THE EXTENSION OF THE *WOTTON* APPROACH TO CH III: PREVENTING OR ENCOURAGING HERESY?

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In its recent decision of Commonwealth v AJL20*, the High Court of Australia determined that the prolonged detention of an 'unlawful non-citizen' under the* Migration Act *was lawful. This was despite an accepted failure by the executive to remove him from Australia 'as soon as reasonably practicable' as required by the legislation. In determining whether the circumstances of his detention went beyond established limits derived from ch III of the* Constitution*, the Court applied a 'legislation-centric approach' in which constitutional limits apply only at the level of statute, and not at the level of executive action taken pursuant to such statute. In this article, I argue that the extension of the legislation-centric approach — previously utilised only in 'constitutional freedoms' cases — to the ch III context is problematic. Courts conducting judicial review of administrative action must have the capacity to apply the constitutional limits derived from ch III directly, without consequently invalidating entire statutory provisions. I then explore the capacity of contemporary administrative law to do so, finding that in many immigration detention cases, such limits can be conceptualised within the requirement that executive officers act for a proper purpose.*

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I Introduction

Since its introduction in the 1990s, the uniquely Australian scheme of mandatory immigration detention underpinning the *Migration Act 1958* (Cth) ('*Migration Act*') has been subject to one constitutional challenge after another in the High Court of Australia. In the first such challenge, *Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*'),[1] a majority of the Court upheld the validity of provisions mandating the detention of non-citizens present in Australia without an effective visa.[2] In doing so, however, the majority also expounded key limitations on detention which derived from ch III of the *Constitution*. Very broadly, the Court held that the detention of a citizen against their liberty is (usually) an exercise of judicial power which is only capable of performance by a ch III court.[3] The executive may validly be empowered, however, to detain a *non-citizen* in particular circumstances: namely, if their detention is for a non-punitive purpose which is reasonably capable of being seen as necessary for the purposes of admitting the person to, or removing the person from, Australia.[4] The Court's embrace of *Lim* has ebbed and flowed over the past three decades. In the early 2000s, *Lim*'s influence was diminished in several cases, most notably by the finding of a majority of the Court in *Al-Kateb v Godwin* ('*Al-Kateb*') that the likely indefinite detention of a stateless person was constitutionally permissible.[5] Jurisprudence in the 2010s,

[1] (1992) 176 CLR 1 ('*Lim*').

[2] Ibid 10 (Mason CJ), 33–4 (Brennan, Deane and Dawson JJ), 46–7 (Toohey J), 57–8 (Gaudron J), 74–5 (McHugh J).

[3] See ibid 26–9 (Brennan, Deane and Dawson JJ).

[4] Ibid 32–3 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10).

[5] (2004) 219 CLR 562, 584 [45] (McHugh J), 650–1 [267]–[268] (Hayne J, Heydon J agreeing at 662–3 [303]), 661–2 [298] (Callinan J) ('*Al-Kateb*'). See also *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 499 [21] (Gleeson CJ), 507 [53] (McHugh, Gummow and Heydon JJ), 543 [175]–[176] (Hayne J), 561 [223] (Callinan J) ('*Behrooz*'); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR

however, saw a renewed support for *Lim* which led commentators to anticipate a gradual imposition of stricter limits on indefinite detention by the Court.[6] The Court's most recent decision in *Commonwealth v AJL20* ('*AJL20*'),[7] however, appears to fly in the face of such premonitions.

In *AJL20*, the Court was asked to determine the consequences of the executive failing to remove a person from Australia 'as soon as reasonably practicable',[8] as required by the *Migration Act*, for a purpose which the legislation itself expressly stated was irrelevant.[9] Four justices found that the detention was lawful, and that the provisions allowing the detention were constitutionally valid.[10] A key component of their reasoning rested on the application of a conceptual approach never before utilised in the ch III context — what will be referred to as the 'legislation-centric approach'[11] to constitutional limits, or simply, the '*Wotton* approach'.[12] This approach dictates that constitutional limits 'operate as direct limits on the scope of legislative power only, and do not directly constrain the exercise of statutory executive powers'.[13] Therefore, these limits will only be relevant in constitutional judicial review proceedings ('constitutional

1, 40 [102] (McHugh J), 60 [164]–[165] (Gummow J), 73–4 [211]–[212] (Kirby J), 77 [227] (Hayne J), 85 [263] (Callinan J).

6 See, eg, *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 369–70 [137]–[141] (Crennan, Bell and Gageler JJ) ('*Plaintiff M76*'); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 231 [25]–[26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ) ('*Plaintiff S4*'); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 593 [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) ('*Plaintiff M96A*'). See generally Rohan Nanthakumar, 'Immigration Detention in Australia: An Indefinite Future for Indefinite Detention' (2014) 33(1) *University of Tasmania Law Review* 165; Joyce Chia, 'Back to the *Constitution*: The Implications of *Plaintiff S4/2014* for Immigration Detention' (2015) 38(2) *University of New South Wales Law Journal* 628; Amelia Simpson, 'Executive Detention as a Site for Creative Constitutional Interpretation in Australia' (2019) 45(2) *Commonwealth Law Bulletin* 296.

7 (2021) 273 CLR 43 ('*AJL20*').

8 See, eg, *Migration Act 1958* (Cth) ss 197C(2), 198(6) ('*Migration Act*').

9 Ibid ss 196, 197C.

10 *AJL20* (n 7) 70–1 [45]–[46] (Kiefel CJ, Gageler, Keane and Steward JJ).

11 Janina Boughey and Anne Carter, 'Constitutional Freedoms and Statutory Executive Powers' (2022) 45(3) *Melbourne University Law Review* 903, 904, 909–10.

12 David Hume, '*Palmer v Western Australia* (2021) 95 ALJR 229; [2021] HCA 5: Trade, Commerce and Intercourse Shall Be Absolutely Free (Except When It Need Not)', *Australian Public Law* (Blog Post, 23 June 2021) <https://auspublaw.org/2021/06/palmer-v-western-australia-2021-95-aljr-229-2021-hca-5/>, archived at <https://perma.cc/6Y3D-55VD> ('Except When It Need Not'); *Wotton v Queensland* (2012) 246 CLR 1, 13–14 [21]–[22], [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ, Kiefel J agreeing at 29–30 [74]), 23 [54] (Heydon J) ('*Wotton*').

13 Boughey and Carter (n 11) 904.

review').[14] The only limits on (statutory) executive power are *statutory* in nature, and interpreted without reference to any constitutional limits.[15] Their relevance, the approach dictates, is in proceedings involving judicial review of administrative action ('administrative review') only.[16] The legislation-centric approach had only ever been adopted by the Court in relation to two constitutional freedoms: the implied freedom of political communication ('implied freedom')[17] and the express freedom of interstate trade, commerce and intercourse in s 92 of the *Constitution* ('s 92').[18] Scholars have identified various conceptual and practical difficulties with the approach, which members of the Court have acknowledged yet failed to unanimously address.[19] Far from providing clarification, the utilisation of the approach in this new (and very different) constitutional context has raised further uncertainties.

Part II of this article tracks the development of the legislation-centric approach in relation to the constitutional freedoms and explains some of the issues identified with its use in that context. Part III sets out the established limitations on executive detention derived from ch III of the *Constitution* and their application to Australia's immigration detention scheme. In Part IV, the three judgments of the Court in *AJL20* are analysed. A slim majority of Kiefel CJ, Gageler, Keane and Steward JJ applied a legislation-centric approach in concluding that the prolonged detention of the respondent was lawful.[20]

[14] Ibid 909–10, discussing *Wotton* (n 12) 14 [22]–[24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[15] *Wotton* (n 12) 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ, Kiefel J agreeing at 29–30 [74]).

[16] Ibid 14 [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ, Kiefel J agreeing at 29–30 [74]).

[17] Ibid 13 [19]–[20], 14 [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 17 [39], 23 [54] (Heydon J), 29–30 [73]–[74] (Kiefel J); *Comcare v Banerji* (2019) 267 CLR 373, 395 [20] (Kiefel CJ, Bell, Keane and Nettle JJ), 421–2 [96]–[97] (Gageler J) ('*Banerji*'); *Chief of Defence Force v Gaynor* (2017) 246 FCR 298, 315 [71]–[72] (Perram, Mortimer and Gleeson JJ) ('*Gaynor*').

[18] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 567 (Gibbs CJ), 585 (Murphy J), 591 (Wilson J), 614–15 (Brennan J), 625 (Deane J), 628 (Dawson J) ('*Miller*'); *Palmer v Western Australia* (2021) 272 CLR 505, 530 [63] (Kiefel CJ and Keane J), 545–6 [117]–[118] (Gageler J), 574 [201] (Gordon J), 578 [219], 580 [224] (Edelman J) ('*Palmer*').

[19] Boughey and Carter (n 11) 922–34; James Stellios, '*Marbury v Madison*: Constitutional Limitations and Statutory Discretions' (2016) 42(3) *Australian Bar Review* 324, 335–40 ('Constitutional Limitations and Statutory Discretions'); David Hume, 'Broad Administrative Discretions and Constitutional Limitations: Current Issues' (Working Paper, 30 July 2013) 22–31 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303229>, archived at <https://perma.cc/7FVJ-NESD> ('Broad Administrative Discretions'); Kieran Pender, '*Comcare v Banerji*: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131, 140–5.

[20] *AJL20* (n 7) 70–1 [45]–[46].

