



HIGH COURT OF AUSTRALIA

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Important Information

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B E T W E E N:

CLIVE FREDERICK PALMER
First Plaintiff

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

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AND

THE STATE OF WESTERN AUSTRALIA
First Defendant

CHRISTOPHER JOHN DAWSON
Second Defendant

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DEFENDANTS' SUBMISSIONS

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Date of Document: 12 October 2020

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Part I: Certification

1. The defendants certify that this submission is suitable for publication on the internet.

Part II: Concise Statement of Issues

2. The issues in the Special Case are stated in the Plaintiffs' Submissions (PS) [2].

Part III: Section 78B Notices

3. The defendants do not consider that any further notice is required.

Part IV: Material Facts

4. The facts are set out in the Special Case, and in the findings of Rangiah J on the remitted question.¹ The defendants have summarised the significant matters below, and indicated where there is a dispute or no dispute with the plaintiffs.

The Border Directions

5. On 11 March 2020, the World Health Organisation declared COVID-19 to be a pandemic.² On 15 March 2020, the Western Australian Minister for Emergency Services declared the State of Emergency³ under the *Emergency Management Act 2005* (the Act) to address the hazard described as "the pandemic caused by virus COVID-19". The State of Emergency is essentially a temporary matter. It can only be extended by periods of up to 14 days.⁴ Consequently the Minister must reconsider whether the State of Emergency is extant fortnightly. The State of Emergency has been continually extended since 15 March 2020.⁵
6. During a state of emergency, the second defendant, as the State Emergency Coordinator, has various powers under the Act, such as powers concerning the movement and evacuation of persons (see s 67), which are exercisable for an emergency management purpose. The Act defines emergency management to include matters directed to the "prevention [of]", "preparedness [for]", "response [to]" and "recovery [from]" an emergency, which is defined to mean "the occurrence or imminent occurrence of a hazard which is of such a nature or magnitude that it requires a significant and coordinated response".⁶

¹ *Palmer v State of Western Australia (No 4)* [2020] FCA 1221 (*Palmer (No 4)*), Court Book Vol 1, 127ff. On 16 June 2020, Kiefel CJ ordered that "so much of this matter as concerns the claim by the defendants of the reasonable need for and efficacy of the community isolation measures contained in the Quarantine (Closing the Border) Directions ... be remitted to the Federal Court of Australia for hearing and determination."

² *Palmer (No 4)* [1], Court Book Vol 1, 132.

³ Special Case [1], "State of Emergency", Court Book Vol 2, 239.

⁴ The Act, s 58(3), (4).

⁵ Special Case [24]-[25], Court Book Vol 2, 243-244.

⁶ The Act, s 3.

7. The second defendant has previously exercised those powers upon the basis of health advice from the Chief Health Officer.⁷ Pursuant to these powers, the second defendant made the *Quarantine (Closing the Border) Directions* (WA) on 5 April 2020 (the **Directions**), which have since been amended several times, most recently on 2 October 2020.⁸
8. The stated purpose of the Directions is to limit the spread of COVID-19.⁹ They aim to do so by limiting the number of people entering Western Australia in order to reduce the probability that people infected with SARS-CoV-2 enter the State¹⁰ and by placing controls on persons who do so enter.

10 **Relevant Features of COVID-19**

9. Justice Rangiah identified 11 features of SARS-CoV-2 and COVID-19 and other matters relevant to the pandemic.¹¹ *First*, COVID-19 has the capacity to kill and affects vulnerable groups with comorbidities, such as people in aged care facilities and Indigenous communities, the most.¹² *Second*, the symptoms of COVID-19 are variable, including symptoms consistent with the common cold.¹³ *Third*, approximately 13% of cases notified in Australia have required admission to hospital.¹⁴ *Fourth*, there is presently no known vaccine or cure for COVID-19,¹⁵ which remains the case.¹⁶ *Fifth*, given there is asymptomatic and pre-symptomatic transmission of SARS-CoV-2, coupled with mildly symptomatic cases, persons may unknowingly spread the virus.¹⁷ *Sixth*, SARS-CoV-2 is highly infectious and is transmitted exponentially, with a reproduction number of approximately 2.3 to 2.5. Rapid uncontrolled community transmission from a single infected individual has occurred in multiple settings where there are otherwise good surveillance and testing control measures in place.¹⁸ *Seventh*, testing for SARS-CoV-2 is imperfect and infectious persons can return negative test results.¹⁹ *Eighth*, transmission

⁷ Special Case [57], Court Book Vol 2, 252; Court Book Vol 5, 1988ff.

⁸ See *Quarantine (Closing the Border) Amendment Directions (No 7)* (WA). A consolidated version of the Directions, including the most recent amendments, will be included in the Joint Book of Authorities.

⁹ Directions, cl 1, Court Book Vol 4, 1449.

¹⁰ *Palmer (No 4)* [71], Court Book Vol 1, 148.

¹¹ *Palmer (No 4)* [84]-[95], Court Book Vol 1, 151-153.

¹² *Palmer (No 4)* [84], Court Book Vol 1, 151. As at 16 September 2020, the crude case fatality rate had increased to 3.05%: Special Case [3], Court Book Vol 2, 240.

¹³ *Palmer (No 4)* [85], Court Book Vol 1, 151.

¹⁴ *Palmer (No 4)* [86], Court Book Vol 1, 151.

¹⁵ *Palmer (No 4)* [87], Court Book Vol 1, 151.

¹⁶ Special Case [2], Court Book Vol 2, 239.

¹⁷ *Palmer (No 4)* [88], Court Book Vol 1, 151-152.

¹⁸ *Palmer (No 4)* [89], Court Book Vol 1, 152.

¹⁹ *Palmer (No 4)* [90], Court Book Vol 1, 152.

of SARS-CoV-2 is stochastic. This is in part because there are variable factors that determine whether a person who displays symptoms or comes into contact with a known case, will undergo testing. Certain such persons will continue with her or his daily routine unless and until they become seriously ill, creating chains of infection and clusters of COVID-19 in the meantime.²⁰ *Ninth*, there is a lag time of at least a week for a "COVID-19 hotspot" to be identified, by which time there may be multiple generations of transmission with people having entered or left the hotspot, potentially with the virus.²¹ *Tenth*, the efficacy of Containment Measures²² depends upon people's willingness and ability to comply. In many cases, people will not comply with such measures.²³ *Eleventh*, due to COVID-19's novelty, there are a number of uncertainties about the disease, with the longer term health impacts unknown.²⁴

Issues Considered on the Remitter

10. In considering the remitted question, Rangiah J determined issues concerned with the risk that an infectious disease which is not presently within the Western Australian population, may enter the population in the future. This necessarily involved making predictions about hypothetical scenarios.²⁵ Justice Rangiah considered that, from a public health perspective, a precautionary approach, consistent with the "precautionary principle", is required.²⁶
11. Justice Rangiah considered the public health risks of COVID-19 in two parts: the probability of a COVID-19 case being imported into Western Australia; and the seriousness of the health impacts if that probability manifests.²⁷ His Honour also considered the efficacy of the Directions in reducing these risks, generally and by comparison to other possible measures; and made specific findings about the matters pleaded in the Second Amended Defence.²⁸ A summary of Rangiah J's findings on each of these matters is set out below. This has been updated by information concerning the probability of a case of COVID-19 being imported into Western Australia.

