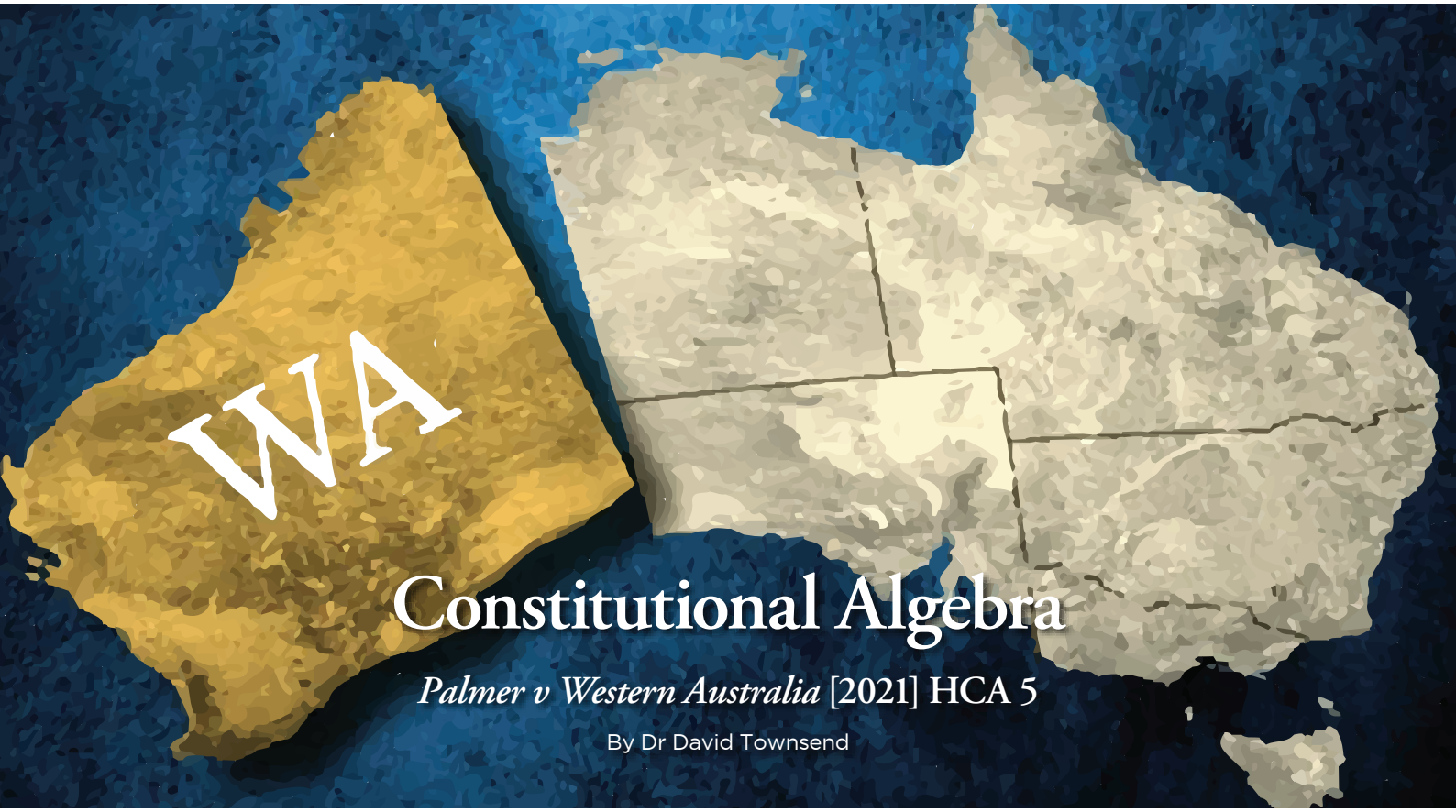


Constitutional Algebra

Palmer v Western Australia [2021] HCA 5

By Dr David Townsend

When 9th Century Baghdad-based polymath al-Khwārizmī established his method for performing complex calculations for unknown quantities, he drew on medical terminology to describe his new method. He called it '*al-jabr*' (now known as 'algebra'), which in a surgical sense means 'the setting of broken bones', but more generally may be translated as 'the reunion of broken parts'. It is 'the reunion of broken parts' of s 92 of the Constitution which the High Court performed in *Palmer v Western Australia*.

