



## HIGH COURT OF AUSTRALIA

### NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 02 Nov 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

#### Details of Filing

File Number: B26/2020  
File Title: Palmer & Anor v. The State of Western Australia & Anor  
Registry: Brisbane  
Document filed: DEFENDANT'S WRITTEN SUBMISSIONS REGARDING C  
Filing party: Defendants  
Date filed: 02 Nov 2020

#### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY**

**No. B26 of 2020**

**B E T W E E N:**

**CLIVE FREDERICK PALMER**  
First Plaintiff

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

10

**AND**

**THE STATE OF WESTERN AUSTRALIA**  
First Defendant

**CHRISTOPHER JOHN DAWSON**  
Second Defendant

20

**DEFENDANTS' WRITTEN SUBMISSIONS REGARDING CHANGE IN  
QUARANTINE (CLOSING THE BORDER) DIRECTIONS (WA)**

30

---

Date of Document: 2 November 2020

Filed on behalf of the Defendants by:

State Solicitor for Western Australia  
David Malcolm Justice Centre  
28 Barrack Street  
PERTH WA 6000

Tel: (08) 9264 1874  
Fax: (08) 9264 1440  
Ref: Ed Fearis (1802-20)  
Email: [e.fearis@sso.wa.gov.au](mailto:e.fearis@sso.wa.gov.au)

## Part I: SUITABILITY FOR PUBLICATION

---

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

## Part II: WRITTEN SUBMISSIONS

---

### The Reserved Question

2. As the plaintiffs' submissions do not address the constitutional validity of the *Emergency Management Act 2005* (WA), the only aspect of the substantive reserved question which arises is whether the *Quarantine (Closing the Border) Directions (Directions)* are wholly or partly invalid because they contravene section 92 of the Constitution? The defendants submit that the Directions, as they presently stand, are wholly valid.
3. On 28 May 2020, the plaintiffs expressly indicated that they only seek a determination as to the validity of the Directions as at the date of the hearing into the validity of the Directions.<sup>1</sup> The Plaintiffs' Reply Submissions refer to whether the Directions remain reasonably required on the day that those submissions were filed.<sup>2</sup>

### The History of the Directions

4. On 11 March 2020, the World Health Organisation declared COVID-19 to be a pandemic.<sup>3</sup> This led to the WA Minister for Emergency Services to declaring a State of Emergency under the *Emergency Management Act 2005* to address this pandemic on 15 March 2020.<sup>4</sup>
5. The declaration of a State of Emergency is made pursuant to section 56 of the *Emergency Management Act 2005*.<sup>5</sup> For the purposes of this State of Emergency, the emergency area was the whole of the State of WA.<sup>6</sup>

---

<sup>1</sup> Directions Hearing, 28 May 2020, p 5, lines 159-168.

<sup>2</sup> Plaintiffs' Reply Submissions, 27 October 2020, [13].

<sup>3</sup> *Palmer v WA (No 4)* [2020] FCA 1221, [1] (Case Stated Book, vol 1, p 132) (**CSB1/132**).

<sup>4</sup> *Palmer v WA (No 4)* [2020] FCA 1221, [1] (**CSB1/132**).

<sup>5</sup> See Joint Book of Authorities, vol 1, Tab 4, p 127 (**JBA1/4/127**).

<sup>6</sup> Special Case, definition of "State of Emergency", CSB2/239.

6. A State of Emergency may be extended by the Minister, for a period of up to a further 14 days. This is by reason of section 58 of the *Emergency Management Act 2005*.<sup>7</sup>
7. Under section 67 of the *Emergency Management Act 2005*,<sup>8</sup> the State Emergency Coordinator has the power to give directions for the purposes of the "emergency management" of a state of emergency. These directions may include a direction to prohibit movement into or out of an emergency area.
8. The Directions have been made by the State Emergency Coordinator, and updated from time to time, pursuant to this power. The Directions were first made on 5 April 2020.<sup>9</sup> The Directions remain in place until they are amended, revoked or until there is no longer a "state of emergency".