Justices Gordon and Gleeson, and separately, Edelman J, issued strongly worded dissents critiquing the reasoning of the majority, and ultimately took approaches involving a more direct application of the ch III limits to the particular action taken by the executive.[21]

In Part V, I identify three major problems with the majority's application of the legislation-centric approach to ch III, building on those identified in its application to the constitutional freedoms. First, it fails to recognise that the ch III limits affect both legislative and executive power, rather than merely the former. Second, it fails to recognise the individualised nature of the ch III limits, which ultimately exist to protect the most fundamental individual right recognised by the common law: liberty. Third, the application of the approach creates a dangerous accountability gap for the executive because it allows individual action taken by the executive to go beyond the ch III limits without adequate judicial intervention. Consequently, this article argues that courts conducting administrative review must have the capacity to consider the ch III limits in individual cases. When they find that such limits have been infringed, this should not result in the automatic invalidity of an entire statutory provision. Part VI thus explores how this might be done. Building on the reasoning of Edelman J's dissent, I argue that in many situations similar to *AJL20*, the ch III limits can be conceptualised within the established administrative law principle that decision-makers must act for the purposes for which their powers and duties are conferred.

II The Legislation-Centric Approach to Constitutional Freedoms

Over the past decade, various majorities of the Court have embraced a legislation-centric approach when dealing with situations raising the implied freedom or s 92. The nature of these constitutional limits is unique in the Australian context. As 'freedoms', the Court has emphasised consistently that they are simply limits on power.[22] They are not, as often characterised in common parlance, akin to American-style constitutional rights belonging to the

[21] Ibid 87–9 [90]–[92] (Gordon and Gleeson JJ), 95–6 [107]–[108], 101–3 [127]–[129] (Edelman J).

[22] *Palmer* (n 18) 530–1 [65] (Kiefel CJ and Keane J), discussing *Wotton* (n 12) 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 258 [14] (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*Betfair*'); *Wotton* (n 12) 30 [76] (Kiefel J), citing *Coleman v Power* (2004) 220 CLR 1, 49 [90] (McHugh J), 77 [195] (Gummow and Hayne JJ) ('*Coleman*'); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

individual.[23] Mills argues that '[a] right is an individual's moral or legal entitlement to have or to do something', while '[a] freedom … is simply the condition of a person who has the capacity to do something'.[24] The implied freedom exists to prevent the political branches from *impermissibly* burdening political communication to the point that constitutionally mandated free and fair elections are jeopardised.[25] Section 92 exists to prevent such actors from imposing protectionist measures which *impermissibly* disadvantage one state over another.[26] As this language highlights, these freedoms can lawfully be limited when there are justifications for doing so, regardless of the effect on individuals.[27] The majority in *Unions NSW v New South Wales* explained that

> [a] … prohibition or restriction on the [implied] freedom is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally.[28]

Weis suggests that 'perhaps what the High Court wants to insist upon is that the function of the [implied] freedom is to protect the *system of government* that is constitutive of popular sovereignty'.[29] Historically, cases concerning the implied freedom and s 92 have usually challenged legislation; however, the early jurisprudence on both indicates that they were intended to limit legislative *and* executive power.[30]

[23] See Lael Weis, 'McCloy Symposium: Lael Weis on Why Political Communication Isn't an Individual Right in Australia', *Opinions on High* (Blog Post, 19 October 2015) <https://blogs.unimelb.edu.au/opinionsonhigh/2015/10/19/weis-mccloy/>, archived at <https://perma.cc/U52W-6D33>. See generally Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374.

[24] Ashleigh Mills, 'Rights and Freedoms under the Australian Constitution: What Are They and Do They Meet the Needs of Contemporary Australian Society?' (2019) 93(8) *Australian Law Journal* 655, 656.

[25] *Lange* (n 22) 571–2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[26] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 465–6 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) ('*Castlemaine*'), quoting *Cole v Whitfield* (1988) 165 CLR 360, 394–5 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) ('*Cole*').

[27] Weis (n 23); *Lange* (n 22) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Betfair* (n 22) 272 [60] (Heydon J); *Coleman* (n 22) 52 [99] (McHugh J).

[28] (2013) 252 CLR 530, 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[29] Weis (n 23) (emphasis in original).

[30] Most commonly, the Court has applied the tests relating to the freedoms to delegated legislation: see, eg, *Levy v Victoria* (1997) 189 CLR 579, 596–7 (Brennan CJ); *Cole* (n 26) 393 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 43–5 [67]–[68] (French CJ), 61–4 [130]–[141] (Hayne J),

The legislation-centric approach first arose in the prominent dissent of Brennan J in *Miller v TCN Channel Nine Pty Ltd* ('*Miller*') in 1986.[31] The *Wireless Telegraphy Act 1905* (Cth) imposed a blanket prohibition on the transmission of messages by wireless telegraphy from a station.[32] The Minister held a wide discretion to issue licences exempting persons from the prohibition.[33] Channel Nine challenged the application of the legislation to its own activities, arguing that it contravened s 92.[34] Given the 'unsophistication' of administrative review in the decades prior to the case, judges had a tendency when dealing with broad discretions which could feasibly contravene s 92 to simply declare them unconstitutional.[35] However, the gradual development of administrative review — through both the development of the common law and enactments like the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') — 'began to ease the Court's concerns.'[36] Consequently, in *Miller*, Brennan J found that a wide discretion

> can be destructive of the validity of the scheme only if the exercise of the discretion conferred by the statute cannot be restrained by judicial review so that its exercise is within constitutional power.[37]

Here, his Honour held that an exercise of the discretion which went beyond the limits of s 92 could simply be held invalid in administrative review on the basis that it went beyond *statutory*, rather than constitutional, power.[38] Boughey and Carter note that Brennan J

> saw judicial review of administrative action as providing the proper *process* through which a person affected by the exercise of discretion in breach of that constraint could seek remedies from a court. However, contrary to the High Court's current trajectory … this does not mean that s 92 is relevant only in constitutional proceedings challenging the statutory provisions conferring discretion.[39]

86–90 [209]–[222] (Crennan and Kiefel JJ, Bell J agreeing at 90 [224]). For a discussion of this history, see Boughey and Carter (n 11) 925–6.

31 *Miller* (n 18) 612–15.

32 *Wireless Telegraphy Act 1905* (Cth) s 6(1).

33 Ibid s 5.

34 *Miller* (n 18) 564 (Gibbs CJ).

35 Stellios, 'Constitutional Limitations and Statutory Discretions' (n 19) 328.

36 Ibid.

37 *Miller* (n 18) 612.

38 Ibid 612, 614.

39 Boughey and Carter (n 11) 908 (emphasis in original).

Two years later, the monumental decision in *Cole v Whitfield* altered the s 92 test so that the provision was 'a far less problematic one'.[40] Consequently, Brennan J's approach was not tested in this context for decades.

The approach was, however, adopted unanimously by the Court in 2012 in *Wotton v Queensland* ('*Wotton*') (hence the abovementioned moniker), in relation to the implied freedom.[41] The appellant challenged the constitutional validity of provisions of the *Corrective Services Act 2006* (Qld), which conferred a wide discretion on the executive to impose parole conditions, *and* the validity of parole conditions which were actually imposed on him through those provisions.[42] The majority, citing Brennan J in *Miller*, found that only the former could be subject to constitutional review.[43] Boughey and Carter state that the 'Court's rhetoric as to the scope of the implied freedom shifted, with the Court referring to the freedom as a limit on legislative power alone, with no mention of executive power'.[44] The majority stated that

> 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.[45]

Such a statutory question, the majority stated, was 'for agitation in other proceedings', meaning administrative review.[46] To be clear, the majority emphasised that the exercise of a discretion which impermissibly burdened the implied freedom *would* be unlawful: it would be 'ultra vires', since Parliament cannot confer authority that it lacks itself.[47] They stated that 'discretionary powers must be exercised in accordance with any applicable law, including the *Constitution* itself'.[48] However, they did not explain *how* this could actually be raised in administrative review proceedings, if not by invoking the implied freedom itself.

[40] Ibid 906; *Cole* (n 26) 394–5 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[41] *Wotton* (n 12) 9–10 [10], 13–14 [21] (French CJ, Gummow, Hayne and Bell JJ, Kiefel J agreeing at 29–30 [74]), 23–4 [54] (Heydon J).

[42] Ibid 9 [9], 13 [19] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Corrective Services Act 2006* (Qld) ss 132, 200.

[43] *Wotton* (n 12) 13–14 [21]–[22], [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[44] Boughey and Carter (n 11) 909.

[45] *Wotton* (n 12) 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[46] Ibid 14 [24].

[47] Ibid 13–14 [21].

[48] Ibid 9 [9].

In later cases, the Court has continuously emphasised its support for the *Wotton* approach but failed to reach a consensus on the above issue. If constitutional limits do constrain executive powers, but can only be brought up through constitutional review, how will an exercise of power going beyond those limits be invalidated through administrative review? In *Chief of Defence Force v Gaynor* ('*Gaynor*') in 2017, a Full Federal Court suggested in obiter dicta that the implied freedom may be treated as a 'relevant consideration' for some decision-makers.[49] A failure to consider the freedom might establish a finding of jurisdictional error under administrative law, even though it does not amount to 'what might be called the "purely" constitutional question' raised in constitutional review.[50] In the 2019 case of *Comcare v Banerji* ('*Banerji*'), a majority of the High Court rejected a submission that the implied freedom was a relevant consideration limiting the discretion in question, but suggested it could be for others.[51] Even more confusingly, the majority suggested that the ground of reasonableness could be raised to ensure discretions were exercised within constitutional limits.[52] Boughey and Carter note the bizarre effect of this, being that '[t]he implied freedom forms the context for what is reasonable, but it should not be expressly mentioned or discussed by the reviewing court in assessing the reasonableness of the decision'.[53]

Justice Gageler in *Banerji* suggested that the issue would never arise since, when assessing the constitutional validity of a statutory provision conferring a discretion, the Court will look 'across the range of potential outcomes of the exercise of that discretion'.[54] Notwithstanding the obvious impracticability of such an endeavour, it remained unexplained what must occur if just *one* potential application of the discretion is found to contravene the implied freedom.[55] The logical conclusion is that the entire statutory provision would be invalid in *all* of its applications. This would of course be absurd, since 'if the hypothetical risk of abuse were a criterion of validity, no power would be valid'.[56] Justice Edelman, on the other hand, held that a broad discretion can simply

[49] *Gaynor* (n 17) 317 [80] (Perram, Mortimer and Gleeson JJ).