²⁰ *Palmer (No 4)* [91], Court Book Vol 1, 152.

²¹ *Palmer (No 4)* [93], Court Book Vol 1, 153.

²² See Special Case [1], Court Book Vol 2, 238 for the definition of "Containment Measures".

²³ *Palmer (No 4)* [94], Court Book Vol 1, 153.

²⁴ *Palmer (No 4)* [95], Court Book Vol 1, 153.

²⁵ *Palmer (No 4)* [72], Court Book Vol 1, 148-149.

²⁶ *Palmer (No 4)* [73]-[81], Court Book Vol 1, 149-151.

²⁷ *Palmer (No 4)* [366] (first bullet point), Court Book Vol 1, 214.

²⁸ The Second Amended Defence is effectively in the same terms as the Third Amended Defence in Court Book Vol 1, 39-82. The Third Amended Defence has been updated with matters after the hearing before Rangiah J.

Probability of Importation of COVID-19

12. The probability of importation of the virus if the Directions are removed has been, and can only appropriately be, expressed in qualitative terms. As at the time of the trial of the remitted question, the qualitative probability of importation of COVID-19 was as follows:
- (a) from other parts of Australia overall – high;²⁹
 - (b) from Victoria (which, at the time, had over 4,000 active cases and reported over 100 cases that were locally acquired from an unknown source (**community transmission**) over three days) – high;³⁰
 - 10 (c) from New South Wales (which had ongoing community transmission within the previous 28 days) – moderate;³¹
 - (d) from Tasmania (which had no community transmission within the previous 28 days and border controls that mitigated the risk of "border hopping")³² – very low;³³
 - (e) from each of South Australia, the Australian Capital Territory and the Northern Territory (all of which had no community transmission within the previous 28 days) – low;³⁴ and
 - (f) from Queensland (which had no reported community transmission within the previous 28 days, but had recent cases of local transmission circulating within the community) – too uncertain to assess.³⁵
- 20 13. It can be inferred from the matters set out in paragraph [12] above that the qualitative scale of values articulated by Rangiah J generally corresponds to the following scenarios:
- (a) high – a jurisdiction with a large number of active cases overall and in the order of 30 reported cases of community transmission per day;³⁶
 - (b) moderate – a jurisdiction with at least one reported case of community transmission within the previous 28 days;
 - (c) low – a jurisdiction with no reported community transmission within the previous 28 days; and
 - (d) very low – a jurisdiction with no reported community transmission within the

²⁹ *Palmer (No 4)* [256]-[262], Court Book Vol 1, 190-192.

³⁰ *Palmer (No 4)* [256]-[262], Court Book Vol 1, 190-192.

³¹ *Palmer (No 4)* [264]-[269], Court Book Vol 1, 192-193.

³² See paragraph [21(d)] below.

³³ *Palmer (No 4)* [270]-[274], Court Book Vol 1, 193-194.

³⁴ *Palmer (No 4)* [275]-[285], Court Book Vol 1, 194-195.

³⁵ *Palmer (No 4)* [286]-[289], Court Book Vol 1, 195-196.

³⁶ Based upon 100 cases of community transmission in 3 days, which is just over 30 cases per day.

previous 28 days and border controls that effectively mitigate the risk of border hopping.

14. The state of the pandemic has continued to develop. Justice Rangiah's caution in relation to whether there was community transmission in Queensland was borne out. Queensland reported a number of locally acquired cases between 20 August 2020 and 14 September 2020, including two cases of community transmission on 1 September 2020.³⁷
15. In Victoria and New South Wales, as at 14 September 2020, community transmission was still occurring, with Victoria reporting 20 such cases in the week prior to 14 September 2020 and New South Wales reporting three such cases in the same time period.³⁸
- 10 16. Based only upon the probability of disease importation, Rangiah J accepted that the Western Australian border should not be opened to States or Territories with active community transmission within two incubation periods of COVID-19 (being 28 days) or to places, such as Queensland, where it was unknown whether there was ongoing community transmission.³⁹
17. As at 9 October 2020, by reference to Rangiah J's qualitative scale, the current probability of importation of COVID-19 into Western Australia from interstate is:⁴⁰
 - (a) from other parts of Australia overall – likely moderate;
 - (b) Victoria – likely moderate;
 - (c) New South Wales – moderate;
 - 20 (d) Queensland, South Australia, the Australian Capital Territory and the Northern Territory – low;⁴¹ and
 - (e) Tasmania – very low.⁴²

Serious Health Impacts of Importation into Western Australia

18. In light of the highly infectious nature of COVID-19, if an infected person enters Western Australia, there is a high probability that they will transmit the disease into the Western Australian population.⁴³ If such transmission occurs there is at least a moderate risk of an uncontrolled outbreak for a time, but the extent of the risk cannot be confidently assessed

³⁷ Special Case [14]-[21], Court Book Vol 2, 241-242.

³⁸ Special Case [13], Court Book Vol 2, 241.

³⁹ *Palmer (No 4)* [263], [269] and [291], Court Book Vol 1, 192, 193 and 196.

⁴⁰ Department of Health, Daily Epidemiology Update at 1500, 9 October 2020, 1-2. .

⁴¹ See also, *Public Health Direction – Border Restrictions Direction (No 15)* (Qld); *Emergency Management (Cross Border Travel No 16) (COVID-19) Directions 2020* (SA); *Public Health (COVID-19 Interstate Travellers) Emergency Direction 2020 (No 2)* (ACT); *COVID-19 Directions (No 49) 2020 Directions for Territory Border Restrictions* (NT) as amended by No 50 and No 53.

⁴² *Directions in Relation to Persons Arriving in Tasmania (General)* (Tas) dated 9 October 2020; *Directions in Relation to Persons Arriving in Tasmania from affected Regions and Premises* (Tas) dated 9 October 2020.

