the guarantee of absolute freedom of interstate trade and commerce only to the extent that absolute freedom of interstate intercourse extends to freedom from discriminatory burdens of any kind. That is to say, the guarantee of absolute freedom of interstate intercourse is infringed by any differential burden on interstate intercourse that cannot be justified. An unjustified differential burden on interstate intercourse need not operate to the competitive advantage of intrastate trade or commerce.

100 That understanding of the intercourse limb fits comfortably with the imputed constitutional purpose of s 92 indicated by the pre-federation history expounded in *Cole v Whitfield*⁹⁷ and elaborated in *Betfair [No 1]*⁹⁸. The purpose was "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"⁹⁹.

101 The constitutional purpose derives from a structural imperative. *Betfair [No 1]* drew attention to the "apparent, albeit at times inconvenient, truth" that democratically elected legislatures in a political subdivision of a federal system have a structural incentive to "protect and promote the interests of their own constituents"¹⁰⁰. The Constitution of the Commonwealth of Australia, like that of the United States, "was framed under the dominion of a political philosophy less parochial in range"¹⁰¹.

96 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 477; *Betfair [No 1]* (2008) 234 CLR 418 at 478-480 [106]-[113].

97 (1988) 165 CLR 360 at 385-391.

98 (2008) 234 CLR 418 at 454-459 [21]-[32].

99 (1988) 165 CLR 360 at 391.

100 (2008) 234 CLR 418 at 459-460 [34]-[35], quoting Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 1051-1052.

101 *Betfair [No 1]* (2008) 234 CLR 418 at 460 [35], quoting *Baldwin v G A F Seelig Inc* (1935) 294 US 511 at 523.

102 By 1891, when the First National Australasian Convention, on the motion of Sir Henry Parkes, resolved principles "to establish and secure an enduring foundation for the structure of a federal government"¹⁰², the inconvenient truth of democratically elected legislatures in political subdivisions of a federal system having a structural incentive to protect and promote the interests of their own constituents had been demonstrated through long experience in the United States. There, forces of localism had repeatedly been experienced to result in State laws protecting in-State traders and producers against out-of-State traders and producers. The Supreme Court had repeatedly held State laws of that protectionist character to be within the purview of the freedom of trade guaranteed by the "dormant" operation of the "commerce clause"¹⁰³, relevantly expressed to confer power on the United States Congress "[t]o regulate Commerce with foreign Nations, and among the several States"¹⁰⁴. But much the same forces of localism had also been experienced to result in State laws prohibiting entry into a State by non-State citizens within categories considered to be undesirable¹⁰⁵, taxing entry into a State by non-State citizens¹⁰⁶, taxing citizens seeking to leave a State and taxing non-State citizens seeking simply to pass through a State¹⁰⁷. Countering those forces in a non-commercial context, the Supreme Court had declared in 1867 that, independently of the dormant operation of the commerce clause, all citizens of the United States, "as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in [their] own States"¹⁰⁸.

103 Of the principles proposed by Sir Henry Parkes, and that were later adopted by the First National Australasian Convention, the first was "[t]hat the powers and privileges and territorial rights of the several existing colonies shall remain intact,

102 *Official Report of the National Australasian Convention Debates* (Sydney), 4 March 1891 at 23.

103 Notably, *Guy v Baltimore* (1879) 100 US 434 and *Minnesota v Barber* (1890) 136 US 313, discussed in *Betfair [No 1]* (2008) 234 CLR 418 at 462-464 [42]-[47].

104 *United States Constitution*, Art I, §8, cl 3.

105 *New York v Miln* (1837) 36 US 102.

106 *The Passenger Cases* (1849) 48 US 283.

107 *Crandall v Nevada* (1867) 73 US 35.

108 *Crandall v Nevada* (1867) 73 US 35 at 49, quoting *The Passenger Cases* (1849) 48 US 283 at 492. See Willoughby, *The Constitutional Law of the United States*, 2nd ed (1929) at 1076.

except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government". The second, which necessarily qualified the first and which came to be embodied in s 92, was "[t]hat the trade and intercourse between the federated colonies ... shall be absolutely free"¹⁰⁹.

104 Speaking to the second of those principles, and of its centrality to the Australian federal project, Sir Henry Parkes said¹¹⁰:

"By my next condition I seek to define what seems to me an absolutely necessary condition of anything like perfect federation, that is, that 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 on from one end of the continent to the other, with no one to stay its progress or to call it to account; in other words, if this is carried, it must necessarily take with it the shifting of the power of legislation on all fiscal questions from the local or provincial parliaments to the great national Parliament sought to be created. To my mind, it would be futile to talk of union if we keep up these causes of disunion. It is, indeed, quite apparent that time, and thought, and philosophy, and the knowledge of what other nations have done, have settled this question in that great country to which we must constantly look, the United States of America."

As noted by Professor La Nauze¹¹¹, the second principle was agreed to without discussion and "'absolutely free' was, to coin a phrase, absolutely free of legal criticism in open Convention".

105 Understanding the intercourse limb of s 92 as a guarantee of absolute freedom from discriminatory burdens also fits well with *Cole v Whitfield's* reference to the intercourse limb extending to "a guarantee of personal freedom"¹¹²,

109 *Official Report of the National Australasian Convention Debates* (Sydney), 4 March 1891 at 23.

110 *Official Report of the National Australasian Convention Debates* (Sydney), 4 March 1891 at 24.

111 La Nauze, "A Little Bit of Lawyers' Language: The History of 'Absolutely Free', 1890-1900", in Martin (ed), *Essays in Australian Federation* (1969) 57 at 70-71.

112 (1988) 165 CLR 360 at 393.

the content of which was indicated by *Gratwick v Johnson*, where the operation of s 92 was described as protecting against legislation "pointed directly at the passing of people to and fro among the States"¹¹³. That reference to personal freedom was plainly to freedom of movement of persons and cannot be taken to suggest the conferral of an individual right. The language used in *Gratwick* to describe the freedom was drawn from *James v The Commonwealth*¹¹⁴ which, as *Cole v Whitfield* went on to observe, employed a "notion of freedom as at the frontier" on one view little different from "the notion of freedom from burdens of a discriminatory kind"¹¹⁵.

106 *Gratwick* usefully illustrates a differential burden on interstate intercourse which was not justified as a constitutionally permissible means of pursuing a constitutionally permissible non-discriminatory legislative end. Found wanting in that case was a statutory order purporting to prohibit interstate, but not intrastate, travel by rail or commercial passenger vehicle during a time of war. As put by Dixon J, the prohibition imposed by the statutory order was "simply based on the 'inter-Stateness' of the journeys it assume[d] to control"¹¹⁶. Although the statutory order was purportedly made pursuant to a statutory regime confining orders restricting movement to those in the interests of defence of the Commonwealth and effectual prosecution of the war, his Honour observed that it was "going a long way to suggest that the imperative demands of national safety necessitate a general prohibition operating in every part of the continent of travelling without a permit by public conveyance, but only if it is a journey with its terminus *a quo* in one State and its terminus *ad quem* in another State"¹¹⁷.

107 Three other pre-*Cole v Whitfield* cases can be seen in retrospect as turning on the application of the intercourse limb of s 92. Each of them also serves as an example of a differential burden on interstate intercourse which, to comply with the guarantee of absolute freedom of interstate intercourse, needed to be justified as reasonably necessary to the pursuit of a non-discriminatory legislative end.

113 (1945) 70 CLR 1 at 17. See also at 14.

114 (1936) 55 CLR 1; [1936] AC 578.

115 (1988) 165 CLR 360 at 397.

116 (1945) 70 CLR 1 at 19.

117 (1945) 70 CLR 1 at 20.

108 The earliest was *R v Smithers; Ex parte Benson*¹¹⁸. There, a law prohibited the "coming into" New South Wales of persons convicted of serious offences in other States. The law thereby imposed a differential burden on persons entering the State in comparison to persons having equivalent antecedents already in the State. The burden can be seen in retrospect to have been incapable of justification by reference to a standard of reasonable necessity. The burden was in fact sought to be justified on the basis that its imposition was a permissible means of pursuing the amorphous end of "the self-protection of the State"¹¹⁹. The reasoning of Griffith CJ¹²⁰ and of Barton J¹²¹ directly picked up the approach of the Supreme Court of the United States to the implication of freedom of movement between States. Although the expression of their reasoning was redolent of an attitude towards constitutional interpretation now long rejected, their preparedness to recognise an implication along those lines underscores Sir Henry Parkes' emphasis on the criticality of freedom of interstate intercourse to the Australian federal system. Had it not been expressed, freedom of interstate intercourse under the *Constitution* would have had to have been implied. Higgins J, who like Isaacs J saw the case as turning solely on the application of s 92, said that the freedom of movement held by the Supreme Court of the United States to be implied in the Constitution of the United States "is expressed in sec 92 of our Constitution, so far as regards State boundaries"¹²².

109 The other two cases, *Ex parte Nelson [No 1]*¹²³ and *Tasmania v Victoria*¹²⁴, both concerned State phytosanitary legislation empowering prohibition of importation into a State of animals or vegetables sourced from an area of another State affected by contagious diseases. In the first, a qualified prohibition of limited duration, during a period in which there existed "reason to believe" that a contagious disease existed, was held valid by a statutory majority. In the second, a blanket prohibition of unlimited duration was held invalid unanimously.

118 (1912) 16 CLR 99.

119 (1912) 16 CLR 99 at 104.

120 (1912) 16 CLR 99 at 108-109.

121 (1912) 16 CLR 99 at 109-110.

122 (1912) 16 CLR 99 at 119.

123 (1928) 42 CLR 209.

124 (1935) 52 CLR 157.

110 After *Cole v Whitfield*, in *Nationwide News Pty Ltd v Wills*¹²⁵, despite disavowing the proposition that discrimination is an "essential feature of an impermissible burden imposed on interstate intercourse"¹²⁶, Brennan J in effect articulated an understanding of the intercourse limb as a guarantee of freedom from discriminatory burdens. His Honour explained that s 92 does not "purport to place interstate intercourse in a position where it is immune from the operation of laws of general application which are not aimed at interstate intercourse". He went on to describe the object of the section as being "to preclude the crossing of the border from attracting a burden which the transaction would not otherwise have to bear" as distinct from being "to remove a burden which the transaction would otherwise have to bear if there were no border crossing"¹²⁷.

111 That understanding of the intercourse limb as a guarantee of freedom from discriminatory burdens was applied by Brennan J in *Nationwide News*¹²⁸ to hold that s 92 had nothing to say about a law of general application which burdened interstate political communication in precisely the same way as it burdened intrastate political communication, with the consequence that there was no need to consider whether the burden on interstate communication was justified in order to determine that the section was not infringed. In *Cunliffe v The Commonwealth*¹²⁹, the same understanding was again applied by Brennan J¹³⁰, as well as by Toohey J¹³¹, to hold that the intercourse limb had nothing to say about a law of general application which burdened interstate non-commercial communication in the same way as it burdened intrastate non-commercial communication, although Deane J¹³² (with whom Gaudron J expressed agreement¹³³), Dawson J¹³⁴, and

125 (1992) 177 CLR 1.

126 (1992) 177 CLR 1 at 57.

127 (1992) 177 CLR 1 at 58-59.

128 (1992) 177 CLR 1 at 60.

129 (1994) 182 CLR 272.

130 (1994) 182 CLR 272 at 333.

131 (1994) 182 CLR 272 at 384.

132 (1994) 182 CLR 272 at 346.

133 (1994) 182 CLR 272 at 392.

134 (1994) 182 CLR 272 at 366.

McHugh J¹³⁵ all proceeded explicitly or implicitly on the understanding that the intercourse limb, unlike the trade and commerce limb, was capable of being infringed by a law of general application.

112 In *AMS v AIF*¹³⁶, an issue arose about the application of the equivalent statutory guarantee of absolute freedom of trade, commerce and intercourse between a State and the Northern Territory¹³⁷ to a differential burden on intercourse imposed by a judicial order made in an exercise of statutory discretion. The order had the practical effect of impeding the individual to whom it was directed moving from Perth to Darwin¹³⁸. The question raised by the guarantee, which did not need to be answered because the judicial order was to be set aside on appeal for other reasons, was framed by Gleeson CJ, McHugh and Gummow JJ in terms of whether the impediment imposed was greater than that "reasonably required" to achieve the statutory objective¹³⁹.

113 The framing of the question in *AMS* in terms of whether a burden imposed on interstate intercourse was "reasonably required" to achieve the statutory objective, was subsequently adopted and applied by a majority in *APLA Ltd v Legal Services Commissioner (NSW)*¹⁴⁰. Minor linguistic divergences aside, the "reasonably required" standard as then adopted and applied was indistinguishable in substance from the "reasonable necessity" standard settled upon in relation to the trade and commerce limb three years later in *Betfair [No 1]*. The standard was applied in *APLA* to legislative provisions which operated to burden interstate intercourse in the same way as they burdened intrastate intercourse. However, no argument was put in *APLA* that the burden on interstate intercourse did not need to be justified because the burden was not differential. Neither the outcome nor the reasoning therefore stands in the way of now recognising the intercourse limb to be confined to discriminatory burdens.

135 (1994) 182 CLR 272 at 396-397.

136 (1999) 199 CLR 160.

137 Section 49 of the *Northern Territory (Self-Government) Act 1978* (Cth).

138 (1999) 199 CLR 160 at 179 [45].

139 (1999) 199 CLR 160 at 179 [45]. See also at 233 [221].

140 (2005) 224 CLR 322 at 353 [38], 393-394 [177], 461 [420]. See also at 481-482 [462]-[464].

114 By way of summation, the constitutional purpose of s 92 identified in *Cole v Whitfield* is best served by "re-integrating"¹⁴¹ its two limbs: by continuing to accept the trade and commerce limb as a guarantee that interstate trade and commerce is to be absolutely free from discriminatory burdens of a protectionist kind, and by recognising the intercourse limb as a guarantee that interstate intercourse is to be absolutely free from discriminatory burdens of any kind. Re-integration is supported by the reasoning of Brennan J in *Nationwide News* and by the reasoning of Brennan and Toohey JJ in *Cunliffe*, is consistent with the reasoning of Gleeson CJ, McHugh and Gummow JJ in *AMS* and is not prevented by the approach taken in the absence of contrary argument in *APLA*.

Intercourse occurring in trade or commerce

115 Re-integration brings complementarity. Recognising that each limb of s 92 of the *Constitution* guarantees freedom from discriminatory burdens, and that each limb demands the same standard of justification for a law imposing a differential burden, harmonises the operation of the two limbs in a manner that meets concerns expressed in *Nationwide News*¹⁴² and in *APLA*¹⁴³ that each limb might have the potential to subsume the other. Each limb has a separate operation. In respect of intercourse occurring in trade or commerce, the two limbs overlap. To the extent they overlap, the guarantee of each must be observed.

116 The result, in the language of Spigelman CJ in *Cross v Barnes Towing and Salvage (Qld) Pty Ltd*¹⁴⁴, is that "a law which operates ... so that it regulates behaviour that may, but need not necessarily, be trade and commerce, will have to pass both tests". Compliance with both limbs will be required of a law which differentially burdens a form of interstate intercourse which occurs in trade or commerce or which may, but need not necessarily, occur in trade or commerce.

The appropriate level of analysis

117 Like the implied constitutional guarantee of freedom of political communication, the express constitutional guarantee of absolute freedom of trade, commerce and intercourse among the States is a limitation on Commonwealth,

141 Kirk, "Section 92 in its Second Century", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 253 at 277.

142 (1992) 177 CLR 1 at 83-84.

143 (2005) 224 CLR 322 at 390-391 [162]-[165], 458 [408].

144 (2005) 65 NSWLR 331 at 344 [44].

State and Territory executive power as much as it is a limitation on Commonwealth, State and Territory legislative power¹⁴⁵.

118 In respect of executive action which takes such legal force or effect as it may have only from legislation, however, the relevant operation of each constitutional guarantee is solely as a limitation on legislative power. The specifically relevant operation of each is as a limitation on the power to enact the legislation which purports to give the executive action legal force or effect.

119 Where executive action purporting to be taken pursuant to statute imposes a burden argued to infringe the implied constitutional guarantee of freedom of political communication or the express constitutional guarantee of absolute freedom of trade, commerce and intercourse among the States, two distinct questions accordingly arise: one constitutional, the other statutory. The statutory question is whether the executive action is authorised by the statute. The constitutional question is whether the statute complies with the constitutional guarantee if, and insofar as, the statute authorises the executive action.

120 Those two distinct questions arise in respect of the making of subordinate or delegated legislation in the same way as they arise in respect of any other executive action pursuant to statute. Our conception of subordinate legislation, as Dixon J explained in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*¹⁴⁶, is that it is wholly dependent for its force and effect on the enactment, and the continuing operation of the statute by which it is authorised.

121 The distinction between the two questions has not been universally observed. The distinction was perhaps less apparent in theory and less workable in practice when judicial review of executive action undertaken in the exercise of discretionary powers conferred by statute was less developed¹⁴⁷. Only in *R v Toohey; Ex parte Northern Land Council*¹⁴⁸ was the position established that an exercise of statutory discretion by a vice-regal representative in ministerial council is reviewable on the basis that it exceeds the scope of statutory discretion or is

145 *Cole v Whitfield* (1988) 165 CLR 360 at 394, 409; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 275-276.

146 (1931) 46 CLR 73 at 101-102.

147 See *Buck v Bavone* (1976) 135 CLR 110 at 118-119, discussing *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 614.

148 (1981) 151 CLR 170. See also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 363-366.

undertaken for a purpose not authorised by the statute. And only in *Kirk v Industrial Court (NSW)*¹⁴⁹ was the position established that a State Supreme Court has constitutionally entrenched jurisdiction to remedy State executive action undertaken in excess of power conferred by State legislation.

122 Even now, the statutory question can converge with the constitutional question in respect of executive action undertaken in the exercise of a discretionary power conferred by a statutory provision that is so broadly expressed as to require it to be read down as a matter of statutory construction to permit only those exercises of discretion that are within constitutional limits¹⁵⁰.

123 And even now, prudential considerations can favour framing the statutory question raised for determination on the facts of a case in a manner that minimally confines the scope of the constitutional question needing to be addressed¹⁵¹. The question whether a burden imposed through the exercise of a statutory discretion is justified across the range of potential outcomes of the exercise of that discretion might not yield a ready answer. The severable operation of the provision conferring the discretion in the event of non-compliance of some exercises of the discretion with the constitutional guarantee might be clear-cut. In that combination of circumstances, a court called upon to determine whether a legislative provision conferring the discretion complies with a constitutional guarantee to the extent that the provision purports to authorise particular discretionary executive action in issue might well proceed to answer the statutory and constitutional questions compendiously by focusing on the particular exercise of statutory discretion without embarking on a consideration of whether the provision conferring the discretion is compliant or non-compliant in all its applications.

124 Thus, as Gummow J pointed out in *APLA*¹⁵² in the context of a challenge to subordinate legislation, there can still be cases in which the statutory and constitutional questions can be appropriately determined by melding them into a composite hypothetical question. If the subordinate legislation in issue had been

149 (2010) 239 CLR 531.