The facts

Section 56 of the *Emergency Management Act 2005* (WA) (EM Act) empowered the Minister to declare a state of emergency as to the whole or any area or areas of Western Australia (WA). The EM Act imposed certain preconditions on the making of such a declaration, and limited a declaration's duration, although it could be extended on a rolling 14-day basis. It also empowered the making of subordinate directions, including directions to prohibit movement to and from a declared emergency area.

On 11 March 2020, the World Health Organisation declared COVID-19 a pandemic. On 15 March 2020, the Minister declared a state of emergency under the EM Act applying to the whole of WA, taking effect the following day. The State Emergency Coordinator (Commissioner of Police) issued the *Quarantine (Closing the Border) Directions* (WA) (Directions), taking

effect on 5 April 2020. The effect of the Directions was to close the WA border to all persons from any place, save persons subject to an exemption (such as officials, security and health workers, and persons granted exemption on compassionate grounds).

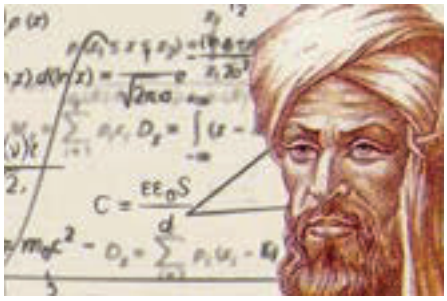
Queensland resident Clive Palmer, who regularly travelled to and from WA for business purposes, applied for and was refused an exemption under the Directions. Palmer and Mineralogy Pty Ltd, of which Palmer is chairman and managing director, challenged the constitutional validity of the EM Act and/or the Directions on the basis that they infringed s 92 of the Constitution, which provides, relevantly: 'trade, commerce and intercourse among the States…shall be absolutely free'.

The plaintiffs contended that the EM Act and/or the Directions infringed s 92 both as regards interstate intercourse (i.e., movement of persons across the border) and as regards interstate trade and commerce.

The decision

The Court (Kiefel CJ and Keane J in joint reasons; Gageler, Gordon and Edelman JJ each delivering separate judgments) unanimously held that the EM Act complied with s 92. Following *Wootton v Queensland* (2012) 246 CLR 1, an Act may be challenged directly for non-compliance with the Constitution, whereas a subordinate instrument such as a regulation or direction may only be challenged indirectly, on the basis that, once its enabling Act is properly construed to be compliant with the Constitution, the subordinate instrument is not validly authorised by that enabling Act. Since it was not pleaded that the Directions were not validly authorised by the EM Act, once it was established that the EM Act complied with s 92, no question could arise as to whether the Directions were, indirectly, non-compliant with s 92. (This evidently caused some confusion in how the case was pleaded, as the plaintiffs addressed their submissions to the alleged constitutional invalidity of the Directions as such.)

The Court unanimously found the EM Act, in the circumstances in which it had been put into effect by the Direction declaring border lockdown as to the entire state of WA, created a differential burden between, on the one hand, intrastate trade, commerce and intercourse (which was not impeded by the border closure), and on the other hand, interstate trade, commerce and intercourse



(which was impeded by the border closure). However, the Court unanimously found this differential burden to be justified.

Kiefel CJ, Keane and Edelman JJ held that the proper test for justification was 'structured proportionality', a three-stage test whereby one asks whether 1) the differential burden imposed by the legislation is suitable to a legitimate non-discriminatory purpose, 2) the differential burden is necessary to achieve that purpose (in the sense that there is no other, less burdensome method reasonably available to achieve that purpose), and 3) there is an adequate balance between the importance of the purpose and the gravity of the burdens imposed on interstate trade, commerce and intercourse (see Edelman J at [269]-[276]).

Gageler and Gordon JJ held that the proper test for justification was 'reasonable necessity', an evaluative judgment that considers the suitability and necessity of the Act imposing the differential burden, but operates as a high standard to be satisfied rather a series of steps to be individually fulfilled (see Gageler J at [136]-[137]).

Quite apart from disagreements as to the proper test for justification, the fact that every member of the Court agreed that the differential burden imposed by the EM Act was justified was no doubt assisted by the clear findings of Rangiah J of the Federal Court, to whom the matter had been remitted for determination of the factual question (*Palmer v Western Australia (No 4)* [2020] FCA 1221). Rangiah J found that the border closure imposed by the Directions was reasonably necessary and efficacious. Key to this was the reasoning that the uncertainties relating to the consequences of COVID-19 being imported across a more porous border and the gravity of the consequences justified the application of the 'precautionary principle' in assessing reasonable necessity of the border closure. The 'precautionary principle' was mentioned with apparent approval Kiefel CJ and Keane J (at [23] and [79]) and was not the subject of criticism from any of the other justices.