⁴³ *Palmer (No 4)* [298], Court Book Vol 1, 197.

and the consequences are of such a serious nature that the precautionary principle ought to be applied.⁴⁴

Efficacy of Directions – Generally and Comparatively

19. The border restrictions contained in the Directions have "very substantially reduced the probability that the virus will be imported into Western Australia from interstate" and are effective.⁴⁵ It is not the case that the contribution of the border restrictions has been "fairly small" compared to other measures.⁴⁶ Rather, the border restrictions had a fairly small contribution to "containing the spread of COVID-19 in Western Australia at that time [being 5 April 2020]" but the restrictions were left in place to guard against future importations of the disease to Western Australia,⁴⁷ and have been effective in doing so.
20. Further, it is not the case that Rangiah J found that border restrictions *could* be eased with some States and Territories without a significantly increased risk of morbidity and mortality within the Western Australian community or population.⁴⁸ Rather, Rangiah J found (as an abstract proposition without immediate application) that it "*may...be possible* to ease the border restrictions with some States and Territories without a significantly increased risk of morbidity and mortality in the Western Australian population...".⁴⁹
21. When considered in the full context of Rangiah J's reasons, the finding that it *may* be possible to ease the border restrictions in some circumstances must be directed to circumstances where a State or Territory has "eliminated" community transmission of COVID-19 for a period of 28 days *and* maintains substantially equivalent border restrictions to Western Australia against States or Territories with community transmission within the last 28 days. This is demonstrated by the following findings:
- (a) the probability of a person infected with COVID-19 entering Western Australia, from Australia as a whole, if border restrictions were completely removed, is high,⁵⁰
 - (b) the easing or relaxation of the Community Isolation Measures contained in the Directions that apply to persons travelling from interstate can only occur without an increased risk of morbidity and mortality within the Western Australian community or population while there is no community transmission within other

⁴⁴ *Palmer (No 4)* [300]-[302], Court Book Vol 1, 198.

⁴⁵ *Palmer (No 4)* [157], Court Book Vol 1, 168-169.

⁴⁶ Contrary to the plaintiffs' submission at PS [8](b).

⁴⁷ *Palmer (No 4)* [152]-[153], Court Book Vol 1, 167.

⁴⁸ Contrary to the plaintiffs' submission at PS [8](f).

⁴⁹ *Palmer (No 4)* [365] (particular (i)), Court Book Vol 1, 213.

⁵⁰ *Palmer (No 4)* [256]-[262], Court Book Vol 1, 190-192.

Australian States and Territories;⁵¹

- (c) if the borders of a State have remained open, or recently have been opened, to a State where there is ongoing transmission, there must be a risk of existing but unidentified community transmission within the first State "...and the probability of importation from a State without community transmission depends upon the nature, strength and enforcement of border controls in that State";⁵²
- (d) "border hopping", where a person leaves one State and enters another to travel to a third State,⁵³ "is a real, and not fanciful, risk";⁵⁴
- (e) if travel is allowed from places such as the Australian Capital Territory, which is more vulnerable to transmissions from people entering from New South Wales, this would leave Western Australia more vulnerable to "border hopping" travellers from the Territory;⁵⁵ and
- (f) no Isolation Measures,⁵⁶ apart from those contained in the Directions, would be equally effective in reducing the risk of importation of COVID-19 into Western Australia and the risk of community transmission of SARS-CoV-2 within Western Australia, so as to prevent further community transmission from a Case who is infected and to prevent an increased risk of morbidity and mortality within the Western Australian community or population.⁵⁷

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22. Further, Rangiah J did not find that border restrictions in fact *should* be eased with any particular State (as a specific and non-abstract proposition). Whether this *should* occur in any particular case must take into account the precautionary principle, that the overall risk of disease importation from Australia as whole is "high", and the finding that the Directions offer a "tangible and substantial layer of protection to the Western Australian community" over the protection offered by other measures, called "Common Measures" at trial.⁵⁸ These Common Measures include isolating actual and potential cases of COVID-19, localised movement restrictions, group limits, social distancing, handwashing, contact tracing and increased testing. This is particularly important, as

⁵¹ *Palmer (No 4)* [363]-[364], Court Book Vol 1, 210-212 (particular (m)).

⁵² *Palmer (No 4)* [270], Court Book Vol 1, 193.

⁵³ *Palmer (No 4)* [221], Court Book Vol 1, 193.

⁵⁴ *Palmer (No 4)* [272], Court Book Vol 1, 193.

⁵⁵ *Palmer (No 4)* [280], Court Book Vol 1, 194. See also, [276] (South Australia), [283] (Northern Territory), [290] (Queensland), Court Book Vol 1, 194, 195 and 196.

⁵⁶ Special Case [1], "Isolation Measure", "Community Isolation Measure" and "Personal Isolation Measure", Court Book Vol 2, 237-238.

⁵⁷ *Palmer (No 4)* [363]-[364], (particular (k)), [365] (subparagraph (h)), Court Book Vol 1, 210-212, 213.

⁵⁸ *Palmer (No 4)* [171], Court Book Vol 1, 171. See *Palmer (No 4)* [137], Court Book Vol 1, 163 for the definition of "Common Measures".

"Common Measures" become less adequate responses to COVID-19 over time as the population becomes more complacent and less compliant.⁵⁹

23. Justice Rangiah also found that the border restrictions contained in the Directions are more effective at reducing the probability of importation of COVID-19, and transmission into the Western Australian community, than: a combination of exit and entry screening, the use of face masks on planes, testing arrivals and mandatory mask wearing for 14 days;⁶⁰ mandatory self-quarantining or mandatory hotel quarantining;⁶¹ or a targeted quarantine or "hotspot" regime (on the assumption that State or Territory borders were not used).⁶²

10 ***Specific Findings on Pleadings Issues***

24. In addition to the matters above Rangiah J, found that particulars (aa) to (m) of paragraph [47](d)(iii), (iv) and (v) of the Second Amended Defence were proven.⁶³ That includes findings about the efficacy of the border restrictions contained in the Directions. In particular, Rangiah J found the following allegations proved: that the Community Isolation Measures contained in the Directions substantially reduced the risk of community transmission of SARS-CoV-2, and the risk of re-introduction of COVID-19 into the community; and no Isolation Measures, apart from those contained in the Directions, would be equally effective in reducing these risks, so as to prevent further community transmission and to prevent an increased risk of morbidity and mortality within Western Australia.

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25. Similar findings were made in relation to paragraph [39C] of the Second Amended Defence.⁶⁴

Disputed and Undisputed Matters

26. Save for some minor, inconsequential errors, there is no dispute as to the factual matters set out in PS [6].
27. The defendants accept that the plaintiffs have standing to bring the present proceedings, by reason that the first plaintiff and the second plaintiff's staff are unable to travel to Western Australia except in accordance with the Directions. The matters stated in PS [7](b) are not disputed. The defendants do not accept the matters stated in PS [7](a) and

⁵⁹ *Palmer (No 4)* [167], Court Book Vol 1, 170.