#### *The Litigation*

9. The present litigation was commenced by a writ of summons in the original jurisdiction of this Honourable Court on 25 May 2020.<sup>10</sup>
10. There were some factual matters in dispute concerning the reasonableness of, and necessity for, the Directions. These matters were set down for a hearing by a judge of the Federal Court, and were heard between 27 and 31 July 2020, before Justice Rangiah. Justice Rangiah delivered judgement on 25 August 2020.<sup>11</sup>
11. On 4 September 2020, this Court ordered that the substantive Reserved Question be referred to consideration by the Full Court in the November sittings.

#### *Amendment of the Directions*

12. As the nature of the pandemic has changed from time to time, and this has caused outside circumstances to change (such as the docking of cruise ships), as well as altering the behaviour of the community in WA, the Directions have required amendment from time to time. They have been amended 8 times.

---

<sup>7</sup> JBA1/4/128.

<sup>8</sup> JBA1/4/134.

<sup>9</sup> *Palmer v WA (No 4)* [2020] FCA 1221, [2] (CSB1/132).

<sup>10</sup> *Palmer v WA (No 4)* [2020] FCA 1221, [4] (CSB1/132).

<sup>11</sup> *Palmer v WA (No 4)* [2020] FCA 1221 (CSB1/127).

13. A consolidated set of the Directions with amendments up to 16 September 2020 has been included in the Case Stated Book.<sup>12</sup> It is proposed that a consolidated set of the Directions with amendments up to 30 October 2020<sup>13</sup> will be included in a Supplementary Court Book (along with the most recent advice from the WA Chief Health Officer). A version of the most recent consolidation will also be annexed to an affidavit in support of these submissions.
14. The hearing before Justice Rangiah necessarily occurred upon the basis of evidence about the pandemic, and the substance of the Directions, as at the end of July 2020.
- 10 15. Since then, the course of the pandemic throughout Australia has been stated in the agreed Special Case.<sup>14</sup> In effect, there have been significant spikes in the number of coronavirus cases in Victoria and to a lesser extent in New South Wales, Queensland and South Australia between the end of July 2020 and the present time. It appears that those spikes, representing outbreaks of coronavirus cases, have now substantially been brought under control or are being brought under control.
16. This has led to a reconsideration of the border restrictions strategy contained in the Directions. In summary, immediately prior to 31 October 2020:
- 20 (a) exempt travellers from States and Territories other than Victoria were, generally, required to self-isolate in home quarantine for 14 days and undergo testing requirements on day 11 of quarantine pursuant to the *Presentation for Testing Directions (No 6)*;
- (b) the categories of exempt travellers permitted to travel from Victoria to WA were more limited. Additional conditions applied to those exempt travellers (such as mask wearing for 14 days). Those Victorian exempt travellers that were permitted entry were subject to certain testing requirements within 2 days of arriving and on day 11 under the *Presentation for Testing Directions (No 6)*.

---

<sup>12</sup> CSB4/1449.

<sup>13</sup> See also Affidavit of Rachel Paljetak, 2/11/2020, ex RP2.

<sup>14</sup> [3]-[23], CSB2/239-243.

17. From 30 October 2020, the Directions were amended so that the categories of exempt travellers permitted entry from Victoria were the same as the other States and Territories and no additional conditions applied to entrants from Victoria.<sup>15</sup> All persons arriving in WA are required to undergo testing at day 11. This represented a loosening of restrictions previously applicable to travellers from Victoria.

### **The Forecast Changes**

- 10 18. There has been a public announcement which indicates that, subject to confirmation by the Chief Health Officer according to the relevant circumstances as they may exist on 14 November 2020, it is anticipated that there will be a further loosening of applicable requirements to all jurisdictions which do not have any community cases of COVID-19 within the last 28 days. This will mean that people may travel to WA from those jurisdictions and will not have to go into any form of quarantine (provided they have only been in such jurisdictions for the last 14 days).
19. That is likely to apply to all jurisdictions, apart from New South Wales and Victoria. Visitors from those jurisdictions may have to go into home quarantine, for 14 days, unless and until community coronavirus cases in their jurisdiction have not occurred for 28 days.
- 20 20. The delay to implement the forecast changes until 14 November 2020 is because:
- (a) New Zealand travellers have been able to enter NSW since 16 October 2020 without quarantine; and
  - (b) all other jurisdictions without any cases of COVID-19 in the last 28 days have announced their intention to open to NSW travellers by 2 November 2020.
21. It follows that, by 14 November 2020:

---

<sup>15</sup> Affidavit of Rachel Paljetak, 2/11/2020, ex RP1.