150 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 373 [104]; *Wotton v Queensland* (2012) 246 CLR 1 at 9-10 [10]; *Betfair [No 2]* (2012) 249 CLR 217 at 282 [91].

151 See *Clubb v Edwards* (2019) 267 CLR 171 at 192-193 [32]-[36], 216-217 [135]-[138].

152 (2005) 224 CLR 322 at 373 [104], quoting *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 594.

enacted as legislation, would that legislation have been compliant with the constitutional guarantee in issue?

125 The parties were content to adopt just that approach in the present case. Proceeding as if the Directions had been enacted as Western Australian legislation, and accepting the prohibition by the Directions of the entry of persons into Western Australia to impose a differential burden on interstate intercourse which might or might not be in trade or commerce, the parties joined issue on the factually intensive question of whether that prohibition could be justified at the time of the hearing as a constitutionally permissible means of pursuing the constitutionally permissible non-discriminatory legislative end of safeguarding the health of persons in Western Australia. The plaintiffs sought for that purpose to unpick and restitch the findings of fact made on remittal by Rangiah J¹⁵³. The defendants sought to adopt, update and supplement his Honour's conclusions.

126 The problem with conflating the statutory and constitutional questions in that manner, however, was that treating the Directions as if they had been enacted as Western Australian legislation failed to acknowledge the constitutional significance of critical constraints built into the scheme of the Act which sustained the Directions. The hypothetical analysis simplified the constitutional question to the point of obscuring the manner of its answer.

127 Better in the circumstances of the case was to adopt the approach urged by the Attorney-General of Victoria, with the support of the Attorneys-General of Tasmania and Queensland, all of whom intervened in the proceeding, of squarely addressing the constitutional question at the level and in the manner indicated in *Wotton v Queensland*¹⁵⁴ and applied there and in *Comcare v Banerji*¹⁵⁵. The constitutional question so isolated was whether the provisions of the Act, insofar as they authorised the making of directions imposing a differential burden on interstate intercourse, are sufficiently constrained in their terms to allow a conclusion to be reached that imposition of a burden of that nature meets the requisite standard of justification across the range of potential outcomes.

128 The answer to that constitutional question being in the affirmative for reasons to which I will eventually come, and no separate statutory question being

153 *Palmer v Western Australia [No 4]* [2020] FCA 1221.

154 (2012) 246 CLR 1 at 14 [22]. See also Stellios, "Marbury v Madison: Constitutional limitations and statutory discretions" (2016) 42 *Australian Bar Review* 324 at 335-337, discussing *Hogan v Hinch* (2011) 243 CLR 506 and *Wainohu v New South Wales* (2011) 243 CLR 181.

155 (2019) 93 ALJR 900 at 915-916 [44], 924-925 [96]; 372 ALR 42 at 59, 72.

raised in the proceeding as to whether the Directions complied with the Act, no further factual analysis was required in order to answer the principal question reserved.

The requisite standard of justification

129 Explained in *Cole v Whitfield* was that its re-interpretation of s 92 involved "a belated acknowledgment of the implications of the long-accepted perception that 'although the decision [whether an impugned law infringes s 92] was one for a court of law the problems were likely to be largely political, social or economic'"¹⁵⁶. Foreseen was that the approach it ushered in would bring "a new array of questions in its wake"¹⁵⁷ and give rise to "questions of fact and degree on which minds might legitimately differ"¹⁵⁸.

130 Further explained in *Castlemaine Tooheys Ltd v South Australia* was that "[t]he question whether a particular legislative enactment is a necessary or even a desirable solution to a particular problem is in large measure a political question best left for resolution to the political process" and that a court would be in an invidious position were it to hold "that only such regulation of interstate trade as is in fact necessary for the protection of the community is consistent with the freedom ordained by s 92"¹⁵⁹. Drawing on a mode of analysis long adopted in the Supreme Court of the United States in relation to the dormant operation of the commerce clause, *Castlemaine Tooheys* addressed the question of whether there existed "an acceptable explanation or justification" for the differential burdening of interstate trade by the legislation in issue in that case by accepting that the legislature had "rational and legitimate grounds" for apprehending that the legislation imposing the differential burden contributed to the resolution of a legislatively identified problem. The manner in which the question was answered was by examining whether the legislative scheme imposing the differential burden was "appropriate and adapted" to the achievement of its legislative purpose such that the "burden imposed on interstate trade was incidental and not disproportionate"¹⁶⁰. Examined in that manner, the legislative scheme was found wanting because the burden it imposed on interstate trade was significantly greater

156 (1988) 165 CLR 360 at 408, quoting *Freightlines & Construction Holding Ltd v New South Wales* (1967) 116 CLR 1 at 5; [1968] AC 625 at 667.

157 (1988) 165 CLR 360 at 408.

158 (1988) 165 CLR 360 at 409.

159 (1990) 169 CLR 436 at 473.

160 (1990) 169 CLR 436 at 473, 477.

than that sufficient to achieve the legislative object¹⁶¹ and because it contained a wholly unexplained provision for exemption to be granted to intrastate traders¹⁶².

131 *Betfair [No 1]* refined the standard of appropriateness and adaptedness referred to in *Castlemaine Tooheys* into one of reasonable necessity¹⁶³. The measure of reasonable necessity, it was then said, "should be accepted as the doctrine of the Court"¹⁶⁴.

132 The significance of *Betfair [No 1]*'s refinement of *Castlemaine Tooheys*' standard of appropriateness and adaptedness into one of reasonable necessity needs to be understood against the background of the intervening formulation in *Lange v Australian Broadcasting Corporation*¹⁶⁵, and refinement in *Coleman v Power*¹⁶⁶, of the analytical framework for determining whether a law infringes the implied freedom of political communication. The *Lange-Coleman* analytical framework requires a law burdening political communication, whether differentially or not, to be justified as "reasonably appropriate and adapted" to the advancement of a legitimate purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government.

133 *Lange* had contained the following notation on terminology¹⁶⁷:

"Different formulae have been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts. For ease of expression,

161 (1990) 169 CLR 436 at 474.

162 (1990) 169 CLR 436 at 475-476.

163 (2008) 234 CLR 418 at 477 [102]-[103].

164 (2008) 234 CLR 418 at 477 [103].

165 (1997) 189 CLR 520 at 567-568.

166 (2004) 220 CLR 1 at 51 [95]-[96], 77-78 [196], 82 [211].

167 (1997) 189 CLR 520 at 562.

throughout these reasons we have used the formulation of reasonably appropriate and adapted."

134 Gleeson CJ had returned to the competing formulae in *Mulholland v Australian Electoral Commission*¹⁶⁸:

"Whichever expression is used, what is important is the substance of the idea it is intended to convey. Judicial review of legislative action, for the purpose of deciding whether it conforms to the limitations on power imposed by the Constitution, does not involve the substitution of the opinions of judges for those of legislators upon contestable issues of policy. When this Court declares legislation to be beyond power, or to infringe some freedom required by the Constitution to be respected, it applies an external standard. Individual judgments as to the application of that standard may differ, but differences of judicial opinion about the application of a constitutional standard do not imply that the Constitution means what judges want it to mean, or that the Constitution says what judges would prefer it to say."

135 Gleeson CJ had observed that "[f]or a court to describe a law as reasonably appropriate and adapted to a legitimate end is to use a formula which is intended, among other things, to express the limits between legitimate judicial scrutiny, and illegitimate judicial encroachment upon an area of legislative power"¹⁶⁹. His Honour had observed that "[t]he concept of proportionality has both the advantage that it is commonly used in other jurisdictions in similar fields of discourse, and the disadvantage that, in the course of such use, it has taken on elaborations that vary in content, and that may be imported sub silentio into a different context without explanation"¹⁷⁰.

136 Having treated appropriateness and adaptedness and proportionality as broadly equivalent expressions of the constitutional standard, however, Gleeson CJ had gone on in *Mulholland* to adopt the terminology of reasonable necessity as the appropriate expression of the measure of justification required of a law which targeted political communication, as distinct from a law of general application which merely burdened political communication in the same way as it burdened other communication. His Honour had explained the application of that more stringent measure "to involve close scrutiny, congruent with a search for

168 (2004) 220 CLR 181 at 197 [32].

169 (2004) 220 CLR 181 at 197 [33].

170 (2004) 220 CLR 181 at 197-198 [34]. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178-179 [17].

'compelling justification'"¹⁷¹. In a subsequent discussion in *Thomas v Mowbray*¹⁷², to which attention was drawn in *Betfair [No 1]*¹⁷³, Gleeson CJ noted that "reasonable necessity" conveys a standard for the making of an evaluative judgment of a nature not uncommonly undertaken in the judicial process across a range of subject-matters.

137 Reasonable necessity, it is important to recognise, expresses a standard that guides the making of an evaluative judgment as distinct from a test that substitutes for the making of an evaluative judgment. The standard cannot be reduced to the presence or absence of a single factor or of a predetermined range of factors. Justification of a burden by reference to the more general standard of appropriateness and adaptedness or proportionality being a matter of degree, reasonable necessity signifies that the requisite degree of justification is high. Correspondingly, reasonable necessity indicates a need for a heightened level of scrutiny.

138 Against that background, the standard of reasonable necessity can be seen to have been adopted in *Betfair [No 1]*, in preference to continuing with the more general expressions of appropriateness and adaptedness or proportionality, in order to convey the stringency of the scrutiny to be applied to determine the acceptability of a proffered justification for a differential burden on interstate trade or commerce. Then pointed out¹⁷⁴ was that the heightened standard of reasonable necessity had in fact been met by the differential burden on interstate trade held to comply with the trade and commerce limb in *Cole v Whitfield*. Also pointed out¹⁷⁵ was that the heightened standard had been applied by Mason J in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*¹⁷⁶ to hold that the differential burden on interstate trade in that case had not been justified as "necessary for the protection of public health".

171 (2004) 220 CLR 181 at 200 [40], referring to *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 and *Levy v Victoria* (1997) 189 CLR 579 at 618.

172 (2007) 233 CLR 307 at 331-333 [20]-[26].

173 (2008) 234 CLR 418 at 477 [102].

174 (2008) 234 CLR 418 at 477 [103].

175 (2008) 234 CLR 418 at 477 [102].

176 (1975) 134 CLR 559 at 608.

139 The standard of reasonable necessity so accepted for the purpose of s 92 as expressing the measure of justification demanded by the trade and commerce limb for a law imposing a differential burden on interstate trade or commerce, as I have already noted, equally expresses the measure of justification demanded by the intercourse limb for a law imposing a differential burden on interstate intercourse.

140 The question to which I now turn is whether the standard of reasonable necessity should be supplemented or supplanted by structured proportionality of the kind imported as a "tool of analysis" or "test" for considering the application of the implied freedom of political communication in *McCloy v New South Wales*¹⁷⁷. Here I am conscious of being drawn yet again into an abstracted debate about methodology more appropriate to the pages of a law review than to the pages of a law report.

141 Over the years, I have followed the march of structured proportionality from its German homeland, first to South Africa, then to Canada, and then to other common law jurisdictions, before its entry into Australia in *McCloy*. I understand its attraction. I unreservedly share the aspiration of those who adhere to it to produce predictable outcomes through a transparent process of reasoning employing judicially manageable standards.

142 Going further, I embrace the need to distinguish legislatively chosen means (what the law does) from legislatively chosen ends (what the law is designed to achieve) when applying any standard of justification in novel circumstances to determine whether a law infringes a constitutional guarantee. I embrace the need to consider how and to what extent the legislatively chosen means impact on the freedom protected by the constitutional guarantee. I embrace the need to consider the degree of connection between the legislatively chosen means and the legislatively chosen ends. I accept that, in so doing, there can often be utility in considering whether, and if so what, other means of achieving the same or similar ends might have a less drastic impact on the freedom protected by the constitutional guarantee. And I accept that need can arise to consider the systemic benefit of achieving the legislatively chosen ends relative to the systemic detriment caused by the impact of the legislatively chosen means on the freedom protected by the constitutional guarantee. All of that is to acknowledge the dimensions of the overall inquiry inherent in a novel application of the standard. I can even concede that there might be utility in attaching standardised labels to subsidiary inquiries indicated by those dimensions.

143 To be clear, my concern is with *structured* proportionality ("Verhältnismäßigkeit"), of the kind translated and presented in tabular form in

177 (2015) 257 CLR 178 at 193-195 [2]-[3].

*McCloy*¹⁷⁸, and of the kind which the Second Senate of the German Federal Constitutional Court recently castigated the European Court of Justice for failing to understand¹⁷⁹. Structured proportionality commands the undertaking of consecutive inquiries into "suitability" ("Geeignetheit"), "necessity" ("Erforderlichkeit"), and "adequacy of balance" ("Zumutbarkeit") or "appropriateness" ("Angemessenheit"). Structured proportionality exhaustively defines, and in so doing confines, each of those standardised inquiries. Relevant considerations not captured within "suitability", as strictly defined, or "necessity", as strictly defined, are pushed down to be swept up in the residual inquiry into "adequacy of balance" or "appropriateness".

144 Quite apart from my reservations about judicial importation of a tool of legal analysis forged in a different institutional setting within a different intellectual tradition and social and political milieu where it has been deployed for different purposes, my concern about structured proportionality as a tool of legal analysis, as I have sought to explain before¹⁸⁰, is with its rigidity.

145 Part of my concern is that the sequencing and linguistic precision of the standardised three-stage test tends to obscure the purpose for which the overall inquiry is undertaken. In consequence, it tends to lessen the sensitivity of the overall inquiry to the constitutional values which underlie the constitutional freedom protected by the constitutional guarantee at stake¹⁸¹. Oliver Wendell Holmes emphasised "the need of scrutinizing the reasons for the rules which we follow". "We must", as he put it, "think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true."¹⁸²

178 (2015) 257 CLR 178 at 193-195 [2].

179 Bundesverfassungsgericht [German Federal Constitutional Court], Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.

180 *McCloy v New South Wales* (2015) 257 CLR 178 at 234-238 [140]-[149]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 71-73 [99]-[105]; *Brown v Tasmania* (2017) 261 CLR 328 at 376-377 [157]-[161]; *Clubb v Edwards* (2019) 267 CLR 171 at 224-225 [159]-[160].

181 *McCloy v New South Wales* (2015) 257 CLR 178 at 235-238 [142]-[149]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 71-72 [99]-[101].

182 Holmes, "Law in Science and Science in Law" (1899) 12 *Harvard Law Review* 443 at 460.

146 Another part of my concern is that the limited scope of the analysis required and permitted at each stage of the standardised three-stage test tends to shape the overall inquiry in ways that actually work against the goal of producing predictable outcomes through a transparent process of reasoning. 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. They get ignored or suppressed or downplayed. They get squeezed into one or more of the standardised verbal formulae in a manner that distorts the identification of the factors themselves or that distorts the language in which the formulae are expressed. Or they get accommodated through the creation of qualifications, which get patched onto, or carved out of, the standardised verbal formulae, creating rules upon rules¹⁸³.

147 Australian constitutional history has taught us, the hard way, that evaluative judgment is inescapable in constitutional adjudication and that no good can come of attempting to avoid it or unduly to canalise it. The natural judicial tendency to the creation of rules in the hope of generating predictable outcomes on constitutional issues of social and economic significance drove the adoption of both the "criterion of operation" doctrine formulated to govern application of s 92¹⁸⁴ and the associated "criterion of liability" doctrine formulated to govern application of s 90 of the *Constitution*¹⁸⁵. Both doctrines were shown through experience to produce neither predictability nor transparency but only confusion¹⁸⁶. Both were ultimately discarded: the first in *Cole v Whitfield*, the second in *Ha v New South Wales*¹⁸⁷.

183 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 71-72 [98]-[101].

184 Associated with *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1.

185 Associated with *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 and *Bolton v Madsen* (1963) 110 CLR 264.

186 As to the confusion attending the criterion of liability doctrine of s 90, see: *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 429-433; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 582-584.

187 (1997) 189 CLR 465.

148 Of the criterion of operation doctrine, *Cole v Whitfield* noted that it "appeared to have the advantage of certainty, but that advantage proved to be illusory"¹⁸⁸. *Cole v Whitfield* elaborated¹⁸⁹:

"In truth the history of the doctrine is an indication of the hazards of seeking certainty of operation of a constitutional guarantee through the medium of an artificial formula. Either the formula is consistently applied and subverts the substance of the guarantee; or an attempt is made to achieve uniformly satisfactory outcomes and the formula becomes uncertain in its application."

149 Writing extra-judicially at a time when the criterion of operation and criterion of liability doctrines were unravelling, Sir Kenneth Jacobs (in a passage to which I have drawn attention in the past¹⁹⁰) stated¹⁹¹:

"Linguistic refinement of concept (much less mere verbalisation) is no substitute for social reality; it can, indeed, result in fineness of distinction which makes it ever more difficult to predict a course of judicial decision. On the other hand, an overtly imprecise concept can yield a degree of certainty in application, provided the reasons for choice are also made as overt as we can. The test of reasonableness and unreasonableness may often yield more certainty than many rules of law couched in terms of apparent precision and decisiveness."

After making the point that "[i]n the law of negligence the uncertain test of reasonableness gives much more predictability of outcome for a particular case than can be found when such a prediction must be based on some rules of law, in the conditions to which the games which lawyers play have reduced these rules", Sir Kenneth continued:

188 (1988) 165 CLR 360 at 384.

189 (1988) 165 CLR 360 at 402. See also the discussion of *Mansell v Beck* (1956) 95 CLR 550 in Stellios, *Zines's The High Court and The Constitution*, 6th ed (2015) at 674.

190 *Clubb v Edwards* (2019) 267 CLR 171 at 224 [159].

191 Jacobs, "The Successor Books to 'The Province and Function of Law' – Lawyers' Reasonings: Some Extra-judicial Reflections" (1967) 5 *Sydney Law Review* 425 at 428, quoted in Stellios, *Zines's The High Court and The Constitution*, 6th ed (2015) at 674.

"The law which seeks certainty in reasoning, which attends to verbal distinction while ignoring or affecting to ignore social reality, becomes truly uncertain in the sense that it becomes increasingly impossible to predict the course which decisions are likely to take. It is only as the area of choice becomes recognised and the factors operating to determine that choice are also then recognised, that one can feel any assurance upon the likely course of legal decision. This may not have been of such great importance in a society where the law-makers constituted by and large a single socially conscious group, as it surely is in the pluralist society which we now have."

150 Since *McCloy*, structured proportionality has not come to dominate all facets of our constitutional analysis. It was treated as "inapposite" in determining whether electoral procedures were compatible with the constitutionally prescribed system of representative government in *Murphy v Electoral Commissioner*¹⁹². Its application to Ch III of the *Constitution* was rejected in *Falzon v Minister for Immigration and Border Protection*¹⁹³.

151 The present question is whether structured proportionality should now be incorporated into our analysis of the application of s 92. My answer is in the words of Sir Anthony Mason: "the *Cole v Whitfield* interpretation has brought an element of certainty and stability to a question which was a source of confusion over a long period of time. So why abandon that interpretation?"¹⁹⁴ Nothing is broken; nothing should be fixed.

The empowering provisions conform to the standard of reasonable necessity

152 That brings me at last to explain how I came to form the evaluative judgment that the provisions of the Act which authorise the making of directions prohibiting movement of persons into Western Australia comply with the guarantee of each limb of s 92 in all their potential applications.