⁶⁰ *Palmer (No 4)* [314]-[315], Court Book Vol 1, 200.

⁶¹ *Palmer (No 4)* [329]; see also [365(h)], Court Book Vol 1, 203 and 213.

⁶² *Palmer (No 4)* [350]; see also [365(h)], Court Book Vol 1, 207 and 213.

⁶³ *Palmer (No 4)* [363]-[364], Court Book Vol 1, 210-212. See also *Palmer (No 4)* [365], Court Book Vol 1, 213 (in respect of the Defence, paragraph [39C(f)] and paragraph [39C(h)]).

⁶⁴ *Palmer (No 4)* [365], Court Book Vol 1, 212-214.

[7](c), but this does not affect standing.

28. There is no dispute over the matters stated in PS [8](a), [8](c). Paragraph [8](d) is presently correct in so far as there has been no reported cases of community transmission outside New South Wales and Victoria, but that may change by the time of the hearing date. The factual matters referred to in paragraph [8](b), [8](e) and [8](f) are addressed in paragraphs [19]-[25] above.

Part V: Argument

29. The plaintiffs essentially make three alternative submissions that the Directions are constitutionally invalid as contrary to section 92:

- 10 (a) the Directions are "aimed at", or "pointed directly at",⁶⁵ persons entering Western Australia by crossing the border. As the Directions depend upon that criterion of operation, they are not facially neutral,⁶⁶ and are contrary to the guarantee of absolute freedom of intercourse in section 92. This submission gives rise to a critical issue of constitutional principle identified below;⁶⁷
- (b) the Directions impose regulation on interstate intercourse which is greater than that which is reasonably required, and for that reason are contrary to the guarantee of absolute freedom of intercourse in section 92;⁶⁸
- (c) the Directions impose a discriminatory burden on interstate trade and commerce, which has a protectionist effect, contrary to the guarantee of absolutely free trade and commerce contained in section 92.⁶⁹
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The Critical Issue of Constitutional Principle

30. The defendants contend that properly construed or applied, the constitutional guarantee of absolutely free intercourse contained in section 92 operates so that, subject to an exception, which has been described as "reasonable regulation"⁷⁰ or which might now be more accurately described as necessary and proportionate regulation, intercourse among the States shall be absolutely free of legislative and executive action which prevents that intercourse.⁷¹
31. The plaintiffs contend that the exception does not apply where a legislative provision is

⁶⁵ PS [23].

⁶⁶ PS [45].

⁶⁷ PS [21]-[44].

⁶⁸ PS [45]-[48].

⁶⁹ PS [49]-[54].

⁷⁰ *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160, 178 [43]. See further paragraph [41] below.

⁷¹ Third Amended Defence ("**Defence**") [47(b)(ii)], Court Book Vol 1, 67.

"aimed at",⁷² "pointed directly at"⁷³ or "directly target[s]"⁷⁴ cross-border movements. In other words, the plaintiffs confine the regulation exception to cases where regulation *incidentally*⁷⁵ affects cross-border movements.

32. There is a question whether a law may ever constitute *incidental* regulation of interstate intercourse, where that law uses an interstate border movement as its criterion of operation; or is such a law necessarily always to be characterised as "aimed at", "pointed directly at" or "directly targeted" at interstate intercourse?
33. The plaintiffs argue that a law which uses interstate movement as a criterion of the operation for the legislation will always be regarded as *directly* affecting intercourse, even where the legislation has another purpose (eg to prevent disease entering a State).
34. The defendants submit that a law might be regarded as *incidentally* regulating intercourse, where it is concerned with another purpose, but necessarily and proportionately prevents or regulates cross-border movements. Only a law which applies to regulate or prevent cross-border movements for no apparent purpose, or which goes beyond what is necessary or proportionate, will be regarded as *directly* affecting interstate intercourse or as "aimed at" or "directed against" interstate intercourse. That is because its purpose or object does not support the regulation which is imposed.
35. The plaintiffs rely upon two cases which involved direct prohibitions on cross-border movements: *Gratwick v Johnson*⁷⁶ and *R v Smithers; Ex parte Benson*.⁷⁷ In both cases, the law was held invalid as contrary to the intercourse freedom. However, in both cases, the Court considered that the relevant laws were not proportionate to any legitimate purpose, and did not constitute reasonable regulation. They are not binding precedent that the regulation exception can never apply to a law which uses interstate cross-border movements as a criterion of operation.
36. To the contrary, in *Ex parte Nelson (No 1)*,⁷⁸ the majority expressly accepted that a law which directly regulated the free flow of interstate trade and commerce in cattle stock was valid to protect citizens from the dangers of infectious and contagious diseases. Likewise, in the *Bank Nationalization Case*, the Privy Council said "that regulation of trade may clearly take the form ... of excluding from passage across the frontier of a State creatures

⁷² PS [10], [11], [13], [14], [23].

⁷³ PS [23].

⁷⁴ PS [20].

⁷⁵ PS [14], [20], [25], [30].

⁷⁶ (1945) 70 CLR 1.

⁷⁷ (1912) 16 CLR 99.

⁷⁸ (1928) 42 CLR 209, 218 (Knox CJ, Gavan Duffy and Starke JJ).

or things calculated to injure its citizens."⁷⁹

The Intercourse Freedom and the Nature of the Regulation Exception

37. The intercourse freedom is distinct from the trade and commerce freedom, and there is no necessity for strict correspondence between them.⁸⁰ This is consistent with the historical drafting of section 92, which consistently adopted distinct and independent concepts of trade and intercourse from the very beginning.⁸¹
38. Consequently, there are two separate constitutional freedoms, not one freedom with two aspects. The content of the guarantee of freedom of interstate intercourse has been treated as being different from the guarantee of freedom of interstate trade and commerce.⁸²
- 10 39. One particular difference between the trade and commerce freedom, and the intercourse freedom, is that a law will only be contrary to the trade and commerce freedom if it imposes a burden upon that trade and commerce and the law has a protectionist effect.⁸³ A law will be contrary to the intercourse freedom simply if it imposes a burden on interstate intercourse.⁸⁴
40. Freedom of intercourse includes freedom of movement of people between States.⁸⁵ However, the intercourse freedom does not create an absolute prohibition against all legislative or executive action which prevents, impedes or impairs any aspect of intercourse. All judges accepted this in *Cunliffe v The Commonwealth*.⁸⁶
- 20 41. In *AMS v AIF*⁸⁷ Gleeson CJ, McHugh and Gummow JJ (with Hayne J agreeing⁸⁸) identified that, although formulated using different terms, four or five members⁸⁹ of the Court in *Cunliffe* considered that a law which imposed restrictions on border movements

⁷⁹ *The Commonwealth v Bank of NSW* (1949) 79 CLR 497, 641.