[50] Ibid 315 [73]. See also Joshua Forrester, Lorraine Finlay and Augusto Zimmerman, 'Finding the Streams' True Sources: The Implied Freedom of Political Communication and Executive Power' (2018) 43(2) *University of Western Australia Law Review* 188, 195–8; Felicity Nagorcka and Gim Del Villar, 'Statutory Powers and Constitutionally Protected Freedoms' (2017) 87 *Australian Institute of Administrative Law Forum* 10, 12.

[51] *Banerji* (n 17) 405–6 [44]–[45] (Kiefel CJ, Bell, Keane and Nettle JJ).

[52] Ibid 405–6 [44].

[53] Boughey and Carter (n 11) 915.

[54] *Banerji* (n 17) 421 [96] (Gageler J).

[55] Boughey and Carter (n 11) 14–15.

[56] Hume, 'Broad Administrative Discretions' (n 19) 20.

be 'disappli[ed]' in constitutional review proceedings to ensure that no possible applications infringing the implied freedom are valid.[57] Again, it remains unexplained on what basis disapplied applications could be raised in administrative review, without reference to the implied freedom itself.

In early 2021, confusion surrounding the legislation-centric approach reached new heights in *Palmer v Western Australia* ('*Palmer*') when it was applied in the s 92 context for the first time since *Miller*.[58] The *Emergency Management Act 2005* (WA) ('*EM Act*') conferred a discretion on the executive to issue directions in response to a public health emergency.[59] One such set of directions was used to close the Western Australian border in response to the COVID-19 pandemic.[60] The Court was unanimous in its support for the *Wotton* approach, but once again disagreed over its implications. Chief Justice Kiefel and Keane J stated that they must apply the s 92 analysis to the *EM Act* only, but 'in fact assessed the validity of the Directions themselves'.[61] Justice Gageler found that because the *EM Act* contained adequate 'hedging duties'[62] limiting the exercise of the discretion, it could never be exercised in a way which contravened s 92.[63] His Honour did acknowledge, however, that in other cases, it would be too difficult to analyse all of the possible applications of a discretion, and so the Court would be forced to look at the *particular* application before it.[64] Justice Edelman also asserted that in such cases it might be necessary to look at individual applications of a discretion to determine the constitutionality of an entire provision.[65] Boughey and Carter argue that

> [i]t is far from clear how focusing on the *application* of the law to a particular set of facts to assess whether the legislation, as applied in that situation, unreasonably limits the relevant freedom is substantively different from an administrative law approach …[66]

[57] *Banerji* (n 17) 459 [211] (Edelman J).

[58] *Palmer* (n 18).

[59] *Emergency Management Act 2005* (WA) s 67(a).

[60] See, eg, *Quarantine (Closing the Border) Directions 2020* (WA).

[61] Boughey and Carter (n 11) 918; *Palmer* (n 18) 530 [63], 533 [77] (Kiefel CJ and Keane J).

[62] See also *AJL20* (n 7) 70–1 [45] (Kiefel CJ, Gageler, Keane and Steward JJ).

[63] *Palmer* (n 18) 559–60 [166] (Gageler J).

[64] Ibid 547 [123].

[65] Ibid 581–2 [227].

[66] Boughey and Carter (n 11) 920 (emphasis in original).

III Constitutional Limits on Executive Detention

A *Detention as Exclusively Judicial*

At the federal level, Australia does not have a strict separation of powers,[67] but rather a strict separation of judicial power as ensured by ch III's exclusive devotion to the judicature.[68] Section 71 of the *Constitution* vests '[t]he judicial power of the Commonwealth' in courts exercising federal jurisdiction.[69] Since Federation, '[m]any attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive'.[70] Some essential features of judicial power have been identified over centuries. In *Lim*, the majority provided the Court's most detailed explanation yet:

> There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and 'could not be excluded from' the judicial power of the Commonwealth. That being so, Ch III of the *Constitution* precludes the enactment, in purported pursuance of any of the sub-sections of s 51 of the *Constitution*, of any law purporting to vest any part of that function in the Commonwealth Executive. … [T]he involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[71]

The exclusive entrustment of the power to detain a citizen against their will rests with the judiciary for particular reasons. Chief amongst them is the protection of individual liberty — perhaps the most fundamental common law right recognised in Australia — from *unlawful* incursion.[72] Justice Gageler in *Magaming v The Queen* stated that ch III

[67] See, eg, *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 564–5 (Latham CJ).

[68] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See *Australian Constitution* ch III.

[69] *Australian Constitution* s 71.

[70] *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J).

[71] *Lim* (n 1) 27 (Brennan, Deane and Dawson JJ) (citations omitted).

[72] See Jeffrey Steven Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention' (2012) 36(1) *Melbourne University Law Review* 41, 57; Kate Chetty, 'Protection from Arbitrary Detention in Australia: A Proposal for an Explicit Constitutional Right' (2016) 35(2) *University of Tasmania Law Review* 79, 82,

> reflects and protects a relationship between the individual and the state which treats the deprivation of the individual's life or liberty, consequent on a determination of criminal guilt, as capable of occurring only as a result of adjudication by a court.[73]

Stellios takes from such an assertion the idea that liberty in the Australian context is a 'constitutional value'.[74] As characterised by Stellios, Gageler J argues that our constitutional

> structure marks out, at least in part, the contours of the relationship between the individual and the state; and, in determining principles deriving from Chapter III, resort is had to the constitutional value that underpins that structure of government — the protection of an individual's liberty.[75]

B *The Immigration Exception*

The Court in *Lim* also laid out various exceptions to the principle that the involuntary detention of a person will ordinarily be punitive and hence an exercise of judicial power. These limits are all identified by reference to their *purpose*. The executive is, of course, charged with arresting and detaining persons accused of criminal conduct so that they may be brought before the courts.[76] Laws may validly empower the executive to involuntarily detain someone non-punitively 'in cases of mental illness or infectious disease'.[77] Other bodies may also exercise powers of detention without infringing the principle — namely, Parliament in using its contempt powers, and 'military tribunals to punish for breach of military discipline'.[78] The exception most relevant to this article, however, is that relating to immigration. The majority in *Lim* explained that the protections against executive detention for reasons other than adjudging criminal guilt apply only to *citizens*. Non-citizens, due to their differing 'status, rights

104, quoting *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520–1 (Brennan J) ('*Re Bolton*'); ibid 13 (Mason CJ).

73 (2013) 252 CLR 381, 401 [67] (Gageler J) ('*Magaming*').

74 James Stellios, 'Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of "The Relationship of the Individual to the State"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 177, 177–8 ('Liberty as a Constitutional Value').

75 Ibid.

76 *Lim* (n 1) 28 (Brennan, Deane and Dawson JJ).

77 Ibid.

78 Ibid, citing *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 626–7 (Deane J), *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *Re Nolan; Ex parte Young* (1991) 172 CLR 460.

and immunities [to those of] an Australian citizen', hold 'significantly … diminish[ed]' protections under ch III.[79] Pursuant to the aliens power in s 51(xix) of the *Constitution*, the Parliament can validly enact laws regulating non-citizens' entry into, and deportation from, Australia.[80] In fulfilling these actions, the Court in *Lim* held that the executive can validly exercise statutory 'authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation'.[81] To avoid contravening the limits imposed by ch III, such detention must be for a non-punitive purpose which is 'limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[82] This justiciable requirement, Simpson argues, ensured 'that the designated Chapter III courts have a mandated role in overseeing executive detention to ensure it conforms to constitutional requirements'.[83]

The significance of *Lim* was diminished somewhat in the early 2000s in a range of cases before the Court, the most notable being *Al-Kateb*.[84] In that case, a stateless Palestinian man who, under the *Migration Act* as it then stood, was not permitted to remain in Australia and could not practicably be removed to any other country, brought proceedings claiming that his detention was no longer for a purpose related to entry or removal, and hence punitive.[85] Four members of the Court held that his likely indefinite detention was non-punitive because it remained for the ultimate purpose of removal according to the terms of the *Migration Act*; theoretically, circumstances abroad could change to allow him to be resettled elsewhere.[86] Pillai states that

> *Al-Kateb* thus held that indefinite executive detention of an alien in Australia is constitutionally valid, and in doing so cast significant doubt over the 'reasonably capable of being seen as necessary' aspect of the *Lim* principle.[87]

[79] *Lim* (n 1) 29 (Brennan, Deane and Dawson JJ).

[80] Ibid 30–1.

[81] Ibid 32.

[82] Ibid 33.

[83] Simpson (n 6) 306. The 'reasonably necessary' requirement has been labelled 'a weak standard of "proportionality"': see Chia (n 6) 639. It is beyond the scope of this article to discern the precise interpretation of this requirement favoured by the current Court following *AJL20* (n 7).

[84] *Al-Kateb* (n 5).

[85] Ibid 630–1 [195]–[198] (Hayne J).

[86] Ibid 638–40 [224]–[233].