153 My analysis began by looking to the legislatively identified end to be achieved by directions of that nature. The legislatively identified ends of the Act emerge from its interlocking statutory definitions of "emergency" and "hazard"

192 (2016) 261 CLR 28 at 53 [39]. See also at 94 [202].

193 (2018) 262 CLR 333 at 343-344 [25]-[32].

194 Mason, "Foreword", in Chordia, *Proportionality in Australian Constitutional Law* (2020) v at vi. See also Simpson, "Section 92 as a Transplant Recipient?", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 283 at 291-292.

and "emergency management"¹⁹⁵. The relevant end to emerge from those definitions is that of managing the adverse effects of a plague or epidemic of a nature that requires a significant and coordinated response.

154 There being no contextual reason to doubt that legislative identification of the relevant legislative end, my analysis took me next to an examination of the means legislatively chosen to pursue that legislative end. The legislated means comprise two principal components. Each is hedged with constitutionally significant qualifications.

155 The foundational component is the conferral of power on the Minister for Emergency Services to make a "state of emergency declaration": a declaration in writing to the effect that a state of emergency, constituted by the occurrence or imminent occurrence of a hazard (relevantly being a plague or epidemic) of a nature that requires a significant and coordinated response, exists in an "emergency area" which comprises the whole or any area or areas of Western Australia¹⁹⁶. Reposing a power of that nature in a Minister reflects the reality that, within our constitutional system of representative and responsible government, at the State level as at the Commonwealth level, "[t]he Executive Government is the arm of government capable of and empowered to respond to a crisis"¹⁹⁷.

156 That ministerial power to make a state of emergency declaration is subject to two significant limitations.

157 The first is a jurisdictional limitation to be found in the express and implied preconditions to the exercise of the power. The express preconditions are that the Minister has considered the advice of the State Emergency Coordinator¹⁹⁸ (who has statutory responsibility for coordinating the response to an emergency during a state of emergency¹⁹⁹), is "satisfied" that "an emergency has occurred, is occurring or is imminent"²⁰⁰, and is further "satisfied" relevantly that "extraordinary measures are required to prevent or minimise ... loss of life, ... or

195 Section 3 of the Act.

196 Section 56(1) of the Act.

197 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 89 [233].

198 Section 56(2)(a) of the Act.

199 Section 11(1) of the Act.

200 Section 56(2)(b) of the Act.

harm to the health, of persons"²⁰¹. Combined with the requirement for the state of emergency declaration to specify the emergency area within which the declared state of emergency exists, those preconditions operate to impose what has elsewhere been referred to as a "triple lock" of "seriousness, necessity and geographical proportionality"²⁰² on the ministerial power to make a state of emergency declaration, each of the components of which is subject to judicial review.

158 The requirement for the Minister to be "satisfied", both of the occurrence or imminence of an emergency and of the need for extraordinary measures to prevent or minimise loss of human life or harm to human health, requires that the Minister in fact form a state of mind that can be described as one of satisfaction and implies that the Minister must form the requisite state of mind reasonably and on a correct understanding of the Act²⁰³. To fulfil the condition of reasonableness, the state of mind formed by the Minister must be one that is open to be formed by a reasonable person in the position of the Minister on the basis of the information available to the Minister and must be one that is in fact formed by the Minister through an intelligible process of reasoning on the basis of that available information²⁰⁴.

159 The second significant limitation is a temporal limitation on the legal effect of an exercise of the ministerial power. A state of emergency declaration has a finite duration. Unless sooner revoked by the Minister²⁰⁵, the declaration remains in force for an initial period of only three days²⁰⁶. Thereafter, the declaration can be extended and further extended by further ministerial declarations in writing but only for incremental periods each generally not exceeding 14 days²⁰⁷. Implicit in

201 Section 56(2)(c)(i) of the Act.

202 Lee, Adams, Campbell and Emerton, *Emergency Powers in Australia*, 2nd ed (2019) at 179, referring to Walker and Broderick, *The Civil Contingencies Act 2004: Risk, Resilience, and the Law in the United Kingdom* (2006) at 52, 72-73.

203 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 30 [57].

204 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 936 [19]-[20]; 383 ALR 407 at 413.

205 Section 59 of the Act.

206 Section 57 of the Act.

207 Section 58 of the Act.

the statutory scheme, as accepted by the defendants in argument, is that the ministerial power of extension is subject to the same preconditions as those that govern exercise of the power to declare an initial state of emergency.

160 The power to give directions prohibiting movement of persons into, out of, or around an emergency area or part of an emergency area²⁰⁸ is one of a suite of emergency powers capable of being exercised only during such period as a declaration of a state of emergency remains in force²⁰⁹. The power is reposed in the State Emergency Coordinator or another officer authorised by the State Emergency Coordinator²¹⁰.

161 The power of direction is expressly limited to being exercised "[f]or the purpose of emergency management". "Emergency management" refers to management of the adverse effects of the declared emergency, including by way of preventing (including mitigating the probability of the occurrence of) or responding to (meaning combating the effect of) the declared emergency²¹¹.

162 How far the authorised officer might choose to go to prevent or respond to the adverse effects of a declared emergency is not the subject of express statutory prescription. Nor is there a requirement that a particular direction prohibiting movement to be given must be (or must be considered by the authorised officer to be) the least restrictive means of preventing or responding to the adverse effects of the declared emergency to the chosen extent.

163 No doubt, the discretion of the authorised officer could have been more tightly confined. But "[t]he reason why such a discretion is left at large is not hard to conjecture": it is that "legislative foresight cannot trust itself to formulate in advance standards that will prove apt and sufficient in all the infinite variety of facts which may present themselves"²¹².

164 What is significant is that the purpose of emergency management is the sole purpose for which the power of direction can be exercised. And the discretion to exercise the power for that purpose is subject to the standard implied condition that

208 Section 67 of the Act.

209 Section 65 of the Act.

210 Sections 3 (definition of "authorised officer") and 61 of the Act.

211 Section 3 of the Act, definition of "emergency management".

212 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757. See also *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613.

it can only ever be exercised by the authorised officer reasonably on the basis of the information available to the authorised officer.

165 The result is that, whilst the discretionary power of direction can extend to authorise the giving of a direction which on its face or in its practical effect imposes a differential burden on interstate intercourse (which might or might not be in trade or commerce), the power can only ever be exercised reasonably for the sole purpose of managing a designated emergency in a designated emergency area for so long as there is in force a state of emergency declaration, of the continuing need for which the Minister must periodically be stringently satisfied.

166 My conclusion was, and remains, that the cumulation of those statutory constraints means that a differential burden on interstate intercourse that might result from an exercise of the power of direction is justified according to the requisite standard of reasonable necessity across the range of potential exercises of the power. Being justified, such a differential burden is not discriminatory. Much less is it protectionist.

167 GORDON J. The plaintiffs challenged the *Quarantine (Closing the Border) Directions* (WA) made by the State Emergency Coordinator²¹³ under the *Emergency Management Act 2005* (WA). The Directions prevented movement of most people into Western Australia from elsewhere (whether overseas or other parts of Australia).

168 The Directions could not lawfully be made unless certain statutory conditions were met. A state of emergency had to be declared by the Minister for Emergency Services ("the Minister")²¹⁴. The Minister could do that only if they had considered the advice of the State Emergency Coordinator²¹⁵ and if satisfied that, relevantly, extraordinary measures were required to prevent or minimise loss of life, prejudice to the safety, or harm to the health, of persons²¹⁶ from, in this case, an epidemic²¹⁷. That declaration being in place, the State Emergency Coordinator had then to be satisfied that, for the management of the adverse effects of the epidemic (including mitigation or prevention of the potential adverse effects)²¹⁸, the nature and magnitude of the epidemic required a significant and coordinated response²¹⁹, which included, by direction, prohibiting the movement of most people into Western Australia²²⁰.

169 The plaintiffs did not allege that these statutory conditions had not been met but did submit that paras 4 and 5 of the Directions infringed s 92 of the *Constitution*. On their proper construction, the provisions of the Act authorising the Directions comply with the constitutional limitation in s 92. Thus, the plaintiffs

213 The State Emergency Coordinator is an office held by the Commissioner of Police and, among other things, is responsible for "coordinating the response to an emergency during a state of emergency": *Emergency Management Act*, ss 10 and 11(1).

214 *Emergency Management Act*, s 67, read with s 56.

215 *Emergency Management Act*, s 56(2)(a).

216 *Emergency Management Act*, s 56(2)(c)(i).

217 *Emergency Management Act*, s 56(2)(b), read with s 3 definitions of "emergency" and "hazard". Referred to by the Minister as a "pandemic" in the Declaration of State of Emergency dated 15 March 2020.

218 *Emergency Management Act*, s 3 definition of "emergency management".

219 *Emergency Management Act*, s 3 definition of "emergency".

220 *Emergency Management Act*, s 67.

not alleging that the Directions were beyond the powers given by the Act, the plaintiffs' challenge failed.

170 The factual background and procedural history, which I gratefully adopt, are set out in the reasons of Kiefel CJ and Keane J²²¹. These are my reasons for joining in the answers given on 6 November 2020 to the questions stated for the opinion of the Full Court.

171 The substantive question stated for the opinion of the Full Court raised two issues: the relationship between the two limbs of s 92 of the *Constitution* where an impugned law is said to infringe both limbs; and the analytical framework for assessing the plaintiffs' submission that the Directions infringed s 92, when the plaintiffs did not challenge the constitutional validity of the provisions of the Act under which the Directions were made and did not allege that the express statutory conditions for the exercise of the power to make the Directions had not been met. Before turning to those issues, it is necessary to address the Act.

Emergency Management Act

172 The Act provides for the "prompt and coordinated organisation of emergency management" in Western Australia²²². It was common ground that ss 56 and 67 of the Act were the source of the power to make paras 4 and 5 of the Directions.

173 Part 5 of the Act is headed "State of emergency". Within Div 1 of Pt 5, s 56(1) confers power on the Minister to "declare that a state of emergency exists in the whole or in any area or areas of the State". On 15 March 2020, four days after the World Health Organization declared COVID-19 to be a pandemic, the Minister declared a state of emergency over Western Australia in respect of the pandemic.

174 The statutory conditions for the exercise of the power to declare a state of emergency are prescriptive and cumulative: the Minister must have considered the advice of the State Emergency Coordinator²²³; the Minister must be satisfied that an *emergency* has occurred, is occurring or is imminent²²⁴; and the Minister must be satisfied that extraordinary measures are required to prevent or minimise,

221 Reasons of Kiefel CJ and Keane J at [8]-[24].

222 *Emergency Management Act*, long title.

223 *Emergency Management Act*, s 56(2)(a).

224 *Emergency Management Act*, s 56(2)(b).

among other things, loss of life, prejudice to the safety, or harm to the health, of persons²²⁵. The term "emergency" is defined as "the occurrence or imminent occurrence of a *hazard* which is of such a nature or magnitude that it requires a significant and coordinated response"²²⁶ (emphasis added). The term "hazard" is in turn defined to include "a plague or an epidemic" and any other event, situation or condition that is capable of causing or resulting in loss of life, prejudice to the safety, or harm to the health, of persons²²⁷. And it is the *hazard* – the *emergency* – that has occurred, is occurring or is imminent in respect of which the Minister must be satisfied that extraordinary measures are required to prevent or minimise, among other things, loss of life, prejudice to the safety, or harm to the health, of persons, before the Minister can declare a state of emergency. The Minister's satisfaction as to these matters must be formed reasonably and on a correct understanding of the law²²⁸. In this case, but for the Minister being satisfied that an epidemic has occurred, is occurring or is imminent and that extraordinary measures are required to prevent or minimise loss of life, prejudice to the safety, or harm to the health, of persons, there could be no state of emergency declaration.

175 And, of no less significance, any state of emergency declaration is of limited duration²²⁹. The initial state of emergency declaration remains in force for three days (unless sooner revoked)²³⁰ and then can only be extended by the Minister by further written declaration, relevantly, for a period that must not exceed 14 days²³¹. Each time the state of emergency declaration is extended, the prescriptive and cumulative statutory conditions to the making of such a declaration must be satisfied.

176 The powers that may be available if a state of emergency declaration is in force are addressed in Div 1 of Pt 6 of the Act, headed "Powers during emergency

225 *Emergency Management Act*, s 56(2)(c)(i).

226 *Emergency Management Act*, s 3 definition of "emergency".

227 *Emergency Management Act*, s 3 paras (d) and (f)(i) of the definition of "hazard".

228 See *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 30 [57].

229 *Emergency Management Act*, ss 57 and 58.

230 *Emergency Management Act*, s 57(b).

231 *Emergency Management Act*, s 58(1) and (4)(a).

situation or state of emergency"²³². Section 67(a) provides that, for the purpose of *emergency management* during a state of emergency²³³, an authorised officer²³⁴ may, among other things, "direct or, by direction, prohibit, the movement of persons ... within, into, out of or around an emergency area²³⁵ or any part of the emergency area". The term "emergency management" is defined²³⁶ to mean:

"the management of the adverse effects of an emergency including –

- (a) prevention – the mitigation or prevention of the probability of the occurrence of, and the potential adverse effects of, an emergency; and
- (b) preparedness – preparation for response to an emergency; and
- (c) response – the combating of the effects of an emergency, provision of emergency assistance for casualties, reduction of further damage ... and
- (d) recovery ...".

177

The state of emergency took effect from midnight on 16 March 2020 and, pursuant to s 58 of the Act, every 14 days has been extended by the Minister. During the state of emergency, the State Emergency Coordinator issued the Directions, which were amended from time to time. At the time of the hearing before this Court, the Directions relevantly provided that "[a] person must not enter Western Australia unless the person is an exempt traveller"²³⁷ and that an exempt

232 *Emergency Management Act*, s 65.

233 Section 67 is also expressed to apply for the purpose of emergency management during an "emergency situation". Section 50 addresses the circumstances in which an emergency situation declaration may be made. The power in s 50 was not in issue in this matter.

234 Defined to mean the State Emergency Coordinator and a person authorised under s 61 of the Act: *Emergency Management Act*, s 3 definition of "authorised officer".

235 Defined to mean "the area to which an emergency situation declaration or a state of emergency declaration applies": *Emergency Management Act*, s 3 definition of "emergency area".

236 *Emergency Management Act*, s 3 definition of "emergency management".

237 Directions, para 4. At the time of the hearing before this Court, an exempt traveller was defined in para 27 as certain persons in the following classes: senior government

traveller must not enter Western Australia if the person has certain COVID-19 symptoms, has been notified that they are a "close contact" of a person with COVID-19, is awaiting a test result after having been tested for COVID-19, or has received a positive test and has not received certification that they have recovered from COVID-19²³⁸. The preamble confirmed that "[t]he purpose of these directions is to limit the spread of COVID-19". That was consistent with the observation, in the paragraphs prior to the preamble, that the World Health Organization had declared COVID-19 a pandemic on 11 March 2020.

Section 92 of the *Constitution*

178 The difficulties that inhere in s 92 of the *Constitution* are longstanding²³⁹. A cause of the difficulties is that s 92 applies to the "diverse and changing nature" of interstate trade, commerce and intercourse²⁴⁰ and, thus, the principles applied in the decided cases have evolved from specific circumstances and features raising unique considerations²⁴¹. This case is the next in line. It concerns steps taken by one State in response to the global pandemic of COVID-19. The steps taken were extraordinary (in effect closing Western Australia at its borders by generally preventing persons from entering the State). But the circumstances in which these steps were taken were extraordinary – a global pandemic that had killed many

officials carrying out their duties; active Australian military personnel required to be on duty in Western Australia; members of the Commonwealth Parliament; persons carrying out functions under Commonwealth law; the Premier of Western Australia and members of their staff; persons requested to assist in the provision of health services in Western Australia; persons engaged in transport, freight and logistics into or out of Western Australia; persons who have specialist skills; "FIFO" employees who are not specialists and their families; emergency service workers; judicial officers and staff of courts, tribunals and commissions; and persons whose entry is otherwise approved on specified grounds.

238 Directions, para 5.

239 *Cole v Whitfield* (1988) 165 CLR 360 at 392.

240 *Cole* (1988) 165 CLR 360 at 383-385, 392. See also *Betfair Pty Ltd v Western Australia* ("*Betfair No 1*") (2008) 234 CLR 418 at 452-454 [12]-[20].

241 See *Gratwick v Johnson* (1945) 70 CLR 1 at 19; *Cole* (1988) 165 CLR 360 at 393; *AMS v AIF* (1999) 199 CLR 160 at 178 [43].

people, where the vector of the pandemic was human and the disease could be transmitted by a person who was asymptomatic²⁴².

179 Despite the extraordinary circumstances giving rise to the extraordinary measures, the constitutional limitation of s 92 continues to apply and must be satisfied. Aspects of the guarantee in s 92 must frame the analysis.

180 Section 92 does not confer a personal right to engage in interstate trade, commerce and intercourse²⁴³; it is a limit on legislative and executive power²⁴⁴. And the guarantee in s 92 that "trade, commerce, and intercourse among the States ... shall be absolutely free" does not confer immunity from all regulation²⁴⁵. It does not prevent the making of laws which impose a differential burden on interstate trade, commerce and intercourse if the differential burden is reasonably necessary to achieve a legitimate object of the law²⁴⁶.

Interstate "trade, commerce, and intercourse" – composite or to be divided?

181 Although this Court in *Cole v Whitfield* said that "[t]he notions of absolutely free trade and commerce and absolutely free intercourse are quite distinct"²⁴⁷ and that the content of one limb need not govern the content of the other²⁴⁸,

242 *Palmer v Western Australia [No 4]* [2020] FCA 1221 at [84], [88]-[89].

243 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 609-610; *Cole* (1988) 165 CLR 360; *Betfair Pty Ltd v Racing New South Wales ("Betfair No 2")* (2012) 249 CLR 217 at 266-267 [42]-[44].

244 *Cole* (1988) 165 CLR 360 at 394; *Australian Capital Television Pty Ltd v The Commonwealth ("ACTV")* (1992) 177 CLR 106 at 150; *Betfair No 2* (2012) 249 CLR 217 at 258 [14].

245 *Cole* (1988) 165 CLR 360 at 394; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 54, 58; *ACTV* (1992) 177 CLR 106 at 192-194; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 307, 346, 395.

246 *Cunliffe* (1994) 182 CLR 272 at 366, 396; *AMS* (1999) 199 CLR 160 at 179 [45], 179-180 [48], 232-233 [221]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 353 [38], 393-394 [177], 461 [420]; *Betfair No 1* (2008) 234 CLR 418 at 477 [102]; *Betfair No 2* (2012) 249 CLR 217 at 269 [52], 295 [136].

247 (1988) 165 CLR 360 at 388.

248 (1988) 165 CLR 360 at 387-388. See also *Nationwide News* (1992) 177 CLR 1 at 54-55, 82-83; *ACTV* (1992) 177 CLR 106 at 192; *Cunliffe* (1994) 182 CLR 272 at

the phrase "trade, commerce, and intercourse" should be treated as a composite and not be divided. *Cole* and the cases since do not provide any compelling reason why the content of the trade and commerce limb and the content of the intercourse limb should be different. For the following reasons, it should now be accepted that s 92 is to be treated as a whole and is centrally concerned with discrimination – an unjustified differential burden²⁴⁹ on interstate trade, commerce and intercourse, compared with intrastate trade, commerce and intercourse.