⁸⁰ *Cole v Whitfield* (1988) 165 CLR 360, 393-394 (per curiam).

⁸¹ *Cole v Whitfield* (1988) 165 CLR 360, 387-388 (per curiam).

⁸² *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, 456 [400] (Hayne J).

⁸³ *Cole v Whitfield* (1988) 165 CLR 360, 394, 407, 409 (per curiam); *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 307 (Mason CJ), 395 (McHugh J); *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, 456 [399] (Hayne J); *Betfair Pty Ltd v Racing NSW* [2012] HCA 12; (2012) 249 CLR 217, 265 [36] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 288 [110] (Kiefel J).

⁸⁴ *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, 391-394 [168]-[178] (Gummow J), 461 [422] (Hayne J).

⁸⁵ *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 110 (Barton J), 113 (Isaacs J), 117-118 (Higgins J); *Gratwick v Johnson* (1945) 70 CLR 1, 17 (Starke J); *Cole v Whitfield* (1988) 165 CLR 360, 393 (per curiam); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 56 (Brennan J); *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 307-308 (Mason CJ), 333 (Brennan J), 366 (Dawson J), 384 (Toohey J).

⁸⁶ (1994) 182 CLR 272, 307 (Mason CJ), 333 (Brennan J), 346 (Deane J), 366 (Dawson J), 384 (Toohey J), 392 (Gaudron J), 395 (McHugh J). See *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, 459 [410] (Hayne J).

⁸⁷ [1999] HCA 26; (1999) 199 CLR 160, 178 [43].

⁸⁸ [1999] HCA 26; (1999) 199 CLR 160, 232-233 [221].

⁸⁹ Chief Justice Mason (dissenting as to result), Deane J (dissenting as to result), Dawson and McHugh JJ and possibly Toohey J.

would not contravene the intercourse freedom if it was within a "reasonable regulation" dispensation, as described by the Privy Council in the *Bank Nationalization Case*.⁹⁰

42. Previously, there has been a question whether reasonable regulation is assessed by concepts of proportionality or structured proportionality. Does reasonable regulation only require a law which is reasonably appropriate and adapted, or proportionate to, a legitimate purpose (ie a looser test of proportionality); or does it also require that the means adopted by the law to achieve a legitimate purpose do not go beyond what is necessary or appropriate (ie a more stringent test of structured proportionality)?
43. In the context of the intercourse freedom, this distinction was observed in 1999 by Gaudron J in *AMS v AIF*.⁹¹ Justice Gaudron made the distinction depend upon whether the constitutional freedom was express or implied. Her Honour suggested that the looser test of proportionality applied to implied constitutional freedoms, whereas the stricter test of structured proportionality applied to express constitutional freedoms.
44. The law concerning constitutional freedoms has developed since these comments. Structured proportionality has been adopted as the appropriate test to ascertain whether a law is contrary to either an express or an implied constitutional freedom. The use of structured proportionality to assess whether regulation is reasonable for the purposes of section 92 is evident in a number of cases.⁹² The parallel between this and structured proportionality testing for another constitutional freedom (the implied freedom of political communication) has been observed by a number of justices.⁹³ The use of structured proportionality in respect of the implied freedom of political communication was confirmed in 2015 by *McCloy v New South Wales*.⁹⁴
45. Any suggestion by the plaintiffs that there is a continuing distinction between the proportionality test which should be adopted for express and implied constitutional freedoms should not be accepted.⁹⁵ Neither should any submission that the defendants

⁹⁰ *The Commonwealth v Bank of NSW* (1949) 79 CLR 497, 639-641 (per curiam).

⁹¹ *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160, 193 [100]-[101].

⁹² *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 471-472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559, 616 (Mason J); *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418, 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

⁹³ *Attorney-General (SA) v Adelaide City Corporation* [2013] HCA 3; (2013) 249 CLR 1, 42-43 [65] (French CJ), *Monis v The Queen* [2013] HCA 4; (2013) 249 CLR 92, [347] (Crennan, Kiefel and Bell JJ); *Murphy v Electoral Commissioner* [2016] HCA 36; (2016) 261 CLR 28, [70] (Kiefel J); *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328, [290] (Nettle J).

⁹⁴ [2015] HCA 34; (2015) 257 CLR 178, 193-195 [2] (French CJ, Kiefel, Bell and Keane JJ).

⁹⁵ PS [46].

have failed to embrace or apply the more stringent test of structured proportionality,⁹⁶ which has been expressly pleaded.⁹⁷

The Principle Underlying the Reasonable Regulation Dispensation

46. These general observations show that, as a matter of principle, a law which prevents people moving across State borders will not infringe the intercourse freedom if the law is for a legitimate purpose, and the law satisfies the test of there being no other alternative, less restrictive modes of regulation to achieve the same purpose, ie the test of structured proportionality set out in *McCloy*. In those circumstances, the law will qualify as reasonable regulation, and will be within the reasonable regulation dispensation.
- 10 47. This statement of principle is based upon the substance of a law, rather than whether it is based formally upon some criterion of operation which relates to interstate border crossing. The scope of reasonable regulation depends upon what is necessary and proportionate to achieve a legitimate purpose, rather than upon any formalistic criterion of operation. This is consistent with the approach in *Cole v Whitfield*, in relation to the trade and commerce freedom.⁹⁸
48. Even before the trade and commerce freedom was clarified by *Cole v Whitfield*, a majority in *Ex parte Nelson (No 1)*⁹⁹ applied the regulation exception to uphold a statutory provision which struck directly at interstate trade, commerce and intercourse¹⁰⁰ by preventing cross-border movement of diseased cattle.
- 20 49. In *Cole v Whitfield*, the Court said that some forms of intercourse are so immune from legislative or executive interference that, if a like immunity were accorded to trade and commerce, anarchy would result.¹⁰¹ However, this appears to mean no more than what was said in *AMS v AIF*,¹⁰² by Gleeson CJ, McHugh and Gummow JJ (with Hayne J agreeing). There is "at least an immunity from State interference, as Dixon CJ put it¹⁰³ 'with all that is involved in [the] existence [of the Australian Capital Territory] as the centre of national government', which 'means an absence of State legislative power to forbid restrain or impede access to it.'"¹⁰⁴

⁹⁶ PS [47].

⁹⁷ Defence [47(d)(iii)]-[47(d)(v)].

⁹⁸ *Cole v Whitfield* (1988) 165 CLR 360. The criterion of operation test was addressed and rejected at 400-403 (per curiam).