[87] Sangeetha Pillai, 'Plaintiff M96A and the Elusive Limits of Immigration Detention', *Australian Public Law* (Blog Post, 29 May 2017) <https://auspublaw.org/2017/05/plaintiff-m96a-and-the-

Soon after, in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*, Gleeson CJ held that so long as detention was for a non-punitive purpose according to the terms of the *Migration Act*, 'there is no warrant for concluding that, if the *conditions of detention* are sufficiently harsh, there will come a point where the detention itself can be regarded as punitive'.[88] Simpson argues that in these cases, the Court failed to 'accept that particular instances of immigration detention might take their character from their features in practice, rather than the legislative intent that lay behind them'.[89]

Throughout the 2010s, a series of judgments were handed down by the Court which attributed greater significance to *Lim* and less to *Al-Kateb* (without directly overturning it). In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* ('*Plaintiff M76*'),[90] the plurality focused on the 'reasonably necessary' requirement from *Lim* 'as a genuine inquiry — rather than an occasion for reflexive deference' to the supposed intentions of Parliament.[91] They also linked this specifically to the duration of detention, stating that the

> necessity referred to in … *Lim* is not that detention *itself* be necessary for the purposes of the identified administrative processes but that the *period* of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified.[92]

An apparent 'real turning point'[93] came a year later in *Plaintiff S4 v Minister for Immigration and Border Protection* ('*Plaintiff S4*'), where the Court (in obiter dicta) emphasised that '[t]he duration of any form of detention, and thus its lawfulness' must be objectively determinable *by a court*.[94] In *Plaintiff M96A/2016 v Commonwealth*, the Court confirmed that 'an attempt to make the length of detention at any time dependent on the unconstrained, and unascertainable, opinion of the Executive' would be unconstitutional, since a court

elusive-limits-of-immigration-detention/>, archived at <https://perma.cc/9ZSZ-VGXD> ('The Elusive Limits of Immigration Detention').

88 *Behrooz* (n 5) 499 [21] (Gleeson CJ) (emphasis added). See also at 507 [53] (McHugh, Gummow and Heydon JJ), 543 [175]–[176] (Hayne J), 561 [223] (Callinan J).

89 Simpson (n 6) 308.

90 *Plaintiff M76* (n 6).

91 Simpson (n 6) 309.

92 *Plaintiff M76* (n 6) 369 [139] (Crennan, Bell and Gageler JJ) (emphasis in original), discussing *Lim* (n 1).

93 Chia (n 6) 650.

94 *Plaintiff S4* (n 6) 232 [29] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

could not make an objective determination itself.[95] These cases all emphasised that, based on their adherence to ch III, individual instances of detention could *become* unlawful.

C *Habeas Corpus*

When detention *is* found unlawful, the courts maintain a constitutional responsibility to end it immediately.[96] The primary mechanism available to courts to remedy detention which has not been authorised by law is a writ of *habeas corpus ad subjiciendum* ('habeas corpus'). This remedy is

> a court order … commanding either a government official or individual who has forcibly detained a person to produce that detainee for the court to determine the lawfulness of the detention and order the detainee's release if detention is unlawful.[97]

If the detention is found to lack a lawful basis, then the detainee must be released.[98] Given the absence of a prerogative power to detain (at least in peacetime),[99] cases of executive detention in Australia will practically require an assessment of whether detention was authorised by statute. The availability of habeas corpus is intricately linked to the constitutional protection of liberty in ch III, with Groves commenting that it has 'long served as an important safeguard for the liberty of the subject'.[100] In *Re Bolton; Ex parte Beane*,[101] Brennan J explained that

> [m]any of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished

[95] *Plaintiff M96A* (n 6) 597 [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ), citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J). See also Pillai, 'The Elusive Limits of Immigration Detention' (n 87).

[96] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 105 [159] (Gageler J) ('*Plaintiff M68*').

[97] Kellie Robson, 'The State of Personal Liberty in Australia after *M47*: A Risk Theory Analysis of Security Rights' (2013) 39(2) *Monash University Law Review* 506, 518.

[98] Matthew Groves, 'The Use of Habeas Corpus To Challenge Prison Conditions' (1996) 19(2) *University of New South Wales Law Journal* 281, 281.

[99] See Anne Twomey, 'The Prerogative and the Courts in Australia' (2021) 3(1) *Journal of Commonwealth Law* 55, 59; *Lim* (n 1) 28 (Brennan, Deane and Dawson JJ).

[100] Groves (n 98) 281.

[101] *Re Bolton* (n 72).

> force. This is such a case and the common law of habeas corpus and the *Habeas Corpus Act 1679* (31 Car II c 2) [sic] as extended by the *Habeas Corpus Act 1816* (56 Geo III c 100) [sic] are such laws.[102]

Thus, the power to issue habeas corpus is an instrumental feature of judicial power for the purposes of s 71 of the *Constitution*. Li and Ngo argue that it is so fundamental to the Australian constitutional framework that Parliament could never successfully legislate its abolition.[103]

IV *AJL20*

The Court's decision in *AJL20* represents the latest 'piece in the evolving jurisprudential puzzle on the constitutional limits of mandatory immigration detention in Australia'.[104] In the short time since it was handed down, commentators have generally concluded that it represents a shift away from the more interventionist approaches seen in *Plaintiff M76* and *Plaintiff S4*, back towards the 'highly deferential approach' in *Al-Kateb*.[105] Foster summarised this attitude in a recent lecture:

> [M]any of those concerned with the plight of asylum seekers in Australia were saying … 'there's life in Chapter III yet' … 'there's life in *Lim* yet' … 'we just have to wait for the right case to get to the Court' … but I think we're now seeing post-*AJL20* that that is probably not the case …[106]

As will be evident through the below discussion, the majority's utilisation of the legislation-centric approach in this new context was key to this shift.

[102] Ibid 520–1.

[103] Ying Hao Li and Kevin Ngo, 'The Entrenchment of Certiorari and Habeas Corpus: A Reconceptualisation of the Source and Content of Judicial Power' (2016) 27(4) *Public Law Review* 311, 322–3.

[104] Pillai, 'The Elusive Limits of Immigration Detention' (n 87).

[105] Simpson (n 6) 308; Sangeetha Pillai, '*AJL20 v Commonwealth*: Non-Refoulement, Indefinite Detention and the "Totally Screwed"', *Australian Public Law* (Blog Post, 8 August 2021) <https://auspublaw.org/2021/09/ajl20-v-commonwealth-non-refoulement-indefinite-detention-and-the-totally-screwed/>, archived at <https://perma.cc/53HQ-KYRA> ('The Totally Screwed').

[106] Michelle Foster, 'The High Court of Australia and Civil Liberties' (Public Lecture, Melbourne Law School, 13 October 2021) 1:26:03–1:26:16 <https://law.unimelb.edu.au/about/mls-video-gallery/public-lectures-and-events/the-high-court-of-australia-and-civil-liberties-13.10.2021>, archived at <https://perma.cc/2HX8-GJ9S>.

A *Background*

The *Migration Act* in its current form rests primarily on the aliens power in s 51(xix), rather than the immigration power in s 51(xxvii) of the *Constitution*.[107] It defines an 'unlawful non-citizen' as a non-citizen without a valid visa.[108] Section 189 imposes a *mandatory* duty on relevant officers of the executive to detain a person if the 'officer knows or reasonably suspects that a person … is an unlawful non-citizen'.[109] Section 196(1) requires that a person detained under s 189 must be kept in detention 'until' a specified event, one such event being the removal of the person from Australia.[110] Section 198 imposes a duty on the executive to 'remove as soon as reasonably practicable' a detainee who asks to be removed, in circumstances where their application options have been exhausted.[111] Section 197C, at the relevant time, provided that Australia's non-refoulement obligations were *not* relevant for the purposes of removing a person under s 198.[112]

AJL20 is a Syrian citizen who arrived in Australia in 2005 on a child visa.[113] The Minister cancelled his visa in 2014 on character grounds, and he was subsequently detained under s 189(1).[114] While in detention, the executive 'failed to take steps to remove AJL20 from Australia to any country'.[115] In 2019, the executive stopped pursuing any removal or resettlement options.[116] They did not remove him to Syria because they did not want to openly breach Australia's

[107] See *Migration Amendment Act 1983* (Cth); Explanatory Memorandum, Migration Amendment Bill 1983 (Cth) 1; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 443 [156] (Gummow and Hayne JJ).

[108] *Migration Act* (n 8) ss 13–14.

[109] Ibid s 189(1).

[110] Ibid s 196(1)(a).

[111] Ibid ss 198(1), (6).

[112] Ibid s 197C, as at 24 May 2021. After the judgment of Bromberg J was delivered, the Commonwealth Parliament enacted the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) which amended s 197C to provide for the continuing detention (and not the removal) of unlawful non-citizens in respect of whom international non-refoulement obligations have been found to be owed: see Sangeetha Pillai, 'The Migration Amendment (Clarifying International Obligations for Removal) Act 2021: A Case Study in the Importance of Proper Legislative Process', *Australian Public Law* (Blog Post, 10 June 2021) <https://www.auspublaw.org/2021/06/the-migration-amendment-clarifying-international-obligations-for-removal-act-2021/>, archived at <https://perma.cc/ZZ7C-LKVZ>.

[113] *AJL20* (n 7) 56–7 [1] (Kiefel CJ, Gageler, Keane and Steward JJ).

[114] Ibid.

[115] Ibid 87 [88] (Gordon and Gleeson JJ).