182 First, there is no textual basis for separating the components of s 92. As Hayne J said in *APLA Ltd v Legal Services Commissioner (NSW)*²⁵⁰, the text of s 92 does not readily yield a distinction between interstate trade and commerce, and interstate intercourse. Any distinction between the trade and commerce limb on one hand and the intercourse limb on the other can have purpose and utility only if it leads to different content being given to the freedom s 92 provides in relation to each limb²⁵¹. As his Honour said, nothing in the text of s 92 reveals why that should be so and, in particular, nothing in the text readily reveals any basis for treating one of three elements of a composite expression which forms the subject of the guarantee as "connoting, let alone requiring, the application of some different test from the test to be applied to the other elements"²⁵². Indeed, the phrase "trade, commerce, and intercourse among the States" is part of a constitutional guarantee concerned to protect the composite concept – interstate "trade, commerce, and intercourse". Impugned laws sometimes burden interstate trade and commerce and interstate intercourse²⁵³. So much was argued in this case.

183 Second, considering the guarantee as a composite concept is consistent with the purpose of s 92, which is "to create a free trade area throughout the Commonwealth and to deny to [the] Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications

307, 346, 395; *AMS* (1999) 199 CLR 160 at 192 [98]; *APLA* (2005) 224 CLR 322 at 456 [400].

249 See *Betfair No 1* (2008) 234 CLR 418 at 476 [101]; *Betfair No 2* (2012) 249 CLR 217 at 263 [31].

250 (2005) 224 CLR 322 at 456-457 [401]-[402].

251 *APLA* (2005) 224 CLR 322 at 456 [401].

252 *APLA* (2005) 224 CLR 322 at 456-457 [402].

253 See, eg, *Nationwide News* (1992) 177 CLR 1 at 54-55, 59; *APLA* (2005) 224 CLR 322 at 353-354 [39], 390-391 [164]-[165], 456 [400], 458 [408].

across State boundaries"²⁵⁴. To accept that s 92 protects interstate trade, commerce and intercourse from laws which discriminate against – impose an unjustified differential burden on – interstate trade, commerce and intercourse, thus accords with its purpose. As has rightly been said in relation to interstate intercourse²⁵⁵:

"That purpose does not require that the guarantee apply to general laws which do not seek to employ State borders as a barrier to free movement ... Section 92 should be understood not so much as a guarantee of freedom of movement per se, but as a restriction on using State borders to keep outsiders out, or keep insiders in. It is that which is offensive to the federal nation."

184 Put in different terms, a discriminatory element – an unjustified differential burden on interstate trade, commerce and intercourse, compared with intrastate trade, commerce and intercourse – is what underpins s 92. The "essence of the legal notion of discrimination" is in "the unequal treatment of equals, and, conversely, in the equal treatment of unequals"²⁵⁶, or "a departure from equality of treatment"²⁵⁷. It may be accepted that the nature of the discrimination differs between the two limbs. For trade and commerce, the discrimination is protectionist, namely the "protection of domestic [intrastate] industries against foreign [interstate] competition"²⁵⁸. For intercourse, the discrimination is between intrastate as distinct from interstate movement or activity. Although the nature of the discrimination may differ, that does not detract from the fact that discrimination must exist and create an unjustified differential burden in favour of intrastate – as distinct from interstate – trade, commerce and intercourse.

185 Third, recognising that the concern of the guarantee is to protect against laws which impose an unjustified differential burden on interstate trade, commerce and intercourse in favour of intrastate trade, commerce and intercourse is no new idea. It has long been accepted that laws infringing the guarantee of free

254 *Cole* (1988) 165 CLR 360 at 391. See also *Nationwide News* (1992) 177 CLR 1 at 82.

255 Kirk, "Section 92 in its Second Century", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 253 at 279.

256 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480.

257 *Cole* (1988) 165 CLR 360 at 399.

258 *Betfair No 1* (2008) 234 CLR 418 at 455-456 [24], quoting *Cole* (1988) 165 CLR 360 at 392-393. See also *Cole* (1988) 165 CLR 360 at 408.

interstate trade and commerce are those that discriminate (in a protectionist sense) against interstate trade and commerce, in favour of intrastate trade and commerce²⁵⁹.

186 But the discriminatory element has also featured in intercourse cases. As Brennan J said in *Nationwide News Pty Ltd v Wills*, "discrimination against interstate intercourse of a particular kind and in favour of intrastate intercourse of a like kind would be a badge of invalidity"²⁶⁰. In *Cunliffe v The Commonwealth*²⁶¹, Toohey J recognised that s 92 was also concerned with protecting interstate intercourse from laws which discriminate against it in favour of intrastate intercourse. His Honour rejected a submission that freedom of interstate intercourse could be impaired "by a law of general application, that is, a law which applies indifferently to communications regardless of whether they are intrastate or interstate communications" (emphasis added)²⁶². And, as has been observed, what is offensive to the federal nation, recognised in s 92, is an unjustified differential burden imposed by a law which extends to "using State borders to keep outsiders out, or keep insiders in"²⁶³.

187 Fourth, if the intercourse limb of the guarantee is not concerned with differential burdens, then the intercourse limb may be too broad. It could undermine the limited scope of the trade and commerce limb²⁶⁴. Thus, unless the intercourse limb of s 92 is confined to laws which impose differential burdens on

259 See, eg, *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 608; *Cole* (1988) 165 CLR 360 at 394, 398, 407-408; *Castlemaine Tooheys* (1990) 169 CLR 436 at 465-467; *Betfair No 1* (2008) 234 CLR 418 at 481 [118], [121], 482 [122]; *Betfair No 2* (2012) 249 CLR 217 at 264-265 [34]-[36], 269 [52].

260 (1992) 177 CLR 1 at 57; see also 58-59. However, Brennan J held that "discrimination is not an essential feature of an impermissible burden imposed on interstate intercourse": at 57. See also *Cunliffe* (1994) 182 CLR 272 at 333.

261 (1994) 182 CLR 272.

262 *Cunliffe* (1994) 182 CLR 272 at 384.

263 Kirk, "Section 92 in its Second Century", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 253 at 279.

264 *Cole* (1988) 165 CLR 360 at 408. See Kirk, "Section 92 in its Second Century", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 253 at 253-254, 270, 275-277.

interstate intercourse, a law which does not impose a differential burden on interstate trade, commerce or intercourse would not burden the trade and commerce limb, yet it might burden the intercourse limb if it restricts movement across a border.

188 Similarly, if the intercourse limb is not confined to differential burdens, it could also give greater protection than is required, for the purpose of s 92, to interstate intercourse compared with intrastate intercourse. Laws that restrict both interstate and intrastate intercourse (and do not impose a differential burden on interstate intercourse as compared with intrastate intercourse) may be held to burden interstate intercourse but not intrastate intercourse, thereby privileging interstate over intrastate movement²⁶⁵. That would go beyond s 92's purpose of preventing State borders from being used as barriers to trade, commerce and intercourse in a manner that is offensive to the federal nation²⁶⁶. Thus, as foreshadowed, in the context of the constitutional guarantee in s 92, the burden on interstate trade, commerce and intercourse must be a differential one.

189 And, as has long been established, the unjustified differential burden, the discriminatory burden, can arise from the legal operation as well as the practical operation of the law²⁶⁷. Where the impugned law arguably burdens both limbs of s 92, it is necessary for the law to satisfy both limbs. The trade and commerce limb does not prevail²⁶⁸. Neither limb subsumes the other. To the extent that earlier decisions of this Court hold otherwise²⁶⁹, they no longer reflect the law on s 92.

Section 92 analysis

190 The first step is to ask whether the impugned law, in its legal or practical operation, imposes a differential burden on interstate trade, commerce or intercourse in favour of intrastate trade, commerce or intercourse. If there is no

265 Kirk, "Section 92 in its Second Century", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 253 at 275, 279-280.

266 See [183] above.

267 *Cole* (1988) 165 CLR 360 at 399-400, 407-408.

268 See *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 65 NSWLR 331 at 344 [44]. cf *APLA* (2005) 224 CLR 322 at 353-354 [39], 390-391 [165], 458 [408].

269 See, eg, *Cole* (1988) 165 CLR 360 at 387-388; *ACTV* (1992) 177 CLR 106 at 192; *Cunliffe* (1994) 182 CLR 272 at 346, 395.

such differential burden, that is the end of the inquiry and the law does not infringe the constitutional guarantee in s 92.

191 Where, however, the law does impose a differential burden of that kind on interstate trade, commerce or intercourse, it is necessary to identify the law's object or objects. That entails "an objective inquiry answered by reference to the meaning of the law or to its effect"²⁷⁰. The inquiry resembles that used "when seeking to identify the mischief to redress of which a law is directed or when speaking of 'the objects of the legislation'"²⁷¹. It is a search for "what the law is designed to achieve in fact"²⁷². The object or purpose of the law is not merely relevant, it is "the crucial determinant of validity"²⁷³. If the only object of the law is to erect State borders as barriers against freedom of trade, commerce or intercourse, that will be the end of the inquiry²⁷⁴. Without more, the law is discriminatory; it will infringe the constitutional guarantee in s 92 and be invalid.

192 But where the law has a legitimate object, the question then is whether the differential burden imposed by that law is justified²⁷⁵. The test of justification applied in the past, to which reference has been made, and which continues to apply, is whether the differential burden imposed by the impugned law is reasonably necessary to achieve a legitimate object of that law²⁷⁶ or, in other words,

270 *APLA* (2005) 224 CLR 322 at 394 [178], citing *Nationwide News* (1992) 177 CLR 1 at 57.

271 *APLA* (2005) 224 CLR 322 at 394 [178]. See also *Brown v Tasmania* (2017) 261 CLR 328 at 363 [101], 392 [208], 432 [321].

272 *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132], citing *APLA* (2005) 224 CLR 322 at 394 [178].

273 *ACTV* (1992) 177 CLR 106 at 195. See also *Nationwide News* (1992) 177 CLR 1 at 94.

274 See *ACTV* (1992) 177 CLR 106 at 194; *Cunliffe* (1994) 182 CLR 272 at 366. See also *R v Smithers; Ex parte Benson* (1912) 16 CLR 99; *Gratwick* (1945) 70 CLR 1, especially at 14-15, 16, 19.

275 *Cole* (1988) 165 CLR 360 at 408; *Castlemaine Tooheys* (1990) 169 CLR 436 at 467, 471; *APLA* (2005) 224 CLR 322 at 394 [178]; *Betfair No 2* (2012) 249 CLR 217 at 265 [38].

276 See fn 246 above.

whether it constitutes reasonable regulation²⁷⁷. If yes, the constitutional guarantee in s 92 will not be infringed; if no, it will be infringed.

193 The idea of "reasonable regulation" has been approved by this Court in relation to both intercourse and trade and commerce. As to the former, the Court has asked whether the burden on interstate intercourse is greater than "reasonably required" to achieve a legitimate object of the legislation in *Cunliffe*²⁷⁸, *AMS v AIF*²⁷⁹ and *APLA*²⁸⁰. In relation to trade and commerce, the Court has asked whether the burden on trade and commerce is "reasonably necessary" to achieve a legitimate non-protectionist purpose in *Betfair Pty Ltd v Western Australia* ("*Betfair No 1*")²⁸¹ and *Betfair Pty Ltd v Racing New South Wales* ("*Betfair No 2*")²⁸². A similar approach had previously been taken in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*²⁸³ and *Cole*²⁸⁴. For the purposes of s 92, there is no difference of substance between "reasonably required" and "reasonably necessary", and it is convenient to adopt the "reasonably necessary" formulation, which was most recently approved in *Betfair*

277 *AMS* (1999) 199 CLR 160 at 178 [43] (citing *The Commonwealth v Bank of NSW* ("the *Bank Nationalization Case*") (1949) 79 CLR 497 at 639-641; [1950] AC 235 at 309-311); *Betfair No 1* (2008) 234 CLR 418 at 477 [102] (quoting *North Eastern Dairy* (1975) 134 CLR 559 at 608), 477 [103] (quoting *Cole* (1988) 165 CLR 360 at 409-410).

278 (1994) 182 CLR 272 at 366; cf 396.

279 (1999) 199 CLR 160 at 179 [45], 179-180 [48], 232-233 [221].

280 (2005) 224 CLR 322 at 353 [38], 393-394 [177], 461 [420].

281 (2008) 234 CLR 418 at 477 [102]-[103], where the majority of the Court endorsed the application "of a criterion of 'reasonable necessity'".

282 (2012) 249 CLR 217 at 269 [52], 295 [136].

283 (1975) 134 CLR 559 at 608.

284 (1988) 165 CLR 360 at 409-410.

*No 1*²⁸⁵ and *Betfair No 2*²⁸⁶, and has been used in various constitutional and other legal contexts²⁸⁷.

194 The need for some "reservation" on the absolute nature of the guarantee of "free" trade, commerce and intercourse in s 92 was explained by the Privy Council in *The Commonwealth v Bank of NSW* ("the *Bank Nationalization Case*")²⁸⁸. As their Lordships stated²⁸⁹:

"Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only *practical and reasonable manner of regulation* and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free." (emphasis added)

195 Recognising that there are limits to the freedom in s 92 does not "involve inconsistency with the words 'absolutely free': it is simply to identify the kinds or classes of burdens, restrictions, controls and standards from which the section guarantees absolute freedom"²⁹⁰. As the Privy Council observed, and the history of the cases concerning s 92 have demonstrated time and time again, the "reservation"²⁹¹ on the absolute nature of the constitutional guarantee in s 92 was, and remains, necessary to meet societal changes and the impact of those changes on interstate trade, commerce and intercourse. And the societal changes are ever-increasing in their complexity and varied in their nature²⁹². They are multi-faceted, concern multiple disciplines and are not limited by the physical area of a State or nation.

285 (2008) 234 CLR 418 at 477 [102]-[103].

286 (2012) 249 CLR 217 at 269 [52], 295 [136].

287 See *Thomas v Mowbray* (2007) 233 CLR 307 at 331-333 [21]-[26].

288 (1949) 79 CLR 497 at 640; [1950] AC 235 at 311.

289 *Bank Nationalization Case* (1949) 79 CLR 497 at 640-641; [1950] AC 235 at 311.

290 *Cole* (1988) 165 CLR 360 at 394.

291 *Bank Nationalization Case* (1949) 79 CLR 497 at 640; [1950] AC 235 at 311.

292 See, eg, *Betfair No 1* (2008) 234 CLR 418 at 452-454 [12]-[20].

196 But the reservation is not at large. The application of the limits is governed by the objects of the impugned law²⁹³ and the test of reasonable necessity becomes one which, at least in large measure, is self-defining in its operation²⁹⁴. As the Court said in *Cole*²⁹⁵ in relation to trade or commerce:

"if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against interstate trade or commerce in pursuit of that object in a way or to an extent which warrants characterization of the law as protectionist, a court will be justified in concluding that it nonetheless offends s 92."

197 Asking whether a differential burden on interstate trade, commerce or intercourse is reasonably necessary to achieve an object of the law is directed to determining whether the law is properly characterised as discriminating against interstate trade, commerce or intercourse compared with intrastate trade, commerce or intercourse. For both limbs, there is an inquiry into whether the impugned law may be characterised as "relevantly discriminatory"²⁹⁶. For both limbs, the question of validity is binary: whether or not a restriction on trade, commerce or intercourse transgresses the freedom²⁹⁷. For both limbs, the answer to that binary question depends on the objects of the impugned law and whether the differential burden imposed is reasonably necessary to achieve a legitimate object – an object other than imposing a differential burden on interstate trade, commerce or intercourse in favour of intrastate trade, commerce or intercourse. Or, to adopt the language used in *Castlemaine Tooheys Ltd v South Australia*²⁹⁸, the inquiry is whether the true purpose of the law, in its legal and practical operation, is to achieve a legitimate object or to effect a form of prohibited discrimination.

293 *APLA* (2005) 224 CLR 322 at 461 [422].

294 *APLA* (2005) 224 CLR 322 at 462 [425].

295 (1988) 165 CLR 360 at 408, quoted in *Castlemaine Tooheys* (1990) 169 CLR 436 at 467.

296 See *Castlemaine Tooheys* (1990) 169 CLR 436 at 472.

297 See Chordia, *Proportionality in Australian Constitutional Law* (2020) at 143, 150-151.

298 (1990) 169 CLR 436 at 472. cf *ACTV* (1992) 177 CLR 106 at 143-144; *Cunliffe* (1994) 182 CLR 272 at 324, 352, 388.

Those inquiries are not assisted by adopting structured proportionality as a tool of analysis. It is unnecessary to repeat the concerns expressed elsewhere about the rigidity of structured proportionality or the validity of the reasons proffered for adopting it²⁹⁹. Those concerns are no less real in the context of s 92. If a law imposes a differential burden on interstate trade, commerce or intercourse and a legitimate purpose of the law is identified, to then ask whether there are compelling alternative, reasonably practicable means of achieving that legitimate purpose which impose a lesser burden, is to ask a question the content of which depends on what is meant by "compelling" and "reasonably practicable means". The absence of alternative means may suggest that the purpose of the law is in truth to achieve the legitimate purpose alleged³⁰⁰. But, the existence of alternative means cannot be conclusive because the test for s 92 is one of characterisation – is the differential burden imposed by the impugned law reasonably necessary to achieve a legitimate object of that law? To treat the existence of alternative means as conclusive that s 92 is infringed, in every case, would be an approach that is too rigid and prescriptive³⁰¹. It would fail to accommodate the specific circumstances and features of the trade, commerce or intercourse in issue. It would ignore the injunction that in questions concerning the application of s 92, the Court should "in each case ... decide the matter, so far as may be, on the specific considerations or features which it presents"³⁰². And, there will be cases where an inquiry into the existence of alternative means will simply not be possible – for example, where the impugned provisions are part of a complex legislative scheme and there is no ready comparator³⁰³ or, as in this case, where an inquiry into the existence of alternative

299 *McCloy* (2015) 257 CLR 178 at 281-282 [308]-[311]; see also 222 [98], 234-238 [140]-[150]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 122-124 [294]-[305]; see also 72 [101]; *Brown* (2017) 261 CLR 328 at 464-468 [427]-[438]; see also 376-379 [159]-[165]; *Clubb v Edwards* (2019) 267 CLR 171 at 304-310 [389]-[404]; see also 224-225 [159]-[160].

300 See *Castlemaine Tooheys* (1990) 169 CLR 436 at 472. cf *Betfair No 1* (2008) 234 CLR 418 at 479-480 [110]-[112].

301 See *Murphy* (2016) 261 CLR 28 at 122-123 [298]-[299]; *Brown* (2017) 261 CLR 328 at 377 [160].

302 *Gratwick* (1945) 70 CLR 1 at 19.

303 cf *Murphy* (2016) 261 CLR 28 at 123 [303]. See also *Clubb* (2019) 267 CLR 171 at 199 [64].

means would be futile³⁰⁴. In the context of s 92, there can be no "one size fits all" approach³⁰⁵.

