



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B26 of 2020

BETWEEN:

CLIVE FREDERICK PALMER
First Plaintiff

MINERALOGY PTY LTD (ABN 65 010 582 680)
Second Plaintiff

and

THE STATE OF WESTERN AUSTRALIA
First Defendant

CHRISTOPHER JOHN DAWSON
Second Defendant

**OUTLINE OF ORAL SUBMISSIONS TO BE MADE BY THE ATTORNEY-
GENERAL OF TASMANIA INTERVENING**

Part 1 - Certification

1. The Attorney-General for the State of Tasmania (Intervening) certifies that this submission is suitable for publication on the internet.

Part 2 - Argument

2. Tasmania respectfully adopts the written submissions of Victoria at [18]-[25] and [46] to [53].
3. Subject to addressing the two issues which follow, Tasmania relies on its written submissions.
4. First, contrary to the plaintiffs' suggestion [PR 8] that a more stringent test is required in a freedom of intercourse case under s 92 than in a case about the implied freedom of political communication, it is submitted that the correct constitutional question identified

Filed and served on behalf of the Attorney-General for the State of Tasmania (intervening)

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at [Tas 30(b)] is no more or less ‘stringent’ than the constitutional question of what is ‘reasonably required’ or ‘reasonably necessary’ to meet the purpose of the impugned law. However, the constitutional tests for s 92 and the implied freedom are different and proceed from different foundations.

5. In a freedom of intercourse case, the test remains one that requires an analysis of whether the law is justified, or proportionate. No matter which method of analysis is adopted for that test, the constitutional question and therefore the result will be the same.
6. Secondly, the underlying premise of the plaintiffs’ argument [PR 14] is that the test of reasonable necessity demands that there are no less restrictive means of achieving the purpose of the impugned law. The argument is that because less restrictive means are adopted in other jurisdictions, the WA directions must fail.
7. The argument is flawed because:
 - (a) it assumes that the WA Directions amount to a prohibition and that ‘reasonable regulation’ will always be a less restrictive means [PR 15(a)];
 - (b) it fails to identify whether the means adopted in other jurisdictions achieve the same purpose as the WA directions and to the same degree; cf *McCloy v New South Wales* (2015) 257 CLR 178, 210 [57], [81].
 - (c) it fails to take into account the geographical, social and other economic circumstances that apply to Western Australia (as opposed to other jurisdictions) and permit its legislature to choose, within the domain of selections, the means. *McCloy*, [82].
8. As to 7 (a), the plaintiffs’ reply elides the distinction between the purpose of law and the means adopted to achieve it (which may amount to prohibition in some circumstances). ‘...[A] law which has the effect of preventing or impeding the crossing of the border will be held invalid *if the circumstances are such* as to show that that is its only or chief purpose.’ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 57-58 (Brennan J) [Tas 38].
9. As to 7(b) and (c), the question of whether there are less restrictive means goes to the characterisation of the law and does not provide a complete answer to invalidity: *Betfair*

Pty Ltd v Western Australia (2008) 234 CLR 418. That case does not assist the plaintiff because it did not depend on similar considerations. It depended on a national betting market, where transactions and information transcended State borders. In any event, it only provided part of the answer to invalidity: *Betfair No 1*, 478-479 [107]-[110] [cf PR 9]. See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 474-477.

10. It is submitted that the test of what is reasonably required, or necessary in the present case will be satisfied despite the means adopted to limit the spread of COVID-19 in jurisdictions other than Western Australia.
11. In the present case, the question of whether the impugned direction is reasonably required is not informed by whether there are 'less restrictive' means adopted by other jurisdictions, because on the facts of this case the question produces an artificial result. There are simply no established means that will meet the purpose of the WA directions to limit the spread of COVID-19. The means will never 'overreach' the purpose, because the risk of the spread of the disease is both real and unquantifiable.

Dated: 4 November 2020



Michael O'Farrell



Sarah Kay