[116] *AJL20 v Commonwealth* (2020) 279 FCR 549, 575–6 [105] (Bromberg J) ('*AJL20 (Federal Court)*').

non-refoulement obligations.[117] AJL20 brought proceedings in the Federal Court of Australia claiming that the failure to remove him from Australia as soon as reasonably practicable, in contravention of s 198, rendered his continuing detention unlawful because it was no longer for a non-punitive purpose authorised by either s 196 or ch III.[118] Justice Bromberg made an order in the nature of habeas corpus releasing AJL20 into the community, and separately ordered that the Commonwealth pay him damages for false imprisonment.[119] The Commonwealth's subsequent appeal to a Full Court of the Federal Court was removed into the High Court following an application by the Commonwealth Attorney-General.[120]

B *The Majority*

A majority of the High Court, comprising Kiefel CJ, Gageler, Keane and Steward JJ, allowed the appeal, quashing the orders of Bromberg J.[121] They found that the established failure of the executive to remove AJL20 from Australia as soon as reasonably practicable, in breach of s 198, did not invalidate the lawfulness of his initial, mandatory detention under s 189.[122] In effect (as the dissenting justices point out) the majority asserted that all that is required for a person to be detained, and to be *kept* in detention, is that a relevant officer believe that the person is an unlawful non-citizen pursuant to s 189.[123]

Surprisingly, in reaching their conclusion, the majority accepted the Commonwealth's submission that 'the approach adopted in *Wotton* and now even more clearly explained in *Banerji* and *Palmer* is an approach that is apt to this case'.[124] This was despite the Solicitor-General's acknowledgement in oral argument that the Commonwealth did 'not think the Court has ever applied that analysis specifically in a Chapter III context'.[125] The joint judgment castigated the primary judge for

[117] *AJL20* (n 7) 93 [102] (Gordon and Gleeson JJ).

[118] *AJL20 (Federal Court)* (n 116) 553 [6] (Bromberg J).

[119] Ibid 589 [172]–[173], 590 [177].

[120] *AJL20* (n 7) 59 [10] (Kiefel CJ, Gageler, Keane and Steward JJ).

[121] Ibid 82 [75]–[76].

[122] Ibid 72 [48].

[123] Ibid 84–5 [83] (Gordon and Gleeson JJ).

[124] Transcript of Proceedings, *Commonwealth v AJL20* [2021] HCATrans 68, 305–7 (SP Donaghue QC) ('Transcript of Proceedings').

[125] Ibid 179–80.

> conflat[ing] questions of constitutional validity with questions of statutory interpretation, and questions concerning the purpose of the Act with questions concerning the purpose of the officers of the Executive bound by it.[126]

This criticism arose out of Bromberg J interpreting s 196 'in light of the constitutional constraints upon administrative detention which flow from Chapter III of the *Constitution*'.[127]

Crucially, the majority — citing *Wotton*, *Banerji* and *Palmer* — proclaimed that

> [w]hen the Executive executes a statute of the Commonwealth, as opposed to exercising its common law prerogatives and capacities or whatever authority is inherent in s 61 of the *Constitution*, the constitutional question is whether the statutory authority conferred on the Executive is within the competence of the Parliament; the statutory question is whether the executive action in question is authorised by the statute. If the statute, properly construed, can be seen to conform to constitutional limitations upon legislative competence without any need to read it down to save its validity, then it is valid in all its applications, and no further constitutional issue arises. The question then is whether the executive action in question was authorised by the statute, with that question to be resolved by reference to the statute as a matter of administrative law.[128]

Relying in large part on the 'Court's settled view of the constitutional validity and proper construction of these provisions and their predecessors', the majority assessed ss 189, 196 and 198 as valid in all of their possible applications.[129] Much as Gageler J found in *Palmer*,[130] the joint judgment came to this conclusion based on the existence of (and *not* adherence by officers of the executive to) 'hedging duties' within the *Migration Act*.[131] Specifically, they held that the duty to remove as soon as reasonably practicable in s 198 would always 'give effect to legitimate non-punitive purposes' and hence, prevent any contravention of ch III.[132] Their Honours' reliance on s 198 is ironic given that they effectively assessed that provision as subservient to the mandatory detention provision in s 189. This assessment at the constitutional level illustrates Hume's

[126] *AJL20* (n 7) 69 [42] (Kiefel CJ, Gageler, Keane and Steward JJ).

[127] *AJL20 (Federal Court)* (n 116) 555 [17].

[128] *AJL20* (n 7) 69–70 [43] (Kiefel CJ, Gageler, Keane and Steward JJ) (citations omitted).

[129] Ibid 59 [11], 70–1 [44]–[45].

[130] *Palmer* (n 18) 559–60 [166].

[131] *AJL20* (n 7) 70–1 [44]–[45] (Kiefel CJ, Gageler, Keane and Steward JJ).

[132] Ibid 70 [44].

contention that '[t]he *Wotton* approach works powerfully in favour of the validity of statutes'.[133]

At the administrative law level, the majority stated that a contravention of the duty to remove as soon as reasonably practicable would only attract an order of mandamus to require the performance of that duty.[134] An order of, or in the nature of, habeas corpus would be inappropriate: s 189 would require immediate re-detention '[b]ecause the evident intention of the Act is that an unlawful non-citizen may not, in any circumstances, be at liberty in the Australian community'.[135] The majority also issued a dramatic warning of the supposed consequences of failing to apply a *Wotton*-style approach. If constitutional limitations were to be applied in relation to individual cases under administrative review, and a breach of such limitations was made out, then the necessary result, they proclaimed, would be that an entire enabling provision would be constitutionally invalid in all of its possible applications.[136] This marked the first time that any member of the Court explicitly stated such a result was necessary, despite its inconvenience. As I explain below, there is no logical reason why finding that an executive officer has exceeded constitutional limits on their authority in a single case should invalidate the statutory provision under which they purported to act. Their Honours held that nothing in the earlier ch III jurisprudence provided a basis for

> the heresy that, where a law is within the Parliament's competence because of the imposition of duties on officers of the Executive, delay in performance of those duties by those officers can take the law outside Parliament's competence.[137]

Noncompliance with the duty to remove as soon as reasonably practicable in s 198 (despite being fundamental to the Act's supposed conformity with ch III) would not invalidate the duty to detain in s 189. They found that '[w]ere it otherwise, the supremacy of the Parliament over the Executive would be reversed and the rule of law subverted'.[138]

D *Justices Gordon and Gleeson*

Justices Gordon and Gleeson issued a dissent which was particularly critical of the submissions made by the Commonwealth (and subsequently endorsed by

[133] Hume, 'Except When It Need Not' (n 12).

[134] *AJL20* (n 7) 73–4 [52]–[53], 81 [73] (Kiefel CJ, Gageler, Keane and Steward JJ).

[135] Ibid 76–7 [61].

[136] Ibid 72 [48].

[137] Ibid.

[138] Ibid.

the majority).[139] Their reasoning seemingly represents the natural conclusion to earlier assertions of the Court in cases like *Plaintiff S4*. Unlike the majority, their Honours were focused on how the ch III limits limited *individual* exercises of executive power. They noted early on that '[c]ontinuing detention beyond the limits necessary for constitutional validity is unlawful'.[140] In failing to remove AJL20 from Australia as soon as reasonably practicable, his detention went 'beyond the *time* at which it *should* have come to an end'.[141] It was not authorised by the legislation and was thus unlawful.[142] They held that if the *Migration Act* was read in a way that accepted such circumstances, it 'would render the Ch III limits on Executive detention meaningless'.[143] It would lead to the duration of detention being at the 'unconstrained, and unascertainable, opinion of the Executive' and hence indeterminable by the Court.[144] Their Honours agreed with the majority that the relevant administrative law issue was whether the statutory provisions had been contravened.[145] In contrast, however, they appeared comfortable with undertaking that task 'against the constitutional background'.[146] They also found that habeas corpus was the most appropriate remedy for AJL20's unlawful detention, asserting that the 'concern of habeas is liberty, or, more accurately, remedying unlawful detention'.[147] They labelled the Commonwealth's assertion that mandamus would ensure that the duration of detention was objectively determinable 'glib and unhelpful', given the legal and practical difficulties with persons in immigration detention obtaining such a remedy.[148]

E *Justice Edelman*

Justice Edelman, in dismissing the appeal, was similarly critical of the majority's reasoning. However, his Honour concluded that the detention of AJL20 was unlawful for unique reasons. The touchstone of Edelman J's reasoning was the accepted *administrative law* principle that

[139] Ibid 82–95 [77]–[105] (Gordon and Gleeson JJ).

[140] Ibid 83 [79].

[141] Ibid 84 [81] (emphasis in original).

[142] Ibid 86–7 [87].

[143] Ibid 84–5 [83].

[144] Ibid 83–4 [80], quoting *Plaintiff M96A* (n 6) 597 [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[145] *AJL20* (n 7) 88–9 [92] (Gordon and Gleeson JJ).

[146] Ibid 85 [84].

[147] Ibid 89 [93].

[148] Ibid 91–2 [99].

> statutory authority is generally conferred subject to the implication that it will be exercised within the scope and purposes of the statute, which might, themselves, be constitutionally constrained.[149]

An exercise of power is likely to be unlawful if done for a purpose for which it was *not* conferred.[150] Here, his Honour found that the executive went even further, since it acted not just for an incorrect purpose, but indeed, 'for an objective purpose that is contrary to an express provision concerning the scope of the *Migration Act*'.[151] The Commonwealth breached its duty to remove AJL20 as soon as reasonably practicable for a purpose which the legislation specifically regarded as irrelevant: Australia's non-refoulement obligations.[152]

His Honour determined that the well-established requirement that statutory *powers* be exercised in accordance with the scope and purpose of the relevant statute is equally applicable to statutory *duties*.[153] If this were not adhered to, then

> the *Migration Act* [would be] an island of freedom from established legal concepts, permitting the Executive to act for any purpose in the exercise of its powers or the performance of its duties, no matter how far that purpose departs from the express or implied terms of statutory authority.[154]

Indeed, it would be in breach of the *Lim* principle and constitutionally invalid if this were so.[155] His Honour further explained that the relevant provisions created two separate duties: a duty to detain a person under s 189 *for proper purposes*, and a duty to remove a person as soon as reasonably practicable under s 198.[156] In AJL20's case, both duties were breached, rendering his detention unlawful. His continued detention for the purpose of fulfilling Australia's non-refoulement obligations was contrary to an express purpose of the *Migration Act*, as made plainly evident by s 197C.[157] The Commonwealth having acknowledged from the outset that removal did not occur as soon as

[149] Ibid 95 [107] (Edelman J).