199 Second, to require the balancing stage of structured proportionality as an additional step of analysis for s 92 would be to introduce a new element that would be contrary to the foundations and current operation of s 92. As explained, the freedom in s 92 is absolute but subject to a reservation³⁰⁶. Determining whether s 92 has been infringed involves an inquiry about the objects of the impugned law. The balancing stage of structured proportionality is not only concerned with identifying the objects of the impugned law³⁰⁷. Rather, the balancing stage of structured proportionality requires "a value judgment, 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 on the freedom"³⁰⁸. Section 92 neither permits nor requires this further inquiry. Adopting and adapting what was said in *Castlemaine Tooheys*, "there is no place for a secondary test to invalidate laws which have been found to lack a [discriminatory] purpose or effect. Rather, the two tests are combined as one inquiry into the characterization of the law as [discriminatory] or otherwise"³⁰⁹. And a secondary test – the balancing stage of structured proportionality – would introduce a degree of values-based decision making that s 92 not only can avoid³¹⁰, but must. The Court is often not well-placed to make such value

304 See [208] below.

305 See, eg, *McCloy* (2015) 257 CLR 178 at 235 [142]; *Brown* (2017) 261 CLR 328 at 477 [474]-[476].

306 *Bank Nationalization Case* (1949) 79 CLR 497 at 640; [1950] AC 235 at 311. See also *Cole* (1988) 165 CLR 360 at 394; *Nationwide News* (1992) 177 CLR 1 at 54, 58; *ACTV* (1992) 177 CLR 106 at 192-194; *Cunliffe* (1994) 182 CLR 272 at 307, 346, 395.

307 *McCloy* (2015) 257 CLR 178 at 219 [87].

308 *McCloy* (2015) 257 CLR 178 at 195 [2], 218-219 [83]-[87].

309 (1990) 169 CLR 436 at 471.

310 See Chordia, *Proportionality in Australian Constitutional Law* (2020) at 143, 149, 150-151.

judgments where the nature of trade, commerce and intercourse is complex, multi-faceted and evolving³¹¹.

Analytical framework for s 92 challenge

200 As explained, the plaintiffs did not challenge the constitutional validity of s 56 or s 67 of the Act, or allege that the express statutory conditions for the exercise of the power to make the state of emergency declaration under s 56³¹² or the Directions under s 67 had not been met. The plaintiffs submitted that the putative burden on the freedom guaranteed by s 92 arose because of the Directions.

201 As a majority of this Court held in *Wotton v Queensland*³¹³, "if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case ... does not raise a constitutional question, as distinct from a question of the exercise of statutory power". That approach had earlier been taken by Brennan J in *Miller v TCN Channel Nine Pty Ltd*³¹⁴ and has subsequently been applied in *Comcare v Banerji*³¹⁵. It is correct in principle because it reflects that a discretion conferred by statute "must be exercised by the repository of a power in accordance with any applicable law, including s 92"³¹⁶. As Victoria submitted, here, the putative burden "has its source in statute"³¹⁷ and its source is necessarily subject to the s 92 "limitation upon legislative power"³¹⁸.

202 Thus, the question is whether, on their proper construction, ss 56 and 67 of the Act comply with the constitutional limitation of s 92, without any need to read

311 See, eg, *Befair No 1* (2008) 234 CLR 418 at 452-454 [12]-[20].

312 Or to extend the state of emergency declaration: see [175] above.

313 (2012) 246 CLR 1 at 14 [22].

314 (1986) 161 CLR 556 at 607, 611, 614. See also *AMS* (1999) 199 CLR 160 at 176 [37], 179 [45], 179-180 [48], 232-233 [221].

315 (2019) 93 ALJR 900 at 916 [44], 924-925 [96], 945-946 [209]-[210]; 372 ALR 42 at 59, 72, 100.

316 *Miller* (1986) 161 CLR 556 at 613-614.

317 *Wotton* (2012) 246 CLR 1 at 14 [22].

318 *Wotton* (2012) 246 CLR 1 at 14 [22].

the Act down to save its validity in its application to the case at hand³¹⁹. Put differently, do those sections, by their terms, confer a power that "is so constrained that its exercise cannot be obnoxious to the freedom guaranteed by s 92"³²⁰. The answer is yes.

Validity of ss 56 and 67 of the *Emergency Management Act*

203 The first question is whether ss 56 and 67 of the Act impose a differential burden on the freedom of interstate trade, commerce or intercourse. By itself, s 56 could not burden interstate trade, commerce or intercourse as it only deals with the Minister's power to make a state of emergency declaration, not the consequences or effect of any declaration.

204 However, an exercise of the power under s 67(a) could burden interstate trade, commerce or intercourse given that it permits the making of a direction prohibiting "the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area". If the emergency area is adjacent to the Western Australian border, and if the direction is for the purpose of emergency management during a state of emergency, s 67(a) could support a direction prohibiting movement across the Western Australian border which differentiates between trade, commerce or intercourse across the Western Australian border as compared with intrastate trade, commerce or intercourse, in its legal and practical operation.

205 It is then necessary to identify the object of the impugned provisions. Sections 56 and 67 are evidently concerned with managing a state of emergency³²¹. That object is one other than erecting State borders as barriers against freedom of trade, commerce or intercourse and it is a legitimate object³²².

319 *Wotton* (2012) 246 CLR 1 at 9-10 [10], 13-14 [21]-[22], 16 [31]; *Brown* (2017) 261 CLR 328 at 442-443 [356]; *Banerji* (2019) 93 ALJR 900 at 916 [44], 924-925 [96], 945-946 [209]-[210]; 372 ALR 42 at 59, 72, 100. See also *Miller* (1986) 161 CLR 556 at 607, 611, 614; *AMS* (1999) 199 CLR 160 at 176 [37], 179 [45], 179-180 [48], 232-233 [221]. cf *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 at 317 [14].

320 *Miller* (1986) 161 CLR 556 at 607.

321 See [174] above.

322 See [191] above.

206 The final question is whether the differential burden is reasonably necessary for that legitimate object³²³. Although no separate question of differential burden arises under s 56, the conditions to the Minister's power to make a state of emergency declaration in s 56 and the limited duration of that declaration³²⁴ are relevant to whether the differential burden under s 67 is reasonably necessary for a legitimate object of the impugned provisions.

207 The power in s 67(a) may only be exercised when a state of emergency has been declared under s 56. In addition, the statutory conditions in s 67(a) to the power of an authorised officer to prohibit movement, by direction, are so confined that any exercise of the power is reasonably necessary for the object of managing a state of emergency³²⁵.

208 Each discretion is "effectively confined so that an attempt to exercise the discretion inconsistently with s 92 is not only outside the constitutional power – it is equally outside statutory power and judicial review is available to restrain any attempt to exercise the discretion in a manner obnoxious to the freedom guaranteed by s 92"³²⁶. Sections 56 and 67 are not provisions where the discretion is insufficiently controlled or is so wide as to be susceptible of being exercised inconsistently with s 92. Put in different terms, the discretion granted by these provisions is not wider than the *Constitution* can support³²⁷; it cannot be exercised in a manner obnoxious to the freedom guaranteed by s 92³²⁸. The statutory indicia are so tightly constrained that a differential burden can be placed on interstate trade, commerce and intercourse only in extraordinary and highly particular circumstances, namely to meet an emergency constituted by, in this case, an epidemic, the management of the adverse effects of which required a significant and coordinated response. That differential burden is not discriminatory. Here, the search for some alternative legislative means for dealing with the epidemic is futile, given the tightly constrained statutory indicia, and in circumstances where the disease was highly contagious and potentially deadly,

323 See fn 246 above.

324 See [174]-[175] above.

325 See [176] above.

326 *Miller* (1986) 161 CLR 556 at 614.

327 *Miller* (1986) 161 CLR 556 at 611.

328 *Miller* (1986) 161 CLR 556 at 607, 611, 612, 614.

the vector was human and the disease could be transmitted to others, sometimes many others, by a person who was asymptomatic³²⁹.

209 The conclusion that the differential burden capable of being imposed by ss 56 and 67 of the Act is reasonably necessary where an emergency is constituted by a hazard in the nature of an epidemic – and is not discriminatory and does not infringe s 92 – is supported by both history and authority. During the Convention Debates, Mr O'Connor, in addressing s 92, considered that States may³³⁰:

"prohibit[] both persons and animals, when labouring under contagious diseases, from entering their territory. They may pass any sanitary laws deemed necessary for this purpose, and enforce them by appropriate regulations. It is upon this reserved right of self-protection that quarantines are permitted to interfere with the freedom of commerce and of human intercourse."

That view has been reflected in decisions of this Court, as well as the Privy Council, holding that s 92 will likely not be infringed by a law which has the object of protecting the citizens of a State from disease or some other threat to health. For example, as Brennan J observed in *Nationwide News*, "permissible regulation ... might take the form 'of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens'"³³¹.

210 On their proper construction, ss 56 and 67 of the Act, in their application to an emergency constituted by the occurrence of a hazard in the nature of an epidemic, comply with the constitutional limitation of s 92 of the *Constitution* in each of its limbs. They do not impose an unjustified differential burden on interstate trade, commerce or intercourse in favour of intrastate trade, commerce or intercourse. They are not discriminatory.

329 *Palmer* [2020] FCA 1221 at [84], [88]-[89]. cf *Betfair No 1* (2008) 234 CLR 418 at 479-480 [110]-[112].

330 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1062.

331 (1992) 177 CLR 1 at 58, quoting *Bank Nationalization Case* (1949) 79 CLR 497 at 641; [1950] AC 235 at 312. See also *Ex parte Nelson [No 1]* (1928) 42 CLR 209 at 218-219; *James v Cowan* (1932) 47 CLR 386 at 396; [1932] AC 542 at 558; *Tasmania v Victoria* (1935) 52 CLR 157 at 168-169, 175-176; *Fergusson v Stevenson* (1951) 84 CLR 421 at 434-435; *North Eastern Dairy* (1975) 134 CLR 559 at 607-608; *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1 at 25; *Castlemaine Tooheys* (1990) 169 CLR 436 at 472.

73.

211 It was open for the plaintiffs, when the Minister issued the state of emergency declaration and every 14 days when it was renewed, and when the State Emergency Coordinator issued the Directions and each time the Directions were amended, to challenge one or more of the exercises of those statutory powers on the grounds that the relevant actions were beyond power. No such challenge was ever made.

212 For these reasons I agreed with the orders that were made on 6 November 2020.

EDELMAN J.

Introduction

213 The central question in the special case in the original jurisdiction of this Court concerns the challenge by the plaintiffs, Mr Palmer and a privately held company under his direct and personal executive management, to the validity of the *Quarantine (Closing the Border) Directions* (WA). Those directions were made under the *Emergency Management Act 2005* (WA) for the purpose of responding to the COVID-19 pandemic. The essence of the plaintiffs' case is that the *Quarantine (Closing the Border) Directions* are invalid by operation of s 92 of the *Constitution* because they involve an impermissible derogation from one or both aspects of the guarantee in that provision, those aspects being freedom of trade and commerce and freedom of intercourse.

214 The relevant and operative part of s 92 of the *Constitution* provides that "[o]n the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free". For more than a century, the meaning and effect of this provision has been disputed. Much of this dispute was resolved in *Cole v Whitfield*³³², where this Court held that the "trade [and] commerce ... among the States" aspect of s 92 was to be absolutely free from unjustified discrimination of a protectionist nature by Commonwealth or State legislation.

215 There were three strands to the reasoning in *Cole v Whitfield* which were not the subject of submissions in that case, which were not necessary for the decision, and which are not yet fully resolved. The first strand is the reasoning of the Court which treated the intercourse aspect of s 92, the movement across State borders generally by dealings or communications between people, as extending beyond freedom from laws that discriminate between the States in their treatment of that intercourse. It should not have been so extended.

216 The second strand is the assumption of the Court that the discrimination with which the trade and commerce aspect is concerned is limited to protectionism, the most prolific form of discrimination among States in trade and commerce. Although it is not necessary to decide this point finally in this case, the proscribed discrimination should not have been so limited.

217 The third strand, which was developed in *Betfair Pty Ltd v Western Australia*³³³, is how discrimination among the States can be justified. Legislation will discriminate when its purpose or effect is to burden trade, commerce, or

332 (1988) 165 CLR 360.

333 (2008) 234 CLR 418.

intercourse in one State more than another. To avoid offending the guarantee in s 92, that burden must be justified by a transparent analysis of structured proportionality.

218 Bringing these strands together, each aspect of s 92 should be aligned so that the provision is understood as a single freedom from unjustified discrimination concerning trade, commerce, or intercourse in Commonwealth or State legislation, with justification to be assessed in a transparent way.

219 A preliminary question arises in this case. That question concerns the subject of the challenge to validity. As in many constitutional cases in the past, the central focus of the plaintiffs' challenge to validity was an instrument, which is a particular application of primary legislation, rather than the primary legislation itself. The instrument is the *Quarantine (Closing the Border) Directions* made under the *Emergency Management Act*. The validity of that primary legislation, as the source of authority for the *Quarantine (Closing the Border) Directions*, must be the starting point for the assessment of the validity of the directions as an exercise or application of that authority. Where the relevant provisions of the primary legislation are open-textured and can be disapplied from any invalid application then it will rarely be appropriate for a court to speculate upon whether the provisions are valid in all their applications, including hypothetical circumstances that are not before the court. It will usually be necessary to consider the validity of the provisions in relation to particular applications before the court or, slightly more generally, to applications of the general kind of those before the court.

220 Sections 56 and 67 of the *Emergency Management Act*, in combination, are the sources of authority for the *Quarantine (Closing the Border) Directions*. Sections 56 and 67 are open-textured provisions which can be disapplied from any application which would be invalid³³⁴. The answer given by this Court on 6 November 2020 to the central question in the special case was that ss 56 and 67 are valid in their application to circumstances that encompass a general type of direction which includes the *Quarantine (Closing the Border) Directions*. For the reasons below, I join in the orders made by the Court.

Sections 56 and 67 of the *Emergency Management Act*

221 Section 56 empowers the Minister for Emergency Services, as the responsible Minister³³⁵, to declare that a state of emergency exists over the whole or any part of the area of Western Australia. One condition for the making of that

334 *Interpretation Act 1984* (WA), s 7.

335 See *Interpretation Act*, s 12.

declaration is that the Minister is satisfied that extraordinary measures are required to prevent or minimise, among other things, loss of people's lives or harm to their health. A state of emergency declaration gives rise to powers under s 67 which can be exercised during the period the declaration remains in force. A state of emergency declaration remains in force initially for three days³³⁶, but can be extended, or further extended, by periods that do not exceed 14 days³³⁷. By itself, s 56 has no effect, and imposes no burden, upon freedom of interstate trade, commerce, and intercourse.

222 Section 67, which depends for its operation on s 56, has the potential to impose a burden upon freedom of interstate trade, commerce, and intercourse. It provides, among other things, that for the purposes of emergency management, during a state of emergency, an authorised officer may prohibit the movement of persons into or out of the "emergency area"³³⁸. In that sphere of its application it allows for possible restrictions on entry to the State of Western Australia, such as those contained in the *Quarantine (Closing the Border) Directions*. Restrictions on entry of this nature have the effect of burdening the freedom of interstate trade, commerce, and intercourse by discrimination. A person resident outside Western Australia, unlike a person resident within Western Australia, could be subject to restrictions or exclusions on conducting in-person trade and commerce in Western Australia, or on engaging in in-person dealings or communications generally in Western Australia.

The level of application at which to assess validity of the *Emergency Management Act*

The premises of the answer given by this Court

223 Two days after the conclusion of the hearing of this special case, this Court answered the first question concerning the alleged invalidity of the *Quarantine (Closing the Border) Directions* and the authorising *Emergency Management Act*, at least by majority, as follows:

"On their proper construction, ss 56 and 67 of the *Emergency Management Act 2005 (WA)* in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic comply with the constitutional limitation of s 92 of the *Constitution* in each of its limbs.

336 *Emergency Management Act 2005 (WA)*, s 57.

337 *Emergency Management Act*, s 58.

338 *Emergency Management Act*, s 3 (definition of "emergency area").

The exercise of the power given by those provisions to make paras 4 and 5 of the *Quarantine (Closing the Border) Directions* (WA) does not raise a constitutional question.

No issue is taken as to whether the *Quarantine (Closing the Border) Directions* (WA) were validly authorised by the statutory provisions so that no other question remains for determination by a court."

224 There are two premises underlying the answer given by this Court. The first, as the State of Victoria correctly submitted, is that questions of constitutional validity should be determined at the level of an empowering statute³³⁹, leaving questions concerning the validity of actions taken under the statute, including regulations, directions and administrative action, to be resolved by reference to whether the valid statute empowers that action.

225 The need to adjudicate questions of validity at the level of an empowering statute arises irrespective of whether the action under the statute is administrative action or delegated legislation. Hence, contrary to the plaintiffs' submissions, an analysis of the validity of the action under the statute does not depend upon fine distinctions arising under s 41 of the *Interpretation Act 1984* (WA) between "subsidiary legislation"³⁴⁰ and administrative action³⁴¹. Just as the "first duty of any Court, in approaching a cause before it, is to consider its jurisdiction"³⁴², the starting point in an assessment of the validity of any administrative action or delegated legislation is the source of authority for that administrative or legislative act. If the administrative or legislative act has a valid source of authority then the question is generally whether the act falls within that source or is ultra vires.

226 The second premise to the answer given by this Court is that it is not appropriate in this case to affirm the validity of the relevant statutory provisions in the *Emergency Management Act*, such as ss 56 and 67, in all of their applications.

339 *Wotton v Queensland* (2012) 246 CLR 1 at 14 [22].

340 *Interpretation Act*, s 5 (definition of "subsidiary legislation").

341 See *Sea Shepherd Australia Ltd v Western Australia* (2014) 313 ALR 184.

342 *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442 at 446. See also *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 290 [51]; *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 477 [132]; Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 37-38. cf *Wilkie v The Commonwealth* (2017) 263 CLR 487 at 521-522 [56]-[57].

That is not to deny that in some cases affirming the validity of the relevant statutory provisions in all their applications will be appropriate. For instance, in *Wotton v Queensland*³⁴³, the State of Queensland successfully defended the validity of s 200(2) of the *Corrective Services Act 2006* (Qld), which permitted the imposition of conditions upon parole that the parole board reasonably considered to be necessary, on the basis that the provision effectively incorporated the requirement for constitutional justification and was therefore valid in its entirety. There was no need, in answering the constitutional question, to descend to the level of a particular application of the statute, namely the particular conditions imposed by the parole board.

227 On the other hand, there are other circumstances, including those in this case, where it is not appropriate for the Court to assess the validity of statutory provisions in relation to all of their applications. In cases where statutory provisions are open-textured – where their interpretation requires them to be "applied distributively"³⁴⁴ to numerous different circumstances – and do not expressly incorporate sufficient limitations as to be facially compliant with the *Constitution*³⁴⁵ then the Court should rarely adjudicate upon the validity of all applications of the relevant statutory provision. It is enough to conclude that the provisions can be "disapplied"³⁴⁶ or, in unfortunate terminology better used in the

343 (2012) 246 CLR 1. See also *Comcare v Banerji* (2019) 93 ALJR 900 at 945-946 [207]-[211]; 372 ALR 42 at 99-101.