- (a) 28 days (ie two incubation periods<sup>16</sup> for COVID-19) will have elapsed since New Zealand visitors were allowed to enter NSW without quarantining;
- (b) 14 days (ie one incubation period for COVID-19) will have elapsed since all other borders were open to NSW; and
- (c) it will be possible to confirm that the improvements in each jurisdiction have continued, and that there have not been any unexpected further outbreaks of cases.
22. This will be sufficient time to detect whether any COVID-19 has been imported  
10 into NSW from New Zealand, or into other jurisdictions from NSW; and whether the border controls that NSW and those other jurisdictions have implemented are adequate to keep out COVID-19. If the border controls of those other jurisdictions appear to be sufficient to keep out cases of COVID-19, travellers from those other jurisdictions will then be allowed to enter WA without quarantine.

### **The Effect of the Changes on 30 October 2020 and the Forecast Changes on 14 November 2020**

23. The changes which were made on 30 October 2020 were of small effect. These  
20 changes simply brought the treatment of exempt Victorian travellers into line with travellers from other States and territories. These changes did not relax the suite of restrictions which have come to be described as WA's "hard border" (although there are exemptions available which permit border crossings into WA).
24. The forecast changes on 14 November 2020, if they are confirmed at that time and implemented, will relax the suite of restrictions which have come to be described as WA's "hard border".

---

<sup>16</sup> *Palmer v WA (No 4)* [2020] FCA 1221, [113] (CSB1/132): "The expert witnesses agree that where there have been no reported cases of community transmission of COVID-19 for two incubation periods (28 days), the disease can be described as "eliminated". The experts also agree that where there have been no reported cases of community transmission with an unknown source of infection for 28 days, that is "as low risk a situation as can reasonably be hoped for"."

### The Determination of the Reserved Question

25. As explained, the Reserved Question is limited only to the constitutional validity of the Directions, as opposed to the *Emergency Management Act 2005*, and it appears to concern the constitutional validity of the Directions as at the date of the hearing (ie 3 and 4 November 2020). In those circumstances, the Reserved Question will effectively relate to WA's "hard border". There is nothing hypothetical about that issue.
26. However, if judgment is reserved until after 14 November 2020, and the forecast changes are brought into effect on that date, there may be a question about the utility of then answering the Reserved Question, particularly in so far as it relates to the Plaintiffs' entry into WA from Queensland. The Plaintiffs themselves have indicated that "were the [D]irections ... styled as against coming from an area of identified risk, then they would meet the criterion of reasonable necessity".<sup>17</sup>
27. Whether there is utility in answering the Reserved Question is a matter for the Court's exercise of discretion. If the relevant circumstances occur, there may be no particular utility in answering the Reserved Question for the Plaintiffs. On the other hand, there may be general utility in resolving the nature of the burdens which are consistent with the intercourse freedom, as this issue may arise again in the context of the COVID-19 pandemic.
28. The Defendants are prepared to argue the issues in this case, if the Court determines that there is utility in proceeding; or to proceed in whatever manner the Court considers most convenient.

Dated: 2 November 2020




---

J A Thomson SC, Solicitor-General for WA  
 Telephone: (08) 9264 1806  
 Facsimile: (08) 9321 1385  
 Email: j.thomson@sg.wa.gov.au




---

J D Berson  
 Telephone: (08) 9264 1888  
 Facsimile: (08) 9264 1670  
 Email: j.berson@sso.wa.gov.au

---

<sup>17</sup> Reply Submissions, fn 7.