[150] See below Part VI. See also *Brownells Ltd v The Ironmongers' Wages Board* (1950) 81 CLR 108, 119–20 (Latham CJ) ('*Brownells*'); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 186–7 (Gibbs CJ) ('*Toohey*').

[151] *AJL20* (n 7) 95 [106] (Edelman J).

[152] Ibid 113 [156]; *Migration Act* (n 8) s 197C, as at 24 May 2021.

[153] *AJL20* (n 7) 100–1 [124]–[125] (Edelman J).

[154] Ibid 95–6 [108].

[155] Ibid 96 [109], discussing *Lim* (n 1).

[156] *AJL20* (n 7) 96 [110].

[157] Ibid 97–8 [113].

reasonably practicable, the second duty was clearly breached too.[158] His Honour further held that the first contravention would attract a remedy of habeas corpus and the second an order of mandamus.[159]

V Problems with Applying the Legislation-Centric Approach to ch III

The extension of the legislation-centric approach to the ch III context has by no means resolved the issues identified with its application to the constitutional freedoms and, if anything, has created further confusion. Unlike with those freedoms, there is not even consensus amongst the justices that the approach *should* apply in this area. The following sections explore three specific problems with its new-found application.

A *Chapter III Affects Legislative and Executive Power*

The utilisation of the *Wotton* approach in *AJL20* fails to recognise that the ch III limits affect *both* legislative and executive power. Chapter III is concerned with preventing the exercise of judicial power by *any* body which is not a ch III court, be that the legislature, the executive, or something else.[160] While the cases referred to in Part III involved constitutional challenges to entire legislative provisions, this cannot mean that ch III's reach is limited to legislative power only. Indeed, given its vast size and resources, the executive branch is the body *most* capable of wrongly detaining people for punitive purposes. It matters not whether officers have acted (properly or not) under legislative authority. *Any* exercise of judicial power by the executive will contravene the constitutional limit.

Once it is accepted that the ch III limits do directly limit executive power, the means for enforcing such limits become relevant. The legislation-centric approach falsely treats constitutional and administrative law as strictly divided, 'not just procedurally, but substantively'.[161] It asserts that statutory executive powers can *only* be limited by the express and implied terms of a statute, which

[158] Ibid.

[159] Ibid 96 [110].

[160] See Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35(1) *Federal Law Review* 25, 29–32; Ronald Sackville, 'The Changing Character of Judicial Review in Australia: The Legacy of Marbury v Madison?' (2014) 25(4) *Public Law Review* 245, 258.

[161] Boughey and Carter (n 11) 928.

must *only* be raised in administrative review.[162] In *AJL20*, the majority found that the only *administrative law* limits on the power to detain were those sourced in the *Migration Act* (for example, s 198) and that such limits were devoid of any influence from ch III.[163] This ignores the fact that Australian administrative law has long been characterised as enforcing *all* legal limits on executive power — not just statutory limits, but those sourced in the common law and the *Constitution* too. In the seminal administrative law case of *Attorney-General (NSW) v Quin*, Brennan J explained that administrative review is concerned with the enforcement of law and legal limits on executive power.[164] In *Victoria v Commonwealth*, Gibbs J stated that the Court's duty to give effect to the provisions of the *Constitution*

> requires us to pronounce on the validity of executive action when it is challenged. Indeed, some might think that the justification for the review by the courts of the constitutional validity of executive acts is even stronger than in the case of legislation.[165]

The judiciary's duty to enforce both statutory *and non-statutory* limits on executive power is further highlighted by the ever-increasing 'constitutionalisation' of Australian administrative law (and the converse decline of statutes like the *ADJR Act*), particularly in the immigration context.[166] In *Plaintiff S157/2002 v Commonwealth*,[167] a majority of the Court held that s 75(v) of the *Constitution* entrenched, according to Reynolds, a 'minimum standard of judicial review that Parliament could neither abrogate nor limit'.[168] Such review, the Court held, was a means 'of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect *any jurisdiction* which the

[162] *Wotton* (n 12) 14 [22], [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[163] *AJL20* (n 7) 70 [43] (Kiefel CJ, Gageler, Keane and Steward JJ).

[164] (1990) 170 CLR 1, 35–6 ('*Quin*'). See also Lynsey Blayden, 'Institutional Values in Judicial Review of Administrative Action: Re-Reading *Attorney-General (NSW) v Quin*' (2021) 49(4) *Federal Law Review* 594, 610–11; Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28(2) *Federal Law Review* 303, 309; Stephen Gageler, 'The Constitutional Dimension' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 165, 171.

[165] (1975) 134 CLR 338, 380.

[166] See generally Debra Mortimer, 'The Constitutionalization of Administrative Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 696; Daniel Reynolds, 'The Constitutionalisation of Administrative Law: Navigating the Cul-de-Sac' (2013) 74 *Australian Institute of Administrative Law Forum* 73.

[167] (2003) 211 CLR 476 ('*Plaintiff S157*').

[168] Reynolds (n 166) 75.

law confers on them'.[169] Boughey and Carter note that administrative review under s 75 of the *Constitution* '*can* be used to challenge the constitutional validity of executive action as well as whether the action has breached statutory limits'.[170] Notably, they refer to two cases brought by immigration detainees which challenged their detention based on both the *Lim* principle *and* breach of statute to illustrate that 'statutory limits on executive power simply cannot always be extricated from constitutional issues'.[171] Indeed, prior to *AJL20*, it did not appear in doubt that courts conducting administrative review could find individual instances of executive detention unlawful because they contravened the *Lim* principle, irrespective of their compliance with an empowering statute. Writing in 2007, Lee stated that

> [t]he purpose underlying *the exercise* of an executive detention power is … crucial in determining the validity of the detention. … Where the executive seeks to effect detention for a purpose which is penal or punitive in nature, *the detention* is rendered unlawful even though it is 'proper' (that is, an intention manifested by the terms of the legislation); it is simply unlawful because the punitive nature of the detention contradicts Chapter III of the *Commonwealth Constitution*.[172]

B *The Constitutional Limit Is Individualised*

One of the supposed justifications behind the legislation-centric approach in relation to the constitutional freedoms is that, if the freedoms were considered in administrative review, they would effectively be transformed into individual rights.[173] In *Gaynor*, for example, a Full Court of the Federal Court criticised the primary judge for determining that a decision to terminate an employee for his statements on social media impermissibly burdened '*his* freedom of political communication'.[174] Boughey and Carter have already explained the difficulties with this argument as applied to the implied freedom and s 92. Most

[169] *Plaintiff S157* (n 167) 513–14 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

[170] Boughey and Carter (n 11) 929 (emphasis in original).

[171] Ibid, discussing *Plaintiff M68* (n 96) 64–5 [16]–[21] (French CJ, Kiefel and Nettle JJ), *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 547 [69], 558 [115] (Hayne and Bell JJ), 584 [215] (Crennan J), 647–9 [478]–[484] (Keane J).

[172] HP Lee, 'Improper Purpose' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 198, 210–11 (emphasis added).

[173] Boughey and Carter (n 11) 927.

[174] *Gaynor* (n 17) 305 [25]–[26], 313–14 [63] (Perram, Mortimer and Gleeson JJ) (emphasis added), quoting *Gaynor v Chief of the Defence Force [No 3]* (2015) 237 FCR 188, 256 [285] (Buchanan J).

relevantly, they argue that even if the freedoms were applied at an individual level, '[j]udicial review of administrative action and its remedies are concerned with limits on executive power, not individual rights'.[175]

In the ch III context, the legislation-centric approach appears even more ill-adapted because of the individualised nature of the limit on power, which is directly concerned with the detention of individuals. As the Court has continuously emphasised since *Lim*, the extent of the ch III protections is diminished only by the differing 'status, rights and immunities' of non-citizens compared with citizens.[176] To be clear, the constitutional limits derived from ch III and explained in *Lim do not themselves* confer rights on individuals.[177] As explained above, the limits — much like the implied freedom and s 92 — are limits on legislative and executive power.[178] Unlike those constitutional limits, however, the ch III limits exist ultimately to further the protection of the most fundamental individual right recognised by the common law: liberty. Stellios argues that in Australia 'the protection and advancement of liberty is primarily, if not entirely, effected through intermediate constitutional structures' like judicial independence.[179] He claims that analyses of ch III often go no further than the separation of judicial power, and thus fail to acknowledge its ultimate role in protecting individual liberty.[180] In contrast, the implied freedom is aimed at ensuring free and fair elections through a guarantee of healthy political discourse.[181] Section 92 is concerned with the economic interests of the states, their businesses and their residents as a whole.[182] This rights-adjacent

[175] Boughey and Carter (n 11) 927.

[176] *Lim* (n 1) 29 (Brennan, Deane and Dawson JJ); *Plaintiff M76* (n 6) 385 [206] (Kiefel and Keane JJ); *Al-Kateb* (n 5) 648–9 [258] (Hayne J).

[177] See, eg, *Lange* (n 22) 560, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[178] Ibid.

[179] Stellios, 'Liberty as a Constitutional Value' (n 74) 180, 189.

[180] Ibid 189–91.

[181] *Lange* (n 22) 570–2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 229–30 [120]–[123] (Gageler J); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 40 [99] (Gageler J), 52–3 [131] (Gordon J), 78 [201] (Edelman J).