344 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 369.

345 See, eg, *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614, quoting *Inglis v Moore [No 2]* (1979) 25 ALR 453 at 459; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 331; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 88 [216].

346 *Clubb v Edwards* (2019) 267 CLR 171 at 316-322 [421]-[433]; *Comcare v Banerji* (2019) 93 ALJR 900 at 945-946 [210]-[211]; 372 ALR 42 at 100-101. See also *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 377, quoting *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357 at 369, "operate on so much of its subject matter as Parliament might lawfully have dealt with"; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 369, "confined in its operation"; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1250 [53]; 374 ALR 1 at 16, "extended only to those orders for which the section might 'lawfully be applied'".

interpretation of the meaning of words rather than in their application³⁴⁷, "read down" to exclude any hypothetical applications that might be constitutionally invalid. The Court can focus upon the application of the provision to the relevant facts before the Court or facts of that general kind.

228 Sections 56 and 67 of the *Emergency Management Act* are open-textured provisions which do not expressly ensure freedom from discrimination in trade, commerce, and intercourse. They are capable of being disapplied to the extent that any hypothetical application would lead to invalidity³⁴⁸. Contrary to the oral submissions of the State of Victoria, it is neither necessary nor appropriate for the Court to adjudicate upon the validity of every application of those provisions. The answer given by this Court does not do so.

The appropriate level of generality at which to assess validity

229 The answer given by this Court to the first question in this special case concerned the validity of ss 56 and 67 of the *Emergency Management Act* in their applications of a particular kind. The provisions were not divided into severable parts³⁴⁹. Instead the answer focused upon the provisions "in their application" as follows:

- (i) although not overtly expressed, the application was limited in the answer to the limb of s 67 concerned with a "state of emergency" as declared under s 56, rather than the limb concerned with an "emergency situation" as declared under s 50;
- (ii) the application was limited in the answer to the purpose of emergency management of a declared state of emergency under s 56 where the "emergency" – defined in s 3 to mean the occurrence or imminent occurrence of a hazard in certain circumstances – involves "a plague or an epidemic" rather than other limbs of the definition of "hazard" in s 3. Those other limbs include: cyclones, earthquakes or other natural events; fires; road, rail or air crashes; terrorist acts; or events prescribed by regulations that are capable of causing harm to the health of persons or animals, or damage to property or the environment. The focus of the answer

347 But, in that context, see Hume, "The Rule of Law in Reading Down: Good Law for the 'Bad Man'" (2014) 37 *Melbourne University Law Review* 620 at 623-624. See also *Dawson v The Commonwealth* (1946) 73 CLR 157 at 178.

348 *Interpretation Act*, s 7.

349 *Clubb v Edwards* (2019) 267 CLR 171 at 314-316 [418]-[420].

in its reference to plague or "epidemic", from *epi dēmos* ("upon people"³⁵⁰), is limited to human disease;

- (iii) the application was limited in the answer to "the occurrence of a hazard", and did not extend to the "imminent occurrence of a hazard" within the definition of "emergency" in s 3, thus excluding from consideration applications based upon anticipated events that might not occur; and
- (iv) the application, by its confinement to a plague or an epidemic and its focus on human disease, was impliedly limited in the answer to a state of emergency where the Minister is satisfied that extraordinary measures are required to prevent or minimise "loss of life, prejudice to the safety, or harm to the health, of persons", rather than "loss of life, prejudice to the safety, or harm to the health, of ... animals" (s 56(2)(c)(i)), "destruction of, or damage to, property" (s 56(2)(c)(ii)), or "destruction of, or damage to, any part of the environment" (s 56(2)(c)(iii)).

230 By focusing only upon particular textual aspects of ss 56 and 67, this Court's answer focused upon the application of the legislation to facts falling within a category based upon circumstances of the same general kind as those before it. There might, at first blush, be thought to be tension between, on the one hand, assessing validity, as the answer to the first question in this special case does, by focusing upon the application of legislation to circumstances of the same general kind as those before the Court and, on the other hand, remarks made in the joint judgment in *Wotton v Queensland*³⁵¹ which accepted a submission that "whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law".

231 This tension is one reason that Professor Stellios suggested that the decision of Crennan and Kiefel JJ in *Attorney-General (SA) v Adelaide City Corporation*³⁵², which assessed the compatibility of a by-law with the constitutional implied freedom of political communication, might be "at odds with the approach accepted in *Wotton*"³⁵³. But there is a difference between (i) assessing the validity of an open-textured legislative provision, such as a general by-law making power, by

350 Porta, *A Dictionary of Epidemiology*, 6th ed (2016).

351 (2012) 246 CLR 1 at 14 [22].

352 (2013) 249 CLR 1 at 88-90 [217]-[222].

353 Stellios, "*Marbury v Madison*: Constitutional limitations and statutory discretions" (2016) 42 *Australian Bar Review* 324 at 341.

reference to limited applications of that legislative provision, and (ii) assessing the validity of the by-law ("the particular application") itself. The former engages questions of constitutional power: "[i]f Parliament had enacted [the by-laws] directly, would they be valid?"³⁵⁴. The latter should only be a question of whether the by-law falls within the valid legislative power.

232 It is arguable that the answer given to the first question in this special case should have been framed with greater focus upon the validity of the *Emergency Management Act* in its application to the particular facts of this case, including the terms of the *Quarantine (Closing the Border) Directions*, which were the basis for the finding of facts by Rangiah J. That focus was present in the careful submissions made by the State of Western Australia, which, as I note below, had the onus of justifying any discrimination between States in relation to trade, commerce, or intercourse in the *Emergency Management Act*³⁵⁵.

233 Courts will not usually need to uphold the validity of open-textured legislation in its application to circumstances that are not before the court and not sought to be validated by the parties. There would have been no difficulty in further confining the answer to the first question in this special case to the validity of the *Emergency Management Act* in its application to circumstances in the nature of those contained in the *Quarantine (Closing the Border) Directions*. Such a more refined answer would exclude further applications that are irrelevant to the facts before this Court such as whether directions could be made in any epidemic under s 67(c) to close all roads and access routes into Western Australia, without any exceptions, or, under s 67(b), to direct the removal of persons infected with any plague or disease from Western Australia. A more confined answer that focuses closely upon the precise circumstances before the Court is also consistent with the approach taken by many decisions of this Court including those before and after *Wotton v Queensland*³⁵⁶, none of which has ever been suggested to be wrong for taking this approach.

354 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 373 [104], quoting *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 594.

355 See, and compare, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 511-512; *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [24]; *Brown v Tasmania* (2017) 261 CLR 328 at 370 [131].

356 For example, *Hartley v Walsh* (1937) 57 CLR 372 (*Dried Fruits Regulations* (Vic), reg 22); *R v University of Sydney*; *Ex parte Drummond* (1943) 67 CLR 95 (*National Security (Universities Commission) Regulations* (Cth), reg 16); *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 (*National Security (Subversive Associations) Regulations* (Cth)); *Gratwick v Johnson* (1945)

234 Although I initially doubted whether it was appropriate for this Court to express the level of application of the answer considerably higher than that to which most of the parties had made submissions, I am now satisfied that it is appropriate to assess the validity of ss 56 and 67 of the *Emergency Management Act* at a higher level of generality than the *Quarantine (Closing the Border) Directions*, although at a more particularised level of application than all applications of those provisions. I have formed that view for three reasons. First, although the State of Western Australia sought to justify ss 56 and 67 of the *Emergency Management Act* at the particular level of the *Quarantine (Closing the Border) Directions*, the State of Victoria sought to justify ss 56 and 67 in *all* their applications. Secondly, no submissions were made about how a choice of the appropriate level of generality should be made for the assessment of the application of ss 56 and 67. Thirdly, I am satisfied that ss 56 and 67, as confined in their application in the three textual ways that I have mentioned, are consistent with s 92 of the *Constitution*. I therefore join in the orders that were made.

Aligning the two aspects of s 92 of the *Constitution*

The two aspects of s 92

235 In *Cole v Whitfield*³⁵⁷, by focusing upon the particular application of the legislation to the regulations before the Court, this Court effectively upheld the validity of s 9 of the *Fisheries Act 1959* (Tas) in its application to regs 31(1)(d)(ix) and 31(1)(d)(x) of the *Sea Fisheries Regulations 1962* (Tas). Central to the Court's reasoning was that "the freedom guaranteed to interstate trade and commerce under s 92 is freedom from discriminatory burdens in the protectionist sense"³⁵⁸.

70 CLR 1 (*Restriction of Interstate Passenger Transport Order* made under the *National Security (Land Transport) Regulations* (Cth)); *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 (*Pure Food Regulations* (NSW), reg 79(10)(c)); *Cole v Whitfield* (1988) 165 CLR 360 (*Sea Fisheries Regulations 1962* (Tas), reg 31(1)(d)); *Levy v Victoria* (1997) 189 CLR 579 (*Wildlife (Game) (Hunting Season) Regulations 1994* (Vic), reg 5); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (*Legal Profession Regulation 2002* (NSW), Pt 14); *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 (By-law No 4 entitled "Roads" made by the Corporation of the City of Adelaide); *Queensland Nickel Pty Ltd v The Commonwealth* (2015) 255 CLR 252 (*Clean Energy Regulations 2011* (Cth), Div 48 of Pt 3 of Sch 1).

357 (1988) 165 CLR 360.

358 *Cole v Whitfield* (1988) 165 CLR 360 at 395.

236 Discrimination involves the "departure from equality of treatment"³⁵⁹. It occurs where there is the "unequal treatment of equals, and, conversely, [the] equal treatment of unequals"³⁶⁰. A law can have the purpose of discrimination or it can have the effect of discrimination. In either case, a conclusion of discriminatory treatment will be easiest to draw where the law, on its face, purports to treat States differently. Where the discrimination does not appear from the text of the law, it is necessary to show that the purpose or effect of the law is to discriminate based upon its expected practical operation.

237 In the trade and commerce aspect of s 92, the relevant discrimination involves unequal treatment by a law that confers a trading or commercial advantage upon persons within one State compared with those in another. Conversely, the law imposes a trading or commercial burden upon those in the second State when compared with the first. But the advantage or burden must concern trade or commerce. In *Cole v Whitfield*, for example, it was held that, although the law operated in a discriminatory way for the protection and conservation of "the stock of Tasmanian crayfish", the law was not relevantly discriminatory because the evidence did not establish that Tasmanian crayfish production gained any competitive advantage such as "by eliminating undersized imported crayfish from the local market"³⁶¹.

238 The focus in *Cole v Whitfield* was upon the particular type of discrimination in trade and commerce called protectionism. Protectionism involves discrimination, in the form of either a protectionist purpose or a protectionist effect³⁶², in favour of the local State by conferring a competitive or market advantage over one or more other States. The assessment of a local competitive advantage requires consideration of economic concepts of cross-elasticity of supply and demand to identify competition between goods or services in the local State and other States. This is the economist's approach to determining, for example, whether "breakfast cereals compete with bacon and eggs"³⁶³. It is difficult to avoid these economic concepts in the assessment of protectionism, although some cases after *Cole v Whitfield* have applied the requirement for protectionist discrimination in a loose manner, without precision in assessing the protectionist

359 *Cole v Whitfield* (1988) 165 CLR 360 at 399.

360 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480.

361 (1988) 165 CLR 360 at 409.

362 *Cole v Whitfield* (1988) 165 CLR 360 at 407-408.

363 Staker, "Section 92 of the Constitution and the European Court of Justice" (1990) 19 *Federal Law Review* 322 at 344-345.

nature of the impugned laws³⁶⁴, and it has been observed that "protectionism may be considered to be unnecessary to the economic theory of competition"³⁶⁵.

239 More will be said of protectionism later in these reasons but at this point it suffices to say that protectionism is only one form of discrimination in trade and commerce that imposes burdens on persons in one State compared with another. Although protectionism is by far the most common form of discrimination relevant to the trade and commerce aspect of s 92, and the form with which the Court was concerned in *Cole v Whitfield*, there are other forms of discrimination that could be just as damaging to the purpose of s 92. For instance, State legislation might have the unintended effect of conferring a competitive disadvantage upon *local* trade and commerce when compared with another State. Or the Commonwealth might confer a competitive advantage on one State to the disadvantage of another. Or a State might confer a competitive advantage on one foreign State over another in an industry in which there is no competition in the local State. For instance, suppose that Western Australian legislation imposed an unjustified prohibition upon the sale in Western Australia of a type of good insofar as it was manufactured in New South Wales but not insofar as that type of good was manufactured in Queensland. Even if no manufacturer in Western Australia competed in the market for that type of good, so that the discrimination was only between products from New South Wales and Queensland, it is difficult to see why that discrimination, if unjustified, would be consistent with the freedom of trade rationale underlying s 92.

240 In *Cole v Whitfield* it was accepted that the constitutional protection of free intercourse among the States – free "movement ... across State borders"³⁶⁶ generally involving interstate "dealings or communication between individuals"³⁶⁷ with "a corresponding increase in their acquaintance with one another and with the

364 *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 at 426; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 476; Staker, "Section 92 of the Constitution and the European Court of Justice" (1990) 19 *Federal Law Review* 322 at 346.

365 Kiefel and Puig, "The Constitutionalisation of Free Trade by the High Court of Australia and the Court of Justice of the European Union" (2014) 3 *Global Journal of Comparative Law* 34 at 41.

366 *Gerner v Victoria* (2020) 95 ALJR 107 at 115 [28], quoting *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 192.

367 *Macquarie Dictionary*, 7th ed (2017), vol 1 at 789, "intercourse", sense 1.

different parts of the Continent"³⁶⁸ – was not confined to guarding against protectionist discrimination, or even discrimination at all. The Court asserted that there was no correspondence "between the freedom guaranteed to interstate trade and commerce and that guaranteed to interstate intercourse"³⁶⁹. The Court said that the freedom of interstate intercourse extended to "a guarantee of personal freedom 'to pass to and fro among the States without burden, hindrance or restriction'"³⁷⁰.

241 The treatment in *Cole v Whitfield* of interstate intercourse as a "personal freedom" was not a suggestion that s 92 operated as a guarantee of a personal right rather than as a restriction upon legislative power. It was to emphasise the height of the barriers to the imposition of any burden upon interstate intercourse. That approach, by which s 92 was seen to guarantee more than merely freedom from discriminatory burdens, was not necessary for the decision in *Cole v Whitfield* and should not be followed. Instead, for the reasons below, the test for contravention of the intercourse aspect of s 92 should be aligned with that applicable to the trade and commerce aspect. The test should involve an enquiry into whether the impugned law, without justification, discriminates between States by burdening one State more than another. The most common instance of such discrimination, and the intercourse with which this case was concerned and to which the State of Queensland pointed, is discrimination between intrastate and interstate intercourse.

Extending the discrimination test to the intercourse aspect of s 92

242 Interstate commerce is very often associated with, and inextricable from, interstate intercourse, as can be seen in the expression used before federation of "commercial intercourse"³⁷¹. The association of the two is usually so close that Sir Robert Garran had thought that it might be better to leave out the words "and intercourse" because "[t]rade and commerce have always been held to include intercourse, and the insertion of 'intercourse' [in s 92] may limit the meaning of

368 Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (1896) at 33.

369 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

370 *Cole v Whitfield* (1988) 165 CLR 360 at 393, quoting *Gratwick v Johnson* (1945) 70 CLR 1 at 17.

371 See, for instance, references to "commercial intercourse" in *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 18 February 1898 at 1155 (Mr Solomon) and *Report from the Committee on Provisions Relating to Finance, Taxation, and Trade Regulation, to the Committee on Constitutional Machinery, Functions, and Powers* (23 March 1891).

'trade and commerce' elsewhere"³⁷². But the conclusion that "intercourse" is limited by a requirement that its purpose be trade and commerce is a formal fallacy, inferring inevitability from usual association. That conclusion has never been accepted. It was expressly rejected in *Nationwide News Pty Ltd v Wills*³⁷³ by Deane and Toohey JJ. In *Cole v Whitfield*³⁷⁴ this Court had proceeded on the assumption that the freedom of intercourse was not limited to intercourse in trade and commerce.

243 It is one thing to conclude, correctly, that the expression "trade, commerce, and intercourse among the States ... shall be absolutely free" does not require that intercourse be for the purpose of trade and commerce. But it is quite another to conclude that fundamentally different tests should be applied to the freedom of trade and commerce on the one hand, and the freedom of intercourse on the other. Nevertheless, the reasoning in *Cole v Whitfield*³⁷⁵ to the effect that these two aspects of the constitutional freedom in s 92 should be treated differently has largely been unquestioned in later cases. But not always.

244 The clearest example of an approach which substantially assimilates the two aspects of s 92 was that taken by Toohey J in *Cunliffe v The Commonwealth*³⁷⁶. In that case, the provisions of Pt 2A of the *Migration Act 1958* (Cth), which regulated the operation of migration agents, were said to contravene the freedom of interstate intercourse. The provisions were said to burden interstate communications involved in immigration assistance and immigration representations. In the majority for holding the provisions entirely valid, Toohey J dismissed the submission that the provisions were contrary to s 92, saying³⁷⁷:

372 *Draft Commonwealth Bill: Amendments suggested by R R Garran*, Garran Papers, MS 2001, Box 10, ANL.

373 (1992) 177 CLR 1 at 82-83. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 192.

374 (1988) 165 CLR 360 at 388.

375 (1988) 165 CLR 360 at 394.

376 (1994) 182 CLR 272 at 384. See also at 333, Brennan J reiterating his views from *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 53-61 but cf at 57 "discrimination is not an essential feature of an impermissible burden imposed on interstate intercourse".

377 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 384.

"Pt 2A is a law of general application. Neither in its terms nor in its operation does it impose any burden on interstate intercourse which it would not impose, absent State borders."

245 The approach of Toohey J requires consideration of whether the impugned law discriminates between dealings or communications between persons based upon State boundaries. To burden intercourse in any State by reference to State borders is to discriminate against interstate intercourse. This reasoning applies the discrimination focus from the trade and commerce aspect to the intercourse aspect. The reasoning of Toohey J has powerful support in the text, the context, and the purpose of s 92.

246 As to the text, "intercourse" appeared from the first draft of the clause which became s 92 in the expression "trade or intercourse"³⁷⁸. The composite nature of the expression "trade, commerce, and intercourse" militates against different tests for the trade and commerce aspect on the one hand and the intercourse aspect on the other. Each of the components of that expression is governed by the same qualifiers, from which the test derives, "absolutely free"³⁷⁹ and "among the States". As Hayne J observed in *APLA Ltd v Legal Services Commissioner (NSW)*³⁸⁰, the text of s 92 involves "three elements of a composite expression (trade, commerce, and intercourse among the States)" and "does not readily yield a distinction" between those elements.