⁹⁹ *Ex Parte Nelson (No 1)* (1928) 42 CLR 209 (Knox CJ, Gavan Duffy and Starke JJ).

¹⁰⁰ *Ex Parte Nelson (No 1)* (1928) 42 CLR 209, 223 (Isaacs J).

¹⁰¹ (1988) 165 CLR 360, 393.

¹⁰² *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160.

¹⁰³ *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 549-550.

¹⁰⁴ [1999] HCA 26; (1999) 199 CLR 160, 178-179 [44].

A Further Difficulty of Invalidating a Law "Directed At" Interstate Movements

50. The distinction between a "direct" burden which diminishes a constitutional freedom, as opposed to an "indirect" regulation of the use of a constitutional freedom, implicitly assumes that the freedom is an individual or personal right. Therefore, this is not a relevant distinction if the intercourse freedom is only concerned with limits upon legislative power, as with other constitutional freedoms.¹⁰⁵ The protection of a constitutional freedom is only concerned with whether legislative power is exercised for a proper purpose in a way which is necessary and proportionate to that purpose, and intrudes as minimally as possible upon the freedom.
- 10 51. The intercourse freedom should be regarded¹⁰⁶ in the same way as the trade and commerce freedom, as not creating individual rights.¹⁰⁷ Although the two freedoms are distinct, it would be an odd result for the one constitutional provision to create different species of freedoms. Nothing in section 92's history, structure or purpose suggests such an outcome.
52. The structured proportionality test in relation to the intercourse freedom (as described above) is stated in terms of balancing legislative aims, rather than infringing a personal freedom. Application of the *McCloy* test therefore assumes that the intercourse freedom creates a limit upon legislative power.¹⁰⁸ Nevertheless, structured proportionality could still be used if the intercourse freedom is viewed as an individual right.
- 20 53. Whichever view is taken, the practical difficulties of using a test which depends upon a criterion of operation, or a distinction between direct and indirect burdens, was expressly dealt with in *Cole v Whitfield* as the basis for determining the operation of the trade and commerce freedom.¹⁰⁹ The same is true for the intercourse freedom.

The Reasonable Regulation of the Directions

54. The Directions, by reason of the temporal limit imposed by the Act, prevent interstate intercourse for two week periods at a time and subject to the exceptions contained in the Directions. They burden the freedom temporarily, and for a particular reason.
55. The purpose of protecting the population of Western Australia against health risks, such as infectious or contagious diseases, is a legitimate subject-matter which may be regulated

¹⁰⁵ The implied freedom of political communication: *Comcare v Banerji* [2019] HCA 23; (2019) 93 ALJR 900, 910, [20] (Kiefel CJ, Bell, Keane and Nettle JJ), 936 [164] (Edelman J).

¹⁰⁶ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 194 (Dawson J).

¹⁰⁷ *Betfair Pty Ltd v Racing NSW* [2012] HCA 12; (2012) 249 CLR 217, 266-268 [42]-[50] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 289 [115] (Kiefel J).

¹⁰⁸ Stellios, *Zines's The High Court and the Constitution* (6th ed, Federation Press), 191-194.

¹⁰⁹ (1988) 165 CLR 360, 401 (per curiam).

by laws of the Western Australian Parliament.¹¹⁰ That is consistent with a number of cases.¹¹¹ The aim of protecting a State's population is compatible with a constitutional assumption that States will continue to exist and function. There are no contrary submissions by the plaintiffs.

56. Justice Rangiah made findings that the Directions were the most effective means for reducing the risk of community transmission of SARS-CoV-2, and the risk of re-introduction of COVID-19 into the community, so as to prevent further community transmission and to prevent an increased risk of morbidity and mortality within Western Australia.

10 57. On this basis, the Court should find that the Directions are reasonably necessary for the purpose of protecting the Western Australian population against the health risks of COVID-19, and that the Directions are suitable, reasonably necessary for, and adequate in achieving the balance for that purpose or object. As well the Court should find that there are no other equally effective means available to achieve that purpose or object which impose a lesser burden on interstate intercourse.

The Plaintiffs' First Submission: Directions Contravene Section 92 on their Face

20 58. The plaintiffs submit that *Gratwick v Johnson*,¹¹² determines that "a law directed at interstate intercourse would always be invalid against the absolute freedom provided for section 92, compared with laws that incidentally affected intercourse, which may be permissible in certain circumstances".¹¹³ They also submit¹¹⁴ that this decision is consistent with what was earlier held in *R v Smithers; Ex parte Benson*.¹¹⁵ The plaintiffs then say that "the Directions are aimed at the crossing of the Western Australian border", and that in the absence of re-opening *Gratwick*, the Directions must be invalid.¹¹⁶

59. These submissions should be rejected, as the reasoning in *Gratwick* and *Smithers* effectively acknowledges the possibility of a "reasonable regulation" dispensation. Certainly, the contrary was not suggested in respect of the intercourse freedom in the

¹¹⁰ That purpose is particularly pleaded in the Defence [47(b)(ii)(1)].

¹¹¹ *Ex parte Nelson (No 1)* (1928) 42 CLR 209, 218-219 (Knox CJ, Gavan Duffy and Starke JJ); *Hartley v Walsh* (1937) 57 CLR 372, 384 (Latham CJ), 399 (McTiernan J); *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116, 134 (Latham CJ), 149-150 (Evatt J), 158 (McTiernan J); *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559, 581-582, 589 (Barwick CJ), 600-601 (Gibbs J), 607-608 (Mason J), 634 (Jacob J); *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1, 25, 27 (Stephen J), 38 (Mason J); *J Bernard & Co Pty Ltd v Langley* (1980) 153 CLR 650, 660-661 (Gibbs ACJ).

¹¹² (1945) 70 CLR 1.

¹¹³ PS [25]. See also PS [11].

¹¹⁴ PS [11], [31].

¹¹⁵ (1912) 16 CLR 99.