[182] *Cole* (n 26) 391–3 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Castlemaine* (n 26) 465–6 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), quoting *Cole* (n 26) 394–5 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 451–3 [10]–[18], 456 [25]–[26] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair* (n 22) 266–7 [42]–[43], 268 [50] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 272 [60] (Heydon J), 286 [105], 289 [114] (Kiefel J); *Palmer* (n 18) 519–20 [27]–[30] (Kiefel CJ and Keane J), 539 [100]–[101], 541 [105] (Gageler J), 564–5 [180]–[181] (Gordon J), 577 [214], 590–1 [248]–[249] (Edelman J).

characteristic further illustrates why the ch III limits should be relevant to individual cases of detention challenged under administrative law. While a law limiting communication or trade can be judged to an extent based on its effect on the implied freedom or s 92 *generally*, a law mandating detention cannot be so easily assessed by its effect on liberty generally without reference to individual cases. Pender notes that

> [i]f constitutional review is the carpenter's saw, administrative review is the surgeon's scalpel — a delicate intrusion confined to the dispute at hand and able to assess the factual matrix in a particularised manner.[183]

The action of detaining a person — whether lawfully or not — will always limit their right to liberty. In contrast, according to the Court's jurisprudence, executive action burdening the freedoms does not limit any rights whatsoever.

C *Unaccountable Detention*

The third problem with the legislation-centric approach as adopted by the majority in *AJL20* is that it creates a significant accountability gap: it allows for individual exercises of executive power to contravene the ch III limits without breaching an empowering statute and thus, to evade judicial scrutiny. Under the approach, a statute conferring powers and duties surrounding detention can be held as constitutionally valid across its 'range of potential outcomes'.[184] However, 'the contravention of a constitutional limitation might only become apparent when the decision-maker, exercising [their] statutory jurisdiction, applies a legislative rule to the circumstances of a particular case'.[185] A detainee affected by that application can only bring a case through administrative review, where courts will not directly apply the ch III limits. Given its unique nature and consideration in *AJL20*, I will focus on these issues as applied to the *Migration Act*, but it is noted that they may arise in other schemes involving detention — for example, under quarantine or anti-terrorism legislation.[186]

Accountability issues have arisen in the constitutional freedoms cases, particularly in relation to broad statutory discretions which appear facially compliant with the freedoms, but once exercised, impermissibly burden them. In

[183] Kieran Pender, '"Silent Members of Society"? Public Servants and the Freedom of Political Communication in Australia' (2018) 29(4) *Public Law Review* 327, 348 ('Silent Members of Society').

[184] *Palmer* (n 18) 547 [123] (Gageler J).

[185] Stellios, 'Constitutional Limitations and Statutory Discretions' (n 19) 325.

[186] See, eg, Anthony Gray, 'Executive Detention in the Time of a Pandemic' (2020) 27(4) *Australian Journal of Administrative Law* 198, 210–13.

those cases, were the statutory provisions conferring the discretions in breach of the *Constitution*? Or was it the parole conditions in *Wotton*,[187] the termination decision in *Banerji*,[188] and the directions in *Palmer*[189] that may have breached the relevant freedom? As highlighted in Part II, the justices have failed to reach a consensus on the appropriate approach to this issue, with Edelman J in *Palmer* referring to it as a 'tension'.[190] The majority's extended application of the legislation-centric approach in *AJL20* has by no means resolved this tension. When the Commonwealth submitted that the approach should be utilised, it acknowledged this unresolved 'broad discretion problem', but argued that because the relevant provisions in the *Migration Act* were *duties*, rather than powers, the problem could not arise.[191] The Solicitor-General suggested that

> the current case … is a situation that is particularly apt for the application of this analysis because not only do you not have broad and general discretions, you have no discretion at all.[192]

Neither in oral argument nor in their judgment do the majority justices seem inclined to challenge this convenient assertion.

I argue that this justification is flawed and has the effect of obscuring discretionary actions by the executive under the *Migration Act* which can *themselves* infringe the ch III limits in individual cases. To be clear, I do not dispute that s 189 of the *Migration Act* imposes a mandatory duty on relevant executive officers to detain an unlawful non-citizen. However, the scheme of detention — particularly following *AJL20* — effectively allows for the duration and conditions of an individual's detention to be at the 'unconstrained discretion of the [e]xecutive'.[193] The effect of the majority's decision is that the sole requirement to detain someone and keep them in detention is that the relevant officer knows or has a reasonable suspicion that the person is an unlawful non-citizen.[194] After noting this, Gordon and Gleeson JJ held that '[t]he logical, and inevitable, consequence … is that … detention could lawfully continue for so long as the

187 *Wotton* (n 12) 9 [9], 13 [19] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

188 *Banerji* (n 17) 389–91 [2]–[7] (Kiefel CJ, Bell, Keane and Nettle JJ).

189 *Palmer* (n 18) 513–15 [1]–[8] (Kiefel CJ and Keane J).

190 Ibid 584 [231]–[232].

191 Transcript of Proceedings (n 124) 79–89, 298, 316–24 (SP Donaghue QC).

192 Ibid 233–6.

193 *Plaintiff S4* (n 6) 230 [22] (French CJ, Hayne, Crennan, Kiefel and Keane JJ). This analysis is further illustrated by the extremely wide and non-compellable statutory discretion conferred on the Minister to bring detention to an end: *Migration Act* (n 8) s 195A.

194 *AJL20* (n 7) 81 [72] (Kiefel CJ, Gageler, Keane and Steward JJ). See Foster (n 106) 25:32–25:40; Pillai, 'The Totally Screwed' (n 105).

Executive chose, notwithstanding non-compliance with s 196'.[195] Within this extremely minimal requirement there is scope for officers to detain persons, or control the conditions of their detention, for a plethora of different reasons, whether punitive or not. Foster notes that

> worryingly, the majority described as problematic the notion that pursuit by the executive of a purpose that is unauthorised or even prohibited by the Act might render the detention invalid.[196]

Indeed, this was the supposed 'heresy' to which they referred.[197]

Suppose that a relevant executive officer 'knows or reasonably suspects that a person … is an unlawful non-citizen'.[198] Compelled by the duty in s 189, the officer detains the person. The sole legal requirement to begin and continue detention has been met. This tells us nothing about the *purpose* for that person's ongoing detention beyond the unhelpfully broad purpose of segregation from the Australian community. Within this framework, the officer could easily, as Edelman J suggests, detain the person 'as a penalty for perceived adverse behaviour'.[199] Such a purpose is clearly punitive, both in its intent and effect on the individual. It is not reasonably necessary for determining whether the person should be admitted to, or deported from, Australia. Like AJL20, that person's application options may become exhausted, such that they request removal to their place of origin under s 196. Unlike in that case, however, the officer may determine to keep the person in detention *purely* as punishment, rather than to pursue the 'morally justifiable' but legally irrelevant purpose of adhering to Australia's non-refoulement obligations.[200] Applying the legislation-centric approach, a court conducting constitutional review would likely find s 189 valid (as has continuously occurred since *Lim*). A court conducting administrative review would be limited by the strict terms of the *Migration Act*, and thus unable to consider whether the individual instance of detention mandated by s 189 contravened ch III. So long as the officer maintained the requisite opinion that the detainee was an unlawful non-citizen, ongoing detention would be lawful according to the legislation. Thus, habeas corpus would be unavailable. A finding that the duty in s 198 was breached would not affect the supposed lawfulness of the detention, but would at most

195 *AJL20* (n 7) 84–5 [83] (Gordon and Gleeson JJ).

196 Foster (n 106) 24:28–24:40.

197 *AJL20* (n 7) 72 [48] (Kiefel CJ, Gageler, Keane and Steward JJ).

198 *Migration Act* (n 8) s 189(1).

199 *AJL20* (n 7) 97 [111].

200 *AJL20 (Federal Court)* (n 116) 579–80 [123] (Bromberg J).

result in an order of mandamus, which is unlikely to release the detainee.[201] The detainee would remain in detention for a punitive purpose. Such circumstances, even if relatively rare, are wholly inadequate.

The majority's primary justification for allowing situations like this to occur is misleading. It bears repeating that declaring executive action invalid for breaching constitutional limits *would not* necessarily invalidate an entire statutory provision conferring a power or duty. Hume argues that

> the mere possibility that a power may be abused cannot render the statutory conferral of power invalid: any statutory power can be abused and all laws would be invalid if the possibility of abuse was fatal to validity.[202]

The majority is correct to assert that the 'validity *of the Act* … cannot be set at nought by the intents or purposes of the officers of the Executive whose duty it is to enforce the Act'.[203] However, the validity *of executive action itself* can and should be determined by reference to those officers' intents or purposes. Such validity should be judged against not just the terms of the *Migration Act*, but the ch III limits influencing those terms. As Hume comments:

> [W]hat is relevant is not misapplication per se, but *uncorrected* misapplication. If power is misapplied, but that misapplication is corrected, the power may still in practical terms advance its purpose and not burden a constitutionally-protected interest.[204]

Given the incapacity of statutes like the *Migration Act* to *always* correct misapplications of executive power, the ch III limits must be there to do so in individual cases.

VI How Can the Limits Be Enforced Individually?

The above discussion illustrates that the legislation-centric approach as applied in *AJL20* does not suit many situations where the ch III limits are engaged. Courts conducting administrative review must have the capacity to apply the ch III limits to individual instances of executive detention. When a court finds that a legal error has been made based on a contravention of the limits, this should not result in the 'all-or-nothing approach to validity' proclaimed by the

[201] See *AJL20* (n 7) 91–2 [99] (Gordon and Gleeson JJ).

[202] David Hume, '*Wotton v Queensland*: "Islands of Power" and Political Speech on Palm Island' (Working Paper No 39, University of New South Wales Faculty of Law Research Series, 17 February 2012) 11.

[203] *AJL20* (n 7) 70–1 [45] (Kiefel CJ, Gageler, Keane and Steward JJ) (emphasis added).

