



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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#### Important Information

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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

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**THE STATE OF WESTERN AUSTRALIA**

First Defendant

**CHRISTOPHER JOHN DAWSON**

Second Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL  
FOR THE STATE OF VICTORIA (INTERVENING)**

**PART I: CERTIFICATION**

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1. These submissions are in a form suitable for publication on the internet.

**PART II: OUTLINE**

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2. Victoria relies on its written submissions. It expands upon two points:

- (1) The **first point** concerns the proper analytical framework to be applied in a case such as this one, where an exercise of statutory power by a decision-maker is claimed to infringe a constitutional limitation (that is, “the *Wotton* point”). If the Court accepts the *Wotton* point, it follows that the plaintiffs cannot obtain the relief they seek in this proceeding, namely a declaration that the Directions are invalid.
- (2) The **second point** concerns the proper approach to s 92 of the Constitution. Because s 92 requires the Court to focus on the character of the impugned laws, the approach to “proportionality” appropriate to s 92 cases is different from the approach adopted in the context of the implied freedom of political communication.

**The *Wotton* point**

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3. The relevant analytical framework is explained at **Vic, paragraphs 18-21**.

- (1) See further Stellios, “*Marbury v Madison*: Constitutional limitations and statutory discretions” (2016) 42 *Australian Bar Review* 324: **JBA, Tab 84**.

4. That approach applies regardless of whether the Directions are legislative or administrative in character; the power to make the Directions (in whatever way they are classified) is found in the EM Act and that Act is limited by the Constitution: **Vic, paragraph 19**; cf **PS, paragraph 21, Reply, paragraph 16**.

5. The approach was first articulated by Brennan J in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 593-594, 611-614 ... **JBA, Tab 49.**
6. The approach was adopted by the Court in *Wotton v Queensland* (2012) 246 CLR 1 at 9-10 [9]-[10], 13-14 [21]-[24] ... **JBA, Tab 70.**
  - (1) The relevant constitutional “test” (for the implied freedom) was akin to the statutory criteria in s 200(2) of the Corrective Services Act; and, as a result, the statutory provision complied with the constitutional limitation: see at 16 [32]-[33] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
  - (2) The Court accordingly considered it “unnecessary to answer” an aspect of the 3rd question reserved – whether the particular exercise of statutory power infringed the constitutional limit: see p 35/38-41 (Answer to Question 3).
  - (3) Victoria submits that is the approach to be applied in the present case, for the reasons explained at **Vic, paragraphs 46-53.**
7. The Court recently affirmed the approach in *Comcare v Banerji* (2019) 93 ALJR 900 at 915-916 [43]-[44] (Kiefel CJ, Bell, Keane and Nettle JJ), 917 [50]-[53], 924-925 [96] (Gageler J), 945-946 [207]-[211] ... **JBA Tab 74.**

### Characterisation

8. The general principles concerning s 92 of the Constitution are set out at **Vic, paragraphs 30-39.**
9. The focus of s 92 is on the proper characterisation of the impugned law, for both the “trade or commerce” limb and the “intercourse” limb.
10. That focus informs the approach to be taken to the “proportionality” analysis. That analysis is undertaken for the purpose of identifying whether a particular law has an impermissible purpose: **Vic, paragraphs 40-42.**
  - (1) *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471-473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
11. The purpose of the proportionality analysis in the context of s 92 is therefore different from the analysis undertaken in the context of the implied freedom of political communication: **Vic, paragraphs 43-45.**

Dated: 4 November 2020

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