¹¹⁶ PS [13].

discussion in the plurality opinion in *AMS v AIF*.¹¹⁷

60. *Gratwick* concerned a challenge to a wartime regulatory regime, in the *Restriction of Interstate Passenger Transport Order* made under Commonwealth legislation, which prohibited interstate travel by rail or passenger vehicle without a permit from the Commonwealth Director-General of Land Transport. The respondent was charged with a summary offence for contravening the regime, by travelling from New South Wales to Western Australia without a permit, to visit her fiancé. The discretion of the Director-General to grant a permit, and to impose conditions on a permit, was unconfined.¹¹⁸
61. The High Court unanimously held that the regulatory regime contained in the Order was contrary to the intercourse freedom contained in section 92.
62. Chief Justice Latham considered that the regime was "directed against" interstate intercourse because it expressly prohibited it without a permit, and the regime did not provide any general system of regulation, as the Director-General could exercise his powers in a completely arbitrary manner.¹¹⁹
63. In *Cole v Whitfield*, the Court quoted a phrase from a passage in Latham CJ's judgment, which was that Australian citizens were "free to pass to and fro among the States without burden, hindrance or restriction".¹²⁰ However, in the same passage, Latham CJ said that there was no precise and inflexible interpretation of section 92, and distinguished between the invalidity of legislation "pointed directly at the right guaranteed and protected by" section 92, and legislation "which is not so pointed".¹²¹
64. Justice Rich was to like effect, but specifically observed that the criterion of application of section 92 depends upon the facts of the particular case.¹²² Justice McTiernan gave a similar judgment.¹²³
65. Justice Starke (who was a member of the majority in *Ex parte Nelson (No 1)*) held that it did not matter if the object or purpose of the legislation was for the public safety or defence of the Commonwealth, or any other legislative purpose, as the regime was "directly pointed at" the right guaranteed and protected by section 92. He accepted that legislation which is not "pointed at" that right, may not contravene section 92.¹²⁴

¹¹⁷ [1999] HCA 26; (1999) 199 CLR 160, 178 [43] (Gleeson CJ, McHugh and Gummow JJ).

¹¹⁸ (1945) 69 CLR 613, 15 (Latham CJ).

¹¹⁹ (1945) 70 CLR 1, 14-15.

¹²⁰ (1988) 165 CLR 360, 393 quoting *Gratwick v Johnson* (1945) 70 CLR 1, 17 (Latham CJ).

¹²¹ (1945) 70 CLR 1, 17.

¹²² (1945) 70 CLR 1, 16.

¹²³ (1945) 70 CLR 1, 21-22.

¹²⁴ (1945) 70 CLR 1, 17.

66. Justice Dixon considered that the Order was directed at the intending passenger, and was not confined to priorities of travel upon transport facilities for troops, and did not depend upon the practical operation or administration of troops, munitions, war supplies or like considerations. He said that it was simply based upon the "inter-Stateness" of the journeys it assumed to control.¹²⁵ He considered that there would be no contravention of section 92 if the Order had related to the factual consequences which ensue from the conduct of war, but these considerations had "no relation to a general administrative order expressly detracting from the freedom guaranteed by s. 92".¹²⁶
67. The critical feature of this case was the unconfined basis for preventing interstate movements. The only inference which could be drawn (from the terms of the legislation)¹²⁷ was that the sole purpose of the Order was to prevent interstate movements, and that there was no basis for applying a reasonable regulation dispensation.
68. In contrast, the Directions are not "aimed at" or "directed to" interstate intercourse in the relevant sense. Rather the purpose or mischief¹²⁸ at which the Directions are targeted is, consistent with the objects of the Act, responding to the pandemic caused by COVID-19 by limiting the spread of COVID-19.¹²⁹ This purpose of the Directions is apparent on their face.¹³⁰ They prevent entry, not exit.¹³¹ They prevent entry even of exempt travellers who have symptoms, who have been a "close contact" with a person with COVID-19, who are awaiting test results or who have positive test results.¹³²
69. *Smithers* concerned a New South Wales law which made it an offence for an interstate resident to enter that State, where that person had been imprisoned within the previous three years for an offence carrying the death penalty or a term of imprisonment of one year or longer. Benson was convicted and sentenced to imprisonment for 12 months in Victoria, for having insufficient lawful means of support. He then left Victoria in the month he was released and travelled to New South Wales to seek employment there. He was convicted of a further offence against the New South Wales law. However, the High Court (consisting of four justices only) unanimously held this law to be invalid.

¹²⁵ (1945) 70 CLR 1, 19.

¹²⁶ (1945) 70 CLR 1, 20.

¹²⁷ Compare *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, 462 [423]-[425] (Hayne J); *Betfair Pty Ltd v Racing NSW* [2012] HCA 12; (2012) 249 CLR 217, 295-296 [136]-[140] (Kiefel J).

¹²⁸ See *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, 394 [178] (Gummow J).

¹²⁹ See paragraph [8] above.

¹³⁰ Clause 1.

¹³¹ Clause 4.

¹³² Clause 5.

70. In effect, Griffith CJ, Barton J and Higgins J held that the law was invalid, as it was not proportionate to the aim of protecting the public safety of the population of New South Wales. Chief Justice Griffith reached this conclusion without relying upon section 92, but instead by referring to an implication about interstate passage derived from the fact of federation.¹³³ Justice Barton considered that the words of section 92 did not carry the implication much further.¹³⁴ He also specifically observed that: "I must by no means be thought to say, and it is quite unnecessary to decide, either that the fact of federation or that the language of sec. 92 destroys the right of individual States to take any precautionary measure in respect of the intrusion from outside the State of persons who are or may be dangerous to its domestic order, its health, or its morals."¹³⁵
71. After referring to a power of a State to make laws to promote public order, safety or morals, Griffith CJ said that he did not think that "the exclusion of an inhabitant of another State for such a reason can be justified on any such ground of necessity as I have referred to".¹³⁶ Justice Barton said there was no necessity for defensive precautions of the type contained in the New South Wales law.¹³⁷ Justice Higgins expressly left open the extent of a State's powers to make laws protecting its borders from ex-criminals, but considered the New South Wales law in this case was "pointed directly at" the act of coming into New South Wales.¹³⁸
72. It was only Isaacs J who gave a wide operation of section 92, as absolute and without discernible limitation.¹³⁹ However, as explained previously, seven justices of this Court accepted in *Cunliffe*, that the intercourse freedom does have limits.¹⁴⁰
73. In contrast to *Smithers*, the necessity for, and proportionality of, the Directions have been established in the present case.¹⁴¹ If, however, *Gratwick* or *Smithers* establishes that the intercourse freedom is contravened where the criterion of liability is a border movement, the defendants seek leave to re-open these decisions and to advance the position set out above concerning the meaning and effect of section 92.

¹³³ (1912) 16 CLR 99, 109.

¹³⁴ (1912) 16 CLR 99, 109-110. See also *Tasmania v Victoria* (1935) 52 CLR 157, 168-169 (Gavan Duffy CJ, Evatt and McTiernan JJ), 173 (Rich J).

¹³⁵ (1912) 16 CLR 99, 110.

¹³⁶ (1912) 16 CLR 99, 109.

¹³⁷ (1912) 16 CLR 99, 110, 111.

¹³⁸ (1912) 16 CLR 99, 118, 119.

¹³⁹ (1912) 16 CLR 99, 113-114, 117.