247 As to context, many transactions which constitute trade and commerce among the States will also constitute intercourse among the States³⁸¹. Goods that are provided in commerce across State boundaries are usually transported by people. Services that are provided in commerce across State boundaries are usually provided by people. Hence, many laws that concern commerce across State boundaries will often concern the movement of people across the same boundaries. If the two aspects of s 92 have different tests there will be an inevitable "tension"³⁸² between them. Should a law concerning commercial intercourse always be required to satisfy both tests, with the practical effect that the more stringent test

378 *Cole v Whitfield* (1988) 165 CLR 360 at 387.

379 Rose, "*Cole v Whitfield*: 'Absolutely Free' Trade?", in Lee and Winterton (eds), *Australian Constitutional Landmarks* (2003) 335 at 350.

380 (2005) 224 CLR 322 at 456-457 [401]-[402].

381 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 456 [400], quoting *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 59.

382 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 83.

for intercourse would be applied to commercial intercourse rather than the less stringent test for trade and commerce? Or should a law concerning commercial intercourse only be required to satisfy the test for trade and commerce, in effect subjecting a law that burdens intercourse to a less stringent test where that intercourse is in trade and commerce³⁸³? Another approach, described by one commentator as "very unsatisfactory"³⁸⁴, is for the test to be applied to depend upon whether the law is characterised as one concerning trade and commerce or one concerning intercourse³⁸⁵. None of these approaches is without difficulty.

248 As to purpose, each aspect of s 92 shares a common purpose of ensuring free movement across borders of goods, services, dealings, and communications. When Sir Henry Parkes proposed the motion in 1891 that "trade and intercourse between the federated colonies ... shall be absolutely free" he saw trade and intercourse as part of a composite expression, with the common goal of removing barriers "of any kind between one section of the Australian people and another"³⁸⁶. Hence, if the intercourse aspect of s 92 shares a focus upon discrimination between the States then it can readily be seen to align with the single purpose of s 92 "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"³⁸⁷. Without a requirement for discrimination, a near-absolute freedom of intercourse would put interstate intercourse "on a privileged or preferred footing, immune from burdens" to which other intercourse is subject³⁸⁸.

249 The effect of this conclusion is that s 92 prohibits any form of unjustified discrimination between States in relation to intercourse among the States. No person should be subject to unjustified restrictions by reference to State borders on dealings or communication, whether constituting commercial or non-commercial intercourse. The intercourse aspect of s 92 is concerned with

383 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 390-391 [165].

384 Rose, "*Cole v Whitfield*: 'Absolutely Free' Trade?", in Lee and Winterton (eds), *Australian Constitutional Landmarks* (2003) 335 at 351.

385 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 83-84.

386 *Official Report of the National Australasian Convention Debates* (Sydney), 4 March 1891 at 23-24.

387 *Cole v Whitfield* (1988) 165 CLR 360 at 391.

388 See *Cole v Whitfield* (1988) 165 CLR 360 at 402. See also Kirk, "Section 92 in its Second Century", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 253 at 279.

discrimination in relation to intercourse between any States, not merely intercourse between a foreign State and the local State. Hence, a law enacted in Western Australia that imposes restrictions on entry into Western Australia upon residents of New South Wales but no such restrictions upon residents of Queensland involves a burden upon intercourse among the States by two types of discrimination. The law must be justified not merely by reference to the restriction upon New South Wales residents vis-à-vis Western Australian residents but also by reference to the restriction upon New South Wales residents vis-à-vis Queensland residents.

Protectionism in the trade and commerce aspect of s 92

250 Despite the force of Queensland's submission that the test for the intercourse aspect should align with that for the trade and commerce aspect, and despite the obvious need for freedom of intercourse, which need not be commercial, not to be confined to freedom from protectionist discrimination, no party challenged the assumption in *Cole v Whitfield* that the discrimination between the States in the trade and commerce aspect of s 92 is limited to protectionist discrimination.

251 As explained above, protectionism is the "protection of domestic [intrastate] industries against foreign [interstate] competition"³⁸⁹. It gives "the domestic product or the intrastate trade in that product a competitive or market advantage over the imported product or the interstate trade in that product"³⁹⁰. Of all the concepts invoked in the explication of s 92 in *Cole v Whitfield*, the concept of protectionism has been described as "the one least known to constitutional law in Australia"³⁹¹. It is, by far, the most common manner by which State laws might discriminate between States in trade and commerce. But it is not the only manner.

252 The assumption in this case, based solidly in long-standing³⁹², accepted³⁹³ precedent, that any requirement for discrimination in a test for freedom of interstate

389 *Cole v Whitfield* (1988) 165 CLR 360 at 393, quoted in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 455-456 [24].

390 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 467.

391 Carney, "The Re-Interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade" (1991) 3 *Bond Law Review* 149 at 155.

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

393 *Cole v Whitfield* (1988) 165 CLR 360 at 393, 406.

intercourse would not be limited to protectionist discrimination was correctly made. There is no basis in the text, context, or purpose of s 92 to limit the concept of discrimination "among the States" to laws concerning dealings or communications between people which are protectionist. Such an unduly limited approach: (i) would not prohibit a Commonwealth law from discriminating between two States or a State law from discriminating between other States; (ii) would not prohibit a State law from discriminating *against* the interests of the local State in favour of another State; and (iii) would not prohibit a Commonwealth or State law from discriminating in favour of one State by conferring advantages upon that State other than competitive or market advantages. Indeed, the leading decision concerning the intercourse aspect of s 92 involved a Commonwealth law that impermissibly discriminated between intrastate and interstate intercourse, without any suggestion that this discrimination was protectionist³⁹⁴.

253 The assumption, whilst correct, highlights the incongruity in prohibiting all forms of discrimination among the States under the intercourse aspect but prohibiting only protectionist discrimination under the trade and commerce aspect of s 92. Indeed, one mark of various early versions of the free trade theory adopted by this Court was the focus upon discrimination generally rather than protectionist discrimination. As this Court observed in *Cole v Whitfield*³⁹⁵, the decision in *Fox v Robbins*³⁹⁶ was "a classic instance of discrimination". Although, as Barton J observed, the higher licence fee for sale of interstate wine involved "inter-state protection"³⁹⁷, the approach in that case, like others³⁹⁸, did not confine discrimination between any States to protectionism³⁹⁹.

254 A broader conceptualisation of discrimination – that is, beyond protectionist discrimination – also accords closely with many statements during the Convention Debates. Those statements emphasised the importance of interstate free trade

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

395 (1988) 165 CLR 360 at 406.

396 (1909) 8 CLR 115.

397 *Fox v Robbins* (1909) 8 CLR 115 at 123.

398 See *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 79; *Duncan v Queensland* (1916) 22 CLR 556 at 574; *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 439-440.

399 *Fox v Robbins* (1909) 8 CLR 115 at 120, quoting *Welton v State of Missouri* (1875) 91 US 275 at 281. See also at 124 ("whether their State of origin be the taxing State or another"), 127 ("the discriminating charge").

generally, freedom from "everything in the nature of an obstruction placed in the way of intercolonial trade"⁴⁰⁰, rather than a concern which was confined to the most common circumstance of discrimination in trade and commerce, namely protectionism. Accordingly, the constraint imposed in *Cole v Whitfield* which limited discrimination in trade and commerce among the States only to protectionist discrimination has been powerfully criticised as contrary to the underlying purpose of s 92 to ensure a unitary free trade area⁴⁰¹.

255 In the absence of any challenge to the protectionist element in the test for the trade and commerce aspect, this issue need not be finally resolved. Nevertheless, given (i) the need to explain and consider the discrimination test in the intercourse aspect of s 92 in this case, (ii) the nature of the composite expression "trade, commerce, and intercourse among the States" and (iii) the obvious incongruity arising from the adoption of a test based on a narrower type of discrimination for the trade and commerce aspect and the need for resolution of the tension between the two aspects of s 92, it is necessary to make four further observations about an assumption which treats the trade and commerce aspect, unlike the intercourse aspect, as concerned only with discrimination in a "protectionist sense"⁴⁰².

256 First, whilst free trade "commonly signified"⁴⁰³ an absence of protectionism, that was not, and is not, its only signification. Free trade also signifies freedom from any kind of discrimination in trade and commerce. As is recognised also by the complementary provisions of ss 99 and 102 of the *Constitution* (which enshrined the same anti-discrimination goal⁴⁰⁴), protectionism is not the only manner in which discrimination can impair trading and commercial

400 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 11 March 1898 at 2373 (Mr Deakin). See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 845 "unburdened by State restrictions, regulations, or obstructions".

401 Staker, "Section 92 of the Constitution and the European Court of Justice" (1990) 19 *Federal Law Review* 322; Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (2008).

402 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

403 *Cole v Whitfield* (1988) 165 CLR 360 at 392-393.

404 *Cole v Whitfield* (1988) 165 CLR 360 at 392.

freedom within a "national economic unit"⁴⁰⁵. Other examples might be a Commonwealth law that discriminates in trade and commerce between two States by imposing a competitive disadvantage on one, or a State law in trade and commerce which discriminates only between other States or discriminates against the interests of the local State in favour of another State. As Professor Zines has said⁴⁰⁶, and as subsequently adopted by Professor Stellios⁴⁰⁷, the "anti-protectionist" version of free trade is narrower than "a broader 'common market' approach". There is no apparent reason why the trade and commerce aspect of s 92 should be confined to the narrow approach. A test which focuses upon discrimination in trade and commerce generally, rather than merely upon protectionist discrimination, has thus been said to produce "results corresponding very closely with the picture [albeit vague] which seems to have been envisaged by the Convention"⁴⁰⁸.

257 Secondly, the only discrimination that was alleged in *Cole v Whitfield* was discrimination in a protectionist sense. Underlying the reasoning that the test for the trade and commerce aspect must be limited only to protectionist discrimination may have been a formal fallacy based on the fact that most observed instances of discrimination, and most of the discussion at the Convention Debates, involved protectionism. This formal fallacy may also have been the reason that this Court said in *Cole v Whitfield* that the pre-1900 United States cases on the negative commerce clause were not of "any assistance" in the interpretation of s 92⁴⁰⁹, a view that has since been quietly jettisoned⁴¹⁰. As I have noted above, a similar formal fallacy based upon the usual association of interstate trade with interstate intercourse has not been committed; interstate intercourse has not been limited to commercial intercourse.

405 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 461 [39], quoting *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 470.

406 Zines, *The High Court and the Constitution*, 5th ed (2008) at 195.

407 Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 195.

408 Bailey, "Interstate Free Trade: The Meaning of 'Absolutely Free'" (1933) 7 *Australian Law Journal* 103 at 104.

409 (1988) 165 CLR 360 at 405.

410 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 459-464 [33]-[48]. See Gleeson, "What's left of *Cole v Whitfield*?" (2013) 24 *Public Law Review* 97 at 101.

258 Thirdly, the Court in *Cole v Whitfield* acknowledged that the existence of the intercourse aspect suggested a "wider operation"⁴¹¹ of the trade and commerce aspect than merely guarding against discrimination in a protectionist sense. But the force of this point was thought to be diminished because the Court assumed that if the test treated the trade and commerce aspect and the intercourse aspect alike then "anarchy would result"⁴¹². This assumption would not have been made if the Court had accepted that freedom of intercourse was also concerned with guarding against discrimination generally between the States in relation to intercourse.

259 Fourthly, although the removal of the protectionist element from discrimination in the trade and commerce aspect involves some adjustment to the understanding of the trade and commerce aspect outlined in *Cole v Whitfield*, in practical effect an almost identical adjustment is required by recognising a test for discrimination, without a requirement of protectionism, for the intercourse aspect of s 92. This is because interstate trade and commerce will almost always involve intercourse. An example of a case where the same adjustment would have to be made even without removing the protectionist element from discrimination in the trade and commerce aspect is *Barley Marketing Board (NSW) v Norman*⁴¹³.

260 In *Barley Marketing Board*, the defendants attempted to engage in interstate commercial intercourse by selling barley grown in New South Wales to a buyer in Victoria. New South Wales legislation prohibited the defendants from doing so by establishing a marketing board into which was vested title to all barley coming into existence in New South Wales. The Court observed that there was no evidence that the scheme restricted the supply of barley to other States⁴¹⁴ and that there was no vesting of title to imported barley⁴¹⁵. Further, it appears there was no evidence before the Court that the prices at which the board sold the barley interstate were higher than those prices which New South Wales producers would have charged in interstate sales⁴¹⁶. The Court therefore held that the scheme was not

411 (1988) 165 CLR 360 at 393.

412 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

413 (1990) 171 CLR 182.

414 *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 204.

415 *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 201-202, referring to *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559.

416 Compare Gray, "Compulsory Marketing Schemes and Section 92 of the Australian Constitution" (2014) 33 *University of Tasmania Law Review* 317 at 331.

protectionist⁴¹⁷. If the requirement of protectionism were removed the case would have to be assessed against a broader criterion of discrimination. The defendants were subject to restrictions upon selling in Victoria that did not apply to producers in Victoria. The focus in the case upon protectionism meant that it was not necessary for the Court to explore whether this discrimination in the course of commercial intercourse conferred an advantage on Victorian producers which was unjustified. But since the defendants' conduct involved commercial intercourse between the States, and thus engaged the intercourse aspect of s 92, that broader assessment of discrimination would be required anyway by complete consideration of the unitary freedom of trade, commerce, and intercourse.

Justifying discrimination by a structured proportionality analysis

261 Putting to one side the difficulties involved in limiting discrimination in the trade and commerce aspect to protectionist discrimination, the test for compliance with s 92 can be simply expressed. The constitutional guarantee that "trade, commerce, and intercourse among the States ... shall be absolutely free" imposes a requirement that laws concerning movement across a border – whether it be goods, persons, or communications or other intangibles – cannot discriminate by imposing an unjustified burden on trade, commerce, or intercourse in one State compared with another.

262 The development of a transparent and concise test of discrimination should not be undermined by a vague and opaque approach to justification. A significant step was taken in *Castlemaine Tooheys Ltd v South Australia*⁴¹⁸ towards making transparent the approach to justification of a law that burdens trade, commerce, or intercourse in the proscribed way. In that case, five members of this Court said that a law that imposes a burden upon interstate trade and commerce would be "appropriate and adapted" if it imposed a burden that was incidental and was not disproportionate to the object to be achieved.

263 This step, while significant, did not complete the movement towards transparency. By themselves, words like "appropriate and adapted" or "disproportionate" still conceal underlying reasoning and leave open a vast area for the exercise of discretion and subjective preference. More is also needed to provide clarity (i) for the State and Commonwealth Parliaments and (ii) for the States and the Commonwealth to attempt to discharge their onus of justifying relevantly discriminatory laws. Judicial reasoning concerning constitutional validity of legislation should not be a black box to be unlocked only when parties

417 *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 204.

418 (1990) 169 CLR 436 at 473.

to a later case seek explanation for the earlier exercise of discretion. As Professor Birks observed when discussing unstructured discretion⁴¹⁹:

"The whole point of the rule of law is to ensure that power which cannot be put under the law should be accountable to the electorate and that, for the rest, we all live under the law, not under the wills and whims of a person or a group of people. The blessings of this commitment have been overlooked by the discretionary remedialists, who suddenly suppose that the judges should be the one group answerable only to God."

264 It is no surprise that a form of structured proportionality analysis has been said to have been adopted by "virtually every effective system of constitutional justice in the world, with the partial exception of the United States"⁴²⁰, and even there the balancing approach may be best understood as a less structured form of proportionality⁴²¹. In Australia, a structured proportionality analysis is now well established in the context of the implied freedom of political communication as a means to elucidate concepts such as "appropriateness". It was an analysis that was adopted by a majority of this Court in *McCloy v New South Wales*⁴²², *Brown v Tasmania*⁴²³, *Unions NSW v New South Wales*⁴²⁴, and *Clubb v Edwards*⁴²⁵. The need for structure and transparency is no less for an analysis of the compatibility of laws with s 92. A similar analysis should be adopted, to make explicit that which would otherwise be implicit, when assessing whether a law which places a burden on the freedom guaranteed by s 92 is justified⁴²⁶.

419 Birks, "Three Kinds of Objection to Discretionary Remedialism" (2000) 29 *University of Western Australia Law Review* 1 at 15.

420 See *Clubb v Edwards* (2019) 267 CLR 171 at 332 [466], quoting Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 72 at 74 and referring to Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 181-210.

421 *Clubb v Edwards* (2019) 267 CLR 171 at 331 [465].

422 (2015) 257 CLR 178 at 193-195 [2]-[3].

423 (2017) 261 CLR 328 at 368-369 [123]-[127], 416-417 [278].

424 (2019) 264 CLR 595 at 615 [42], 638 [110].

425 (2019) 267 CLR 171 at 186 [5]-[6], 264-265 [266], 330-331 [462]-[463].

426 See Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 *Melbourne University Law Review* 1 at 12-15; Kiefel,

265 Structured proportionality makes explicit and transparent the only three independent grounds upon which a law might be held invalid as contrary to s 92. First, a law will be invalid if its very purpose is to undermine the freedom guaranteed by s 92. Secondly, a law will be invalid if its means of achieving its legitimate purpose are not "reasonably necessary", in the sense that those means burden the freedom guaranteed by s 92 substantially more than obvious and compelling alternatives which could achieve the purpose of the law to the same extent. Thirdly, and in absolutely exceptional cases, a law will be invalid if its legitimate, but trivial, purpose is inadequate to support the extent of the burden placed upon the high constitutional purpose of s 92.

266 The "structure" in structured proportionality is rigid in its refusal to countenance fictions or hidden grounds for invalidating legislation. As a matter of logic, each stage of the enquiry also follows the preceding stage. The first requires the identification of a legitimate purpose. The second requires assessment of the extent to which the means of achieving that legitimate purpose, not some other – hypothetical or fictional – purpose, is necessary. The third assesses whether, despite the reasonable necessity of the means adopted to achieve the legitimate purpose, the purpose nevertheless cannot justify the burden upon the constitutional freedom.

267 One objection to this form of structured proportionality is that there is no place for the third stage of the analysis. In *Betfair Pty Ltd v Western Australia*⁴²⁷ the third stage was not mentioned. The third stage requires a comparison of the importance of competing policies, upon which Parliament is far better suited to judge in a representative democracy. There is great force to this objection. In *Clubb v Edwards*⁴²⁸, I explained why this third basis for invalidating laws must be highly exceptional. The third stage permits the invalidation of a law even though the purpose of the law is legitimate and despite the means adopted being reasonably necessary to achieve that purpose. In other words, invalidation at the third stage of a law that has satisfied the first two stages might have the effect that Parliament can never legislate to achieve that legitimate purpose. Ultimately, however, as I

"Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives" (2010) 36(2) *Monash University Law Review* 1 at 10, 13-15; Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 57; Kirk, "Section 92 in its Second Century", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 253 at 259; cf Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (2008) at 143-150; Chordia, *Proportionality in Australian Constitutional Law* (2020) at 147-149.

427 (2008) 234 CLR 418 at 464 [48], 477 [102].

428 (2019) 267 CLR 171 at 341-344 [491]-[498].

explain later in these reasons, there may be extreme examples of laws whose legitimate but trivial purpose cannot justify a necessary, but extreme, burden upon the important freedom of trade, commerce, and intercourse.