The significance

The chief significance of *Palmer v Western Australia* lies in the fact that it establishes that the same standards are to apply to interstate trade and commerce and interstate intercourse under s 92. The same standard is to apply to determining what kind of differential burden is *prima facie* prohibited by s 92: whether it is interstate trade and commerce or interstate intercourse which is alleged to be burdened. The same standard is to apply for justifying (and thereby rendering comfortable with s 92) such *prima facie* infringements, whether it is interstate trade and commerce or interstate intercourse which is burdened. *The High Court has reunited broken parts, has set broken bones.*

The High Court's unanimous decision in *Cole v Whitfield* (1988) 165 CLR 360 ('the Tasmanian Lobster Case') had proceeded on the assumption that the test which it laid down for breach of s 92 – an Act discriminatory in a protectionist sense – was to apply to interstate trade and commerce but not necessarily interstate intercourse, with interstate intercourse to remain a personal freedom of movement as understood under *Gratwick v Johnson* (1945) 70 CLR 1. However, the validity of this distinction had been questioned in the intervening years (see, e.g., *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 456-457).

Palmer v Western Australia now confirms that the same standard applies to interstate trade and commerce and interstate intercourse. One basis for this reunion of broken parts was that 'trade, commerce and intercourse' is a composite phrase and there is no textual basis for treating the two limbs of s 92 separately. Applying the same standard also reduces the tension that may exist between two limbs under different standards, especially where interstate movement of a person on business (like Mr Palmer) may be argued to be interstate trade and commerce or interstate intercourse. Finally, applying the same standard recognises that the purpose of s 92 as a whole was to ensure free movement of goods, services and persons throughout Australia and to remove unjustified barriers between the new 'Australian people' which the Constitution was to create (see Gordon J at [182]-[184] and Edelman J at [246]-[249]).

A potential difficulty with *Palmer v Western Australia* is that a court of five justices split 3-2 on the content of the proper test for justification. Thus, there remains a possibility that a fully-constituted court of seven justices would split 4-3 in the other direction. To continue the surgical metaphor: *What are these bones that the High Court has re-set: a set of left or right pollical phalanges?*

In support of structured proportionality, Kiefel CJ, Keane and Edelman JJ considered that it is transparent and logical in its operation, and avoids fictions, hidden grounds for decision and mere conclusory statements based in judicial impression (see [55] and [264]-[266]). The adoption of structured proportionality also has the effect of applying the same test to justification of differential burdens under s 92 as applies to restrictions of the implied freedom of political communication since *McCloy v New South Wales* (2015) 257 CLR 178.

Gageler and Gordon JJ, on the contrary, determined that structured proportionality is too rigid a tool to determine whether burdensome legislation is justified (see [144] and [198]). While 'suitability' and 'necessity' may be useful labels to identify certain considerations, to elevate them to formal steps in a test for justification 'tends to lessen the sensitivity of the overall inquiry to the constitutional values which underlie the constitutional freedom protected by the constitutional guarantee at stake' (Gageler J at [145]), and thereby risks a return to pre-*Cole v Whitfield* formalistic tests like the 'criterion of operation'. Gordon J specifically criticised the third, balancing stage of structured proportionality as potentially going beyond the proper role of a court in a separated powers system (at [199]).

The differences between the two contrasting views of the proper content of the test for justification are probably more significant in theory than in practical outcome. As Gageler J pithily put it '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' (at [140]). In the ultimate analysis, it is likely that either 'structured proportionality' or 'reasonable necessity' will produce the same outcome. Individual judges may differ on whether a differential burden is justified, but each judge will probably come to the same conclusion whichever method she or he uses. *Perhaps it doesn't matter whether the re-set bones are left or right pollical phalanges: they can each just as readily give a thumbs up or thumbs down to legislation under s 92.*

The role of protectionism in the analysis also remains to be determined in future decisions, following statements by Kiefel CJ and Keane J at [47], Gageler J at [99] and [114], Gordon J at [184] and Edelman J at [254]-[260].

Whatever the theoretical issues still to be agitated, in principle, the reunion of broken parts of s 92 – the High Court's 'constitutional algebra' – should be welcomed. BN