¹⁴⁰ (1994) 182 CLR 272, 307 (Mason CJ), 333 (Brennan J), 346 (Deane J), 366 (Dawson J), 384 (Toohey J), 392 (Gaudron J), 395 (McHugh J). See *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, 459 [410] (Hayne J).

¹⁴¹ See paragraphs [19]-[25] above.

74. Whether the High Court should overrule constitutional precedents depends upon five factors identified by Aickin J in *The Second Territory Senators Case*.¹⁴² His Honour identified various general considerations from the cases.¹⁴³ These do not stand in the way of any overruling. The modern stream of authority on section 92, since *Cole v Whitfield*, is against any criterion of operation test, and in favour of an analysis based upon substance and practical effect. Section 92 is fundamentally important, and the consequences of overruling *Gratwick* and *Smithers*, would be to clarify the proper approach which is uncertain. The defendants' primary submission is that *Gratwick* and *Smithers* are confined and do not need to be overruled.¹⁴⁴

10 ***The Plaintiffs' Second Submission: Reasonable Regulation***

75. The plaintiffs effectively submit that there is no finding by Rangiah J that sustains an analysis of the Directions based upon structured proportionality.¹⁴⁵ They submit that the defendants are seeking to sustain the Directions upon the basis of a less stringent analysis which effectively adopts a looser test of proportionality based upon aims.¹⁴⁶

76. That is not correct. The defendants plead the more stringent proportionality test,¹⁴⁷ and Rangiah J made relevant findings in terms of the particulars supplied for the application of that test.¹⁴⁸

The Plaintiffs' Third Submission: Interstate Trade and commerce

20 77. It is difficult to see how the trade and commerce freedom ever arises. If there is "reasonable regulation" in relation to the intercourse freedom, equally that must also exist for the purposes of the trade and commerce freedom. If there is no "reasonable regulation", there is a contravention of the intercourse freedom.

78. In any event, the plaintiffs have not demonstrated that they themselves are engaged in interstate trade and commerce. There is no real attempt to identify the market in which

¹⁴² (1977) 139 CLR 585, 620-630. See also the matters referred to by Dixon CJ in *Victoria v The Commonwealth* (1957) 99 CLR 575, 615-616, for an earlier distillation of principle.

¹⁴³ (1977) 139 CLR 585, 630. See also French CJ (dissenting) in *Alqudsi v The Queen* [2016] HCA 24; (2016) 258 CLR 203, 234 [66].

¹⁴⁴ That seems to be why the submission that *Gratwick* was wrong (made in the *Bank Nationalization Case* and referred to in PS [13]) was never decided.

¹⁴⁵ PS [47]-[48].

¹⁴⁶ PS [48].

¹⁴⁷ Defence [47(b)(ii)(1)-(3)].

¹⁴⁸ See the findings made in respect of the particulars of (iii), (iv) and (v) to paragraph [47(d)] of the Defence: *Palmer (No 4)* [363]-[364], Court Book Vol 1, 210-212. See also *Palmer (No 4)* [365], Court Book Vol 1, 213 (in respect of the Defence, paragraph [39C(f)] and [39C(h)]).

the plaintiffs operate,¹⁴⁹ or that it is the subject of any protectionist burden.¹⁵⁰ The plaintiffs have not established that there is any discriminatory burden to which they are subject compared to other businesses within their particular market. All businesses have to comply with the Directions. Without examining how the Directions practically affect an identified market, it is impossible to conclude that they operate in a protectionist or discriminatory manner.

The Ludlow Submissions

79. Mr Ludlow should not be granted leave to be heard as *amicus curiae*. Where the parties are represented by experienced lawyers, and there are numerous interveners, applications for leave to make submissions as *amicus* will seldom be necessary or appropriate.¹⁵¹ The submissions of the proposed *amicus* fail to deal directly with the stated question about the validity of the Directions or their authorising Act. Instead, they concern whether the Directions are supported by the Western Australian Parliament's power to make laws with respect to the peace, order, and good government of the State. State Parliaments have power to take precautionary measures in respect of an intrusion from outside the State of persons who are, or may be, a danger to the State's public health.¹⁵²

Answers to Stated Questions

80. Are the Directions and/or the authorising Act invalid because they contravene s 92 of the Constitution? Answer – The Directions and the Act are not invalid to any extent.

81. Who should pay the costs of the special case? Answer – The plaintiffs.

Part VI: Time for Oral Argument

82. The defendants estimate that up to 3.5 hours will be required for oral submissions.

Dated: 12 October 2020



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¹⁴⁹ Beyond PS [51], fn 85, which describes the market as a "tenements" market, whatever that may be.

¹⁵⁰ Compare *Betfair Pty Limited v Racing New South Wales* [2012] HCA 12; (2012) 249 CLR 217, 270-271 [55]-[56] (French CJ, Gummow, Hayne, Crennan and Bell JJ); 275-276 [71]-[72] (Heydon J); 290 [119] (Kiefel J).

¹⁵¹ *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCA 54; (2011) 248 CLR 37, 39 [4]-[6] (per curiam).

¹⁵² See paragraph [55] above and the cases cited.

**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

ANNEXURE TO DEFENDANTS' SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No. 1 of 2020, the defendants set out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

30

Number	Description	Date in Force	Provision
<u>Constitutional provisions</u>			
1	<i>Commonwealth Constitution</i>		S 92
<u>Statutes</u>			
2	<i>Emergency Management Act 2005 (WA)</i>	4 April 2020	S 3
3	<i>Emergency Management Act 2005 (WA)</i>	4 April 2020	S 58
4	<i>Emergency Management Act 2005 (WA)</i>	4 April 2020	S 67
<u>Statutory instruments</u>			
5	<i>COVID-19 Directions (No 49) 2020 Directions for Territory Border Restrictions (NT) as amended by No 50 and No 53</i>	2 October 2020	

6	<i>Directions in Relation to Persons Arriving in Tasmania (General) (Tas)</i>	9 October 2020	
7	<i>Directions in Relation to Persons Arriving in Tasmania from affected Regions and Premises (Tas)</i>	9 October 2020	
8	<i>Public Health (COVID-19 Interstate Travellers) Emergency Direction 2020 (No 2) (ACT)</i>	9 October 2020	
9	<i>Public Health Direction – Border Restrictions Direction (No 15) (Qld)</i>	1 October 2020	
10	<i>Emergency Management (Cross Border Travel No 16) (COVID-19) Directions 2020 (SA)</i>	8 October 2020	
11	<i>Quarantine (Closing the Border) Directions (WA)</i>	5 April 2020	
12	<i>Quarantine (Closing the Border) Amendment Directions (No 7) (WA)</i>	4 October 2020	
13	<i>Restriction of Interstate Passenger Transport Order 1942 (Cth)</i>	17 June 1942	