268 Another objection involves an assertion that structured proportionality can have the effect that unspecified factors are ignored or suppressed or that too much weight is put on specified factors. On this view, it is better to allow unspecified factors to roam free, perhaps unmentioned and possibly even subconscious, in a broad evaluative judgment of invalidity. But what are these factors and how would they lead to a conclusion of invalidity? And as to the complaint about excessive weight, why should legislation be held valid if it failed any of the stages of structured proportionality analysis? For instance, is it to be suggested that legislation should be upheld despite having an illegitimate purpose or despite adopting means which burden the s 92 freedom but are not reasonably necessary to achieve its legitimate purpose?

Proportionality stage one: the purpose of the law

269 A question which is logically anterior to any other stage of proportionality analysis is whether the law is suitable in that it has a rational connection with a legitimate purpose. In the context of justifying a law that would otherwise be contrary to s 92, the question is most neatly expressed as whether the law has an illegitimate purpose. If one of the very purposes of the legislative provision is to discriminate in the manner prohibited by s 92 then the law cannot be justified. Section 92, as a constitutional norm, could not sanction a law with the very purpose of undermining that norm.

270 The purpose of the legislative provision, in this sense, is the object, goal, or aim of the law rather than merely the effect of the law⁴²⁹. Of course, since purpose or intention can be inferred from likely effect⁴³⁰, a discriminatory effect of the law that is very likely or an obvious substantial disproportion with expressed objects of the law might be bases for an inference that the discrimination was an intended purpose. But a law will only fail at this stage if one of its very purposes is to achieve that which was proscribed. Expressions such as "pointed directly at"⁴³¹, "aimed

429 See, generally, *Unions NSW v New South Wales* (2019) 264 CLR 595 at 656-657 [168]-[172]. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 205 [40]; *Brown v Tasmania* (2017) 261 CLR 328 at 362 [99], 392 [209], 432-433 [322].

430 *Zaburoni v The Queen* (2016) 256 CLR 482 at 488 [8]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 394-397 [96]-[101].

431 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 118.

at⁴³², or "directed against"⁴³³, might be said to be "unsatisfactory" descriptions⁴³⁴ because to the extent that those expressions mean something different from purpose then they should not be sufficient for establishing invalidity.

Proportionality stage two: reasonable necessity

271 If the law has a legitimate purpose but has an effect of discriminating between States in trade, commerce, or intercourse, then the next stage of structured proportionality involves asking whether the means used to achieve that legitimate purpose are reasonably necessary for achieving that purpose. As in the context of the implied freedom of political communication⁴³⁵, the question of reasonable necessity in relation to s 92 will be assessed according to the availability and obviousness of means that could achieve the same legitimate purpose to the same extent but without burdening, or with a lesser burden on, the freedom guaranteed by s 92.

272 In *Cole v Whitfield*⁴³⁶, this Court said that even if the law had conferred an advantage on local trade it would have been justified because the regulation was a "necessary means" of enforcing the prohibition against catching undersized crayfish. But, without the qualification of "reasonableness", a requirement for necessary means might be misunderstood as a test of the ingenuity of counsel. It might imply that a defendant could not justify a law if, as could have been done in this case, counsel for the party challenging the law could identify any manner by which the law's objects could be achieved by any other, less restrictive means. That consequence is avoided by the decisions on s 92 which clarified that this consideration is concerned with whether the law burdens the freedom by means that are more restrictive than is "reasonable" to achieve its purposes⁴³⁷.

432 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 58.

433 *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116 at 127.

434 Compare *Cole v Whitfield* (1988) 165 CLR 360 at 401.

435 See *McCloy v New South Wales* (2015) 257 CLR 178 at 210 [57]; *Clubb v Edwards* (2019) 267 CLR 171 at 336-338 [476]-[480].

436 (1988) 165 CLR 360 at 409.

437 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 469, cf at 480 ("alternative means involving no or a lesser burden"). See also *AMS v AIF* (1999) 199 CLR 160

273 In *Betfair Pty Ltd v Western Australia*⁴³⁸, consistently with earlier decisions⁴³⁹, six members of this Court said in a joint judgment that the enquiry should be described as one of "reasonable necessity" and that these terms should be "accepted as the doctrine of the Court". In that case, a Western Australian law was held not to be "proportionate" because it was not shown to be reasonably necessary. As the joint judgment explained, there was an apparent legislative alternative, taken by Tasmanian law, which did not involve discrimination⁴⁴⁰. This description of "reasonable necessity" has been correctly described as a "mirror", to an extent, of the same enquiry in the context of structured proportionality analysis used in relation to the implied freedom of political communication⁴⁴¹.

274 It should be emphasised that reasonableness is not a monolithic standard⁴⁴². In other areas it is now accepted that the threshold of reasonableness, or intensity of review, can vary between different categories of case⁴⁴³. It is enough in this case to say that in the context of s 92 the reasonableness threshold means there will be a margin of appreciation afforded to Parliament before its legislation will be found to fall outside the boundaries of choice of the means by which to implement the legislative purpose.

at 179 [45], 233 [221]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 353 [38], 393-394 [177], 461 [420].

438 (2008) 234 CLR 418 at 477 [102]-[103].

439 See *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 584; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 308.

440 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 479 [110].

441 *McCloy v New South Wales* (2015) 257 CLR 178 at 210 [57]. See also *Unions NSW v New South Wales* (2019) 264 CLR 595 at 615 [42].

442 See *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 567 [59], 574 [84], 584-586 [133]-[135]; *Clubb v Edwards* (2019) 267 CLR 171 at 336-337 [477].

443 *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 61 [26].

Proportionality stage three: adequacy in the balance

275 The final stage of structured proportionality is perhaps the most controversial. It requires asking whether the law is adequate in its balance⁴⁴⁴. Even if the means adopted by the law are reasonably necessary to achieve its purpose, there will be some cases where the purpose of the law is nevertheless not of sufficient importance to justify the burden that the law places on interstate trade, commerce, or intercourse given the high importance and purpose of s 92 of the *Constitution*. A law will be inadequate in the balance if, notwithstanding that the law is the only reasonable means of achieving the purpose, the extent of the discrimination and thus the incursion into the freedom of trade, commerce, or intercourse cannot be justified given the purpose of the law⁴⁴⁵.

276 Considerations of high public policy are involved in this balancing of, on the one hand, Parliament's purpose and, on the other hand, the importance of freedom of trade, commerce, and intercourse and the extent to which that freedom is burdened. A foundational principle of the *Constitution* is representative democracy, which generally requires that significant policy decisions be left to the branch of government best suited to make them: the Parliament. However, the description of the s 92 freedom as "absolute" supports the possibility of invalidity where Parliament puts a necessary but extreme burden on the subject matter of s 92 in order to achieve a purpose that is trivial, usually assessed by reference to the context and importance that Parliament itself has placed on the purpose.

Sections 56 and 67 of the *Emergency Management Act* are justified in their relevant application*Sections 56 and 67 serve a legitimate purpose*

277 The plaintiffs' central submission alleged a substantial identity between the *Quarantine (Closing the Border) Directions* and the *Restriction of Interstate Passenger Transport Order* held by this Court to be invalid in *Gratwick v Johnson*⁴⁴⁶. The primary legislation considered in *Gratwick* was an open-textured wartime power under the *National Security Act 1939* (Cth) to make regulations for securing the public safety and defence of the Commonwealth. The regulations

⁴⁴⁴ See *Clubb v Edwards* (2019) 267 CLR 171 at 208 [96], 209 [102], 266-267 [270], 341-344 [491]-[498]; *Comcare v Banerji* (2019) 93 ALJR 900 at 914 [38], 936 [165]; 372 ALR 42 at 57, 88.

⁴⁴⁵ cf *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120 at 191-193.

⁴⁴⁶ (1945) 70 CLR 1.

made included the *National Security (Land Transport) Regulations* (Cth), under which a power was exercised to pass the *Restriction of Interstate Passenger Transport Order*, which, in para 3(a), prohibited travel by rail or commercial passenger vehicle from one State to another without a permit. The Order did not "depend ... for its practical operation or administration upon the movement of troops, munitions, war supplies, or any like considerations". It was "simply based on the 'inter-Stateness' of the journeys"⁴⁴⁷. On the questionable assumption that the Order would otherwise have been permitted by the primary legislation and regulations, it was held to be invalid. It might have been more accurate to have held the primary legislation invalid insofar as it authorised regulations that would permit such an order. But the key point is that the purposes, not merely the effect, of the Order included discriminating between intrastate and interstate intercourse.

278 The plaintiffs also relied upon the decision in *R v Smithers; Ex parte Benson*⁴⁴⁸, where this Court considered the prohibition in s 3 of the *Influx of Criminals Prevention Act 1903* (NSW) upon certain criminals entering New South Wales from other States. This Court held that the provision was invalid. Isaacs and Higgins JJ did so on the ground that the provision contravened s 92 of the *Constitution*. Isaacs J described s 92 as an "absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians"⁴⁴⁹. Higgins J spoke of how the legislation was "pointed directly at the act of *coming* into New South Wales"⁴⁵⁰. A natural understanding of these passages, and an explanation for the result, is that s 92 imposes an absolute prohibition upon laws with the object, and not merely the effect, of burdening interstate intercourse. Although one object of s 3 was to reduce the number of criminals in New South Wales, the reasoning of Isaacs and Higgins JJ seemed to be that another object (or, as Isaacs J put it, the "regard" of the State), and not merely an effect, was to discriminate between intrastate intercourse for criminals within New South Wales and interstate intercourse for criminals outside New South Wales.

279 The result in both of these decisions is consistent with the approach to s 92 since *Cole v Whitfield*, which invalidates a law whose purpose is the very thing that s 92 prohibits: discriminating between the States in relation to intercourse. That is not the case with ss 56 and 67 of the *Emergency Management Act*.

447 *Gratwick v Johnson* (1945) 70 CLR 1 at 19.

448 (1912) 16 CLR 99.

449 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 117.

450 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 118 (emphasis in original).

280 Section 56 of the *Emergency Management Act* was part of the legislation when it was passed in 2005. Its purpose was "to put appropriate arrangements in place to deal with the catastrophic natural or man-made emergencies that may befall our state"⁴⁵¹. Section 67 was also part of the 2005 Act but it was amended in 2020 in response to what was described in Parliament as the "unprecedented emergency" after "a state of emergency was declared [on 15 March 2020] in respect of the pandemic caused by COVID-19"⁴⁵². In each case the manifest purpose was to create, and to make conditional, broad powers for the Minister to manage a broad range of emergencies.

The discrimination in ss 56 and 67 is reasonably necessary

281 Even where the purpose of a statutory provision concerns a matter of great public importance, the provision will contravene s 92 if its effect is to impose an excessive discriminatory burden by means which are not reasonably necessary. For instance, in *Tasmania v Victoria*⁴⁵³ a majority of this Court held invalid an application of s 4 of the *Vegetation and Vine Diseases Act 1928* (Vic) which empowered proclamations to prohibit the importation into Victoria of any tree, plant or vegetable which, in the opinion of the Governor in Council, is likely to introduce any disease or insect into Victoria. In a conclusion which would be equally appropriate to the application of the test now accepted for s 92, and in a context in which few vegetables were immune from liability to some disease, Dixon J said that it is absurd to suppose that a State could legislate to provide it with a power⁴⁵⁴

"entirely uncontrolled to forbid absolutely the importation of a commodity from another State because the State Executive expresses the opinion that a vegetable disease may be introduced if importation is allowed".

282 Sections 56 and 67, in their limited application to a state of emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic, might empower directions which discriminate in an extraordinary way in relation to freedom of trade, commerce, or intercourse. For instance, within the sphere of application of this Court's answer, the sections appear to empower directions as

451 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 August 2005 at 4120.

452 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 31 March 2020 at 1824.

453 (1935) 52 CLR 157.

454 *Tasmania v Victoria* (1935) 52 CLR 157 at 186.

restrictive as closing all roads and access routes to Western Australia for all purposes and without exception. Such a closure would amount to an impregnable and absolute discriminatory barrier to all trade, commerce, and intercourse that required dealings in person or the contemporaneous transfer of physical things. But despite the possibility of severe discriminatory effects, the terms of ss 56 and 67, in their application as limited in the answer given by this Court, do not exceed the threshold of reasonable necessity because of several significant restrictions.

283 First, an extreme direction such as that described above can only be made under s 67 if the Minister has declared a state of emergency⁴⁵⁵. That declaration cannot be made unless, relevantly, the Minister: has considered the advice of the State Emergency Coordinator⁴⁵⁶; is satisfied that an emergency in the nature of a plague or epidemic has occurred or is occurring⁴⁵⁷; and is satisfied that extraordinary measures are required to prevent or minimise loss of life, prejudice to the safety, or harm to the health, of people⁴⁵⁸.

284 Secondly, unless the state of emergency is extended by the Minister, which extension cannot exceed 14 days for the purposes of exercising powers under s 67⁴⁵⁹, it remains in force for only three days⁴⁶⁰.

285 Thirdly, directions made under s 67 must be "[f]or the purpose of emergency management" during the state of emergency. Section 3 defines "emergency management" as including matters relating to prevention of, preparedness for, response to, and recovery from, the adverse effects of an emergency, relevantly here the occurrence of a hazard in the nature of a plague or epidemic. The requirement that the directions given by an authorised officer be "[f]or the purpose of emergency management" is objective, unlike the subjectivity involved in the proclamation power in *Tasmania v Victoria*. Although "purpose" bears its usual meaning in this context, namely object or aim, the constraint is significant because the less reasonably necessary an extreme direction is (such as

455 *Emergency Management Act*, s 56(1).

456 *Emergency Management Act*, s 56(2)(a).

457 *Emergency Management Act*, s 56(2)(b).

458 *Emergency Management Act*, s 56(2)(c).

459 *Emergency Management Act*, s 58(4).

460 *Emergency Management Act*, s 57.

closing all roads without exception) the more likely it is that an inference will be drawn that the direction is not solely for the purpose of emergency management.

286 Fourthly, although s 67, unlike s 66(3), does not expressly provide that directions must be "*reasonably required*" for the purposes of emergency management" (emphasis added), the usual implication of reasonableness would confine the discretion of the authorised officer to make directions that are reasonable in light of the purpose of emergency management. Nevertheless, the nature of this usual implication, and the extreme nature of the circumstances in which the power is being exercised, might require the threshold for a finding of legal unreasonableness of any direction to be higher than that which might be conveyed by an express condition of being "reasonably required" for the purpose of emergency management⁴⁶¹.

287 The legislative response by Western Australia might have been more limited with less intrusion into the freedom prescribed by s 92. Some simple examples are that the extension of a state of emergency might have been limited to seven days and the power to make directions under s 67 might have been expressly limited to those that are reasonably required. But the existence of such possible lesser intrusions upon the s 92 freedom does not mean that ss 56 and 67 of the *Emergency Management Act* are invalid in their relevant applications for two reasons. First, although ss 56 and 67 permit applications that burden substantially the s 92 freedom, by allowing for both a wide range of directions that could discriminate and a considerable depth or extent of discrimination, the purpose of the provisions – responding to emergencies – requires a great deal of flexibility. It might be expected that the loss of that flexibility by provisions involving a lesser burden would prevent Parliament's purpose being achieved to the same degree. In other words, the lesser intrusions might not achieve Parliament's purpose to the same degree. Secondly, and in any event, ss 56 and 67 in their particular applications identified by this Court are well within a margin of reasonable legislative responses that minimise the intrusions upon the s 92 freedom.

The burden imposed by the Emergency Management Act is adequate in the balance

288 In the context of s 92, a test for adequacy in the balance effectively asks whether the extent of the burden that the law imposes upon the freedom that is prescribed by s 92 can ever be justified by that law's purpose. In other words, the balance is between, on the one hand, the importance of the constitutional freedom of trade, commerce, and intercourse and the extent to which that freedom is burdened by the law and, on the other hand, the purpose of the law that is said to justify that burden. I reiterate that this stage of analysis will only lead to a conclusion of invalidity in extreme circumstances: a conclusion that the law is

461 *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 61 [26].

inadequate in the balance comes very close to saying that Parliament can never legislate to achieve its policy since even a law that is reasonably necessary to achieve that purpose will be invalid.

289 The important purpose of the freedom of interstate intercourse is well summarised by the description by Sir Samuel Griffith of the expected benefits of free intercourse⁴⁶²:

"The effects, both social and material, of such an enlargement of knowledge and extension of movement could not fail to be highly beneficial. The present lack of more general acquaintance and intercourse is, indeed, probably one of the most serious obstacles now existing in the way of Federation."

290 An example of a law whose purpose might be considered inadequate when balanced against the weight of the purpose of s 92 and the extent of the burden effected by the law is one which was considered to be "at the least doubtful" in 1903 by Mr Deakin, then Attorney-General of the Commonwealth⁴⁶³. Tasmanian legislation⁴⁶⁴ imposed a charge for the admission to Tasmania of various categories of person including those who were unable to support themselves or who were likely, "in the opinion of the Collector, to become a charge upon the public". Even assuming that the purpose of decreasing the financial burdens to the State of persons in that relevant class was a legitimate purpose, that purpose might be inadequate in the balance against the discriminatory effect of the law and its undermining of the purpose of s 92. Hence, even if there were no other reasonably available means of reducing those costs, this legislation might be invalid.

291 By contrast, the purpose of public health provisions such as ss 56 and 67 is plainly sufficient to justify even the deep and wide burden that the application of those provisions can place upon the freedom prescribed by s 92. Indeed, at federation it was contemplated that the application of provisions of this nature might be justified despite the imposition of such deep or wide burdens. During the Sydney debates, after one of the delegates, Dr Cockburn, expressed a fear that the clause as drafted might prevent laws prohibiting the passing of cattle across State borders or the introduction of diseased vines into South Australia, Mr O'Connor,

462 Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (1896) at 33.

463 See Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia* (1981), vol 1 at 172-173.

464 *Passengers Act 1885* (Tas), s 3.

quoting from a prolific writer from the United States⁴⁶⁵, set out a good description of the operation of structured proportionality in this area⁴⁶⁶:

"By parity of reason addressed to the protection of the public health, states may exercise their police powers to the extent of prohibiting both persons and animals, when labouring under contagious diseases, from entering their territory. They may pass any sanitary laws deemed necessary for this purpose, and enforce them by appropriate regulations. It is upon this reserved right of self-protection, that quarantines are permitted to interfere with the freedom of commerce and of human intercourse. But this power is not without its limitations, and its exercise must be restricted to directly impending dangers to health, and not to those who are only contingent and remote. Hence, while diseased persons or diseased animals, and those presumedly so from contact with infected bodies or localities, may be prevented from entering a state, any general law of exclusion, measured by months, or operating in such a way as to become a barrier to commerce or travel, would be a regulation of commerce forbidden by the constitution. Such a statute being more than a quarantine regulation, transcends the legitimate powers of a state."

292 Subsequently, Mr Barton said, in terms reflecting the first stage of structured proportionality, that "the power to prevent the introduction of diseases would still remain with the states, except in so far as any state law was found to be an intentional derogation from the freedom of trade"⁴⁶⁷.

Conclusion

293 For these reasons, I join in the orders that were made on 6 November 2020.

465 Ordranax, *Constitutional Legislation in the United States: Its Origin, and Application to the Relative Powers of Congress, and of State Legislatures* (1891) at 296-297.

466 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1062.

467 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1064.