[204] Hume, 'Broad Administrative Discretions' (n 19) 30 (emphasis in original).

majority in *AJL20*.[205] Administrative review has always concerned itself with enforcing *all* legal limits on executive power, including those sourced in the *Constitution*.[206] A finding that constitutional limits have been contravened at the administrative law level cannot logically result in the automatic invalidity of an entire empowering statute. It will simply invalidate that action. This section explores *how* administrative law principles can best accommodate the ch III limits in practice, particularly in circumstances like those experienced by AJL20. I argue that the ch III limits can often be conceptualised within the existing administrative law principle that executive officers act for the purposes for which their powers and duties are conferred.

Analyses of how courts conducting administrative review may assess constitutional limits are often centred around accommodating them within commonly accepted 'grounds of review'.[207] Such grounds are merely convenient labels used by practitioners and academics to categorise popular bases for finding that executive action has gone beyond legal limits. The grounds do *not* constrain what courts are tasked with doing: determining whether *any* legal limits on executive power have been breached, not just those 'set out in a statute or textbook'.[208] Thus, while it is convenient to accommodate constitutional limits within accepted administrative law principles (as I do below), it must be re-emphasised that these principles are by no means exhaustive or restrictive.

As highlighted in Part II, there has been considerable difficulty amongst scholars, litigants and courts with translating the constitutional freedoms into common administrative law principles. No members of the Court have enthusiastically endorsed either treating the freedoms as relevant considerations or using them to inform the boundaries of reasonableness. The difficulties with such approaches have been discussed elsewhere.[209] However, this section explores how in many, perhaps most cases, a less popular but well-established administrative law principle may already conveniently accommodate the ch III limits: that executive officers must act for an authorised purpose. Justice Edelman's dissent in *AJL20* provides a useful jumping-off point for such discussion.[210] The principal basis for this argument is that, at a high level, the ch III limits are *already* concerned with the *purposes* for executive action.

[205] Pender, 'Silent Members of Society' (n 183) 347.

[206] See *Quin* (n 164) 35–6 (Brennan J). See, eg, *Plaintiff S157* (n 167) 504 [71], 505 [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[207] Boughey and Carter (n 11) 930.

[208] Ibid 931.

[209] Ibid 930–1; Stellios, 'Constitutional Limitations and Statutory Discretions' (n 19) 335–40; Hume, 'Broad Administrative Discretions' (n 19) 14–18.

[210] *AJL20* (n 7) 95–114 [106]–[157].

Though beyond the scope of this article, it is noted that there remains some uncertainty around the precise meaning of the reasonably necessary requirement of the *Lim* test — at least at the constitutional level — in the wake of *AJL20*. Therefore, it is not expected that this method should work in all cases, but it would likely be of value in circumstances where executive action has been pursued for punitive purposes, or other purposes not supported by the aliens (or another relevant head of) power.

A *Improper Purpose*

It is a well-established administrative law principle that executive action may be beyond power if a statutory power is exercised, or a statutory duty is performed, for a purpose for which it was not conferred. Chief Justice Latham explained this general proposition in *Brownells Ltd v The Ironmongers' Wages Board* as follows:

> [W]here a statute confers powers upon an officer or a statutory body and either by express provision or by reason of the general character of the statute it appears that the powers were intended to be exercised only for a particular purpose, then the exercise of the powers not for such purpose but for some ulterior object will be invalid.[211]

In *AJL20*, Edelman J found that the primary purpose for the executive's action in refusing to remove AJL20 from Australia was *expressly* contrary to the purposes of the *Migration Act*.[212] Section 197C specifically made consideration of non-refoulement obligations in removal decisions irrelevant.[213] Hence, his Honour found that the duty to detain and continue detention *for proper purposes* was breached.[214]

In assessing the *implied* purposes for which powers and duties are conferred, however, regard can (and should) be had to the *Constitution*. In *Shrimpton v Commonwealth*, Dixon J held that

> finality, in the sense of complete freedom from legal control, is a quality which cannot, I think, be given under our *Constitution* to a discretion, if, as would be the case, it is capable of being exercised for purposes, or given an operation,

[211] *Brownells* (n 150) 120. See also *Toohey* (n 150) 186–7 (Gibbs CJ).

[212] *AJL20* (n 7) 97–8 [113].

[213] *Migration Act* (n 8) s 197C, as at 24 May 2021.

[214] *AJL20* (n 7) 97–8 [113].

> which would or might go outside the power from which the law or regulation … derives its force.[215]

In other words, a statutory discretion which 'derives its force' from the *Constitution* cannot be exercised for a purpose going beyond constitutional limits. Hume similarly remarks that '[a] broad discretion capable of being exercised to burden a constitutionally-protected interest can only be valid if the provision has a compatible purpose'.[216] In *Schlieske v Minister for Immigration and Ethnic Affairs* ('*Schlieske*'), Wilcox and French JJ specifically tied the existence of a provision in the *Migration Act* to a head of power in s 51 of the *Constitution*.[217] This illustrates that a court conducting administrative review can tie the constitutionally-limited purposes permitted by ch III to the permissible purposes for which an executive officer can exercise their powers and perform their duties under the *Migration Act*. Indeed, in *AJL20*, Edelman J specifically held 'that the valid purposes for detention' are confined by the *Lim* principle and that the general purposes of the *Migration Act* must be determined 'as constitutionally constrained'.[218]

In many cases concerning immigration detention, decisions are likely to be made based on multiple purposes. For example, the officers in *AJL20* could be considered as having kept AJL20 in detention both for the purposes of segregation from the community *and* to prevent contravention of Australia's non-refoulement obligations. Generally, where a decision has been made for multiple purposes, Australian courts have tended to ask whether the unauthorised purpose was 'a substantial purpose actuating' the decision.[219] However, this remains merely a 'useful guide'.[220] The scope for allowable ulterior purposes will always be determined based on the relevant statute. In *Schlieske*, the Court held that the *Migration Act* forbade consideration of *any* extraneous purposes by the Minister when making a deportation decision.[221] The *Lim* principle prohibits

215 (1945) 69 CLR 613, 629–30.

216 Hume, 'Broad Administrative Discretions' (n 19) 16.

217 (1988) 84 ALR 719, 724 (Wilcox and French JJ) ('*Schlieske*').

218 *AJL20* (n 7) 101–3 [127], [129].

219 *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 41 ALR 467, 469 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ). See also *Thompson v Randwick Municipal Council* (1950) 81 CLR 87, 106 (Williams, Webb and Kitto JJ).

220 Robin Creyke et al, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 5th ed, 2019) 582 [10.2.11]. See also JJ Spigelman, 'The Equitable Origins of the Improper Purpose Ground' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 147, 157.

221 *Schlieske* (n 217) 729–31 (Wilcox and French JJ).

any imposition of punitive detention.[222] Thus, in interpreting the provisions of the *Migration Act* concerning detention '[a]s constitutionally constrained' by the ch III limits,[223] a court conducting administrative review could determine that the mere *presence* of a punitive purpose — no matter how influential it ultimately was on a final decision — would take the decision beyond power.

The statutory hedging duties that the majority relied on in *AJL20* as ensuring constitutionality could provide a further basis for confining the purposes for which detention can be pursued to align with the ch III limits. The duty to remove a person as soon as reasonably practicable in s 198 was not inserted into the *Migration Act* for no reason. Its specific inclusion reasonably appears designed to ensure (at least at the level of the entire statute) compliance with ch III, and thus, the protection of individual liberty. Dixon notes that, in many implied freedom cases (including *Banerji*),

> [m]embers of the Court have made … suggestions … emphasising the connection between relevant legislative interests and common law constitutional values (ie, rights and freedoms recognised by the common law).[224]

Applying this analysis to AJL20's situation, a court conducting administrative review could have determined that the executive's purpose for continuing detention when it was reasonably practicable to remove him to Syria was, at least in part, punitive, and thus beyond the purposes for which the powers and duties pertaining to detention were conferred. Since this purpose analysis is conducted wholly at the administrative law level, it would not pose a threat to the validity of the *Migration Act*, as the majority feared. Thus, while it may not work in every case, this approach provides a solution to the accountability issues discussed above in circumstances like AJL20's and demonstrates that the majority's concerns of automatic invalidity are unfounded.

VII Conclusion

The new-found application of the legislation-centric approach to ch III in *AJL20* has, far from resolving concerns identified with use of the approach in other constitutional contexts, increased confusion about its operation. The Court should not apply an approach which renders the *Constitution* a limit only on legislative power merely because it might become available to litigants engaged in administrative review. This article tracked the rise of the legislation-

[222] *Lim* (n 1) 33 (Brennan, Deane and Dawson JJ).

[223] *AJL20* (n 7) 102–3 [129] (Edelman J).

[224] Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92, 108–9.

centric approach in relation to the implied freedom and s 92, and issues with its use there. It then explained the key limits deriving from ch III and their goal of protecting the most fundamental individual right recognised by the common law: liberty. Next, it discussed the three animated judgments handed down by the members of the Court in *AJL20*. The particular issues arising from the application of the legislation-centric approach to ch III were then explored. The approach fails to recognise that the ch III limits affect both legislative and executive power, and that they are individualised. Further, it allows the executive to act beyond the ch III limits without being held accountable by the judiciary. Courts conducting administrative review must have the capacity to consider the ch III limits in individual proceedings. When doing so, a finding that an executive officer contravened those limits should not have the absurd, 'here[tical]' result that an entire empowering statute is automatically invalidated.[225] Quite the contrary. I have demonstrated that there exists a relatively straightforward and familiar way to accommodate the ch III limits within Australia's existing administrative law framework: by allowing them to inform the purposes for which statutory powers and duties are conferred.

[225] See *AJL20* (n 7) 72 [48] (Kiefel CJ, Gageler, Keane and Steward JJ).