



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

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and

The State of Western Australia
First Defendant

Christopher John Dawson
Second Defendant

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**PLAINTIFFS' SUBMISSIONS ON IMPACT OF ANNOUNCEMENT OF
PROPOSED CHANGES TO DIRECTIONS**

PART I: CERTIFICATION

1. The plaintiffs certify that these submissions are in a form suitable for publication on the internet.

PART II: ARGUMENT

Facts

2. On Friday 30 October 2020, the Premier of Western Australia announced proposed changes to the Directions challenged in this proceeding.¹ The following matters should be noted:
 - 30 a) the announcement was prospective and conditional – the changes announced will only come into force from 14 November 2020 and then only if the number of cases in other states remain below a rolling average of 5 cases in 14 days;²
 - b) unless and until the changes come into effect, anyone wishing to enter Western Australia can only do so as an exempt traveller or with a permit from the second defendant and faces criminal prosecution if they otherwise enter;

¹ See affidavit of Daniel Jacobson affirmed 1 November 2020 (**Jacobson**).

² Jacobson, p. 8, lines 7-15.

- c) the proposed changes to the Directions involve the removal of the prohibition on entry into Western Australia from other States and Territories, replacing it instead with a self-isolation regime for persons who have been in NSW and Victoria only (assuming no changes to case numbers from other States or Territories in the interim);
- d) the proposed changes represent a departure from the position pleaded by the defendants in paragraphs 39C(g)-(j) of the Third Amended Defence dated 16 September 2020;³ and
- 10 e) the Premier of Western Australia, in announcing the proposed changes, expressly and repeatedly, then and after, purported to reserve the putative right to reintroduce a closed border.⁴
3. It is informative to examine the chronology of the defendants' case and the advice of the Chief Health Officer of Western Australia, as set out in the attachment to these submissions, compared with the movement in border restrictions imposed by Western Australia, to illustrate the real, rather than fanciful, prospect that such measures may be reintroduced.

Continued utility and right to declarations sought

4. Given the above facts, there are no consequences for the parties' special case for the following reasons.
- 20 5. Whether the defendants have the right to prohibit entry into Western Australia, as they have done pursuant to the Directions and as the Premier has asserted as a "right" purportedly reserved, remains in issue. This remains a justiciable "matter" in terms of *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 and *Fencott v Muller* (1983) 152 CLR 570, 603, 608.
6. The plaintiffs have a "real interest" in raising the questions to which the declarations sought in this proceeding would go, notwithstanding that no other relief might be granted or utile; and "there is a considerable public interest" in the limits of power in this regard being authoritatively determined by this Court, given the public

³ Which paragraphs have been relevantly unamended since the Second Amended Defence dated 16 June 2020.

⁴ Jacobson, p.11 line 12; p.18 lines 10-16, 20-23; p.39.

controversy regarding the closing of borders in Australia, the prospect that it might occur again during the pandemic and the infrequency of a suitable vehicle to test such a point arising: *Plaintiff M61/2010E v Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319 at 359 [103]; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 [237]-[238].

7. The issue of utility is akin to that which was addressed by this Court in *Croome v Tasmania* [1997] HCA 5; 191 CLR 119, 127 per Brennan CJ, Dawson and Toohey JJ -

"A person with a sufficient interest to raise a justiciable controversy as to the validity of a law is regarded as having or claiming a right to a declaration and that right satisfies the requirement of some 'right, duty or liability to be established by the determination of the Court'."

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And at 138 per Gaudron, McHugh and Gummow JJ -

"In the circumstances of this case, the claim to declaratory relief is not to be denied at the threshold on the ground that relief is sought prematurely and to establish the legal character of a state of affairs not yet come to pass. If s 109 operates here, as the plaintiffs seek to establish at the trial or other final disposition of their action, it presently operates upon the provisions of the Code and has done so since the commencement of the Act.

Moreso we have sought to indicate, the plaintiffs have a 'real interest' and do not seek to raise a question which is abstract or hypothetical."

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(emphasis added, footnotes omitted)

8. The reference by Gaudron, McHugh and Gummow JJ to "a state of affairs not yet come to pass" is equally apt to refer to the threatened reintroduction of a hard border.
9. Thus, given the prospective and highly conditional nature of the Premier's announcement, there remains as at today an important and justiciable controversy upon which the Court should rule.

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Chronology

Date	Event	Reference
5 Apr 2020	Directions issued, closing the WA border	FASC par 19 at CB Vol. 1, p.31; 3 rd AD par 32 at CB Vol. 1, p.54
25 May 2020	Proceeding commenced	Writ of Summons at CB Vol. 1, p.13
29 May 2020	Letter of advice from WA Chief Health Officer (CHO) to second defendant advises opening of interstate borders is not recommended until community transmission in NSW, Qld and Victoria is substantially eliminated (referring to 2 x 14 day incubation periods with no new positive cases)	CB Vol. 5, pp.1988, 1991
2 Jun 2020	Defendants' (first) Defence pleads at 14(h)-(j) and 15(d)-(h) a risk of community transmission of COVID-19 without measures to isolate WA from other States and Territories	
16 Jun 2020	Defendants' Second Amended Defence maintains relevant pleas in pars 14-15 and adds par 39C, pleading <i>inter alia</i> that the easing of the measures contained in the Directions could only occur without increased risk where there is no community transmission within other States or Territories	

Date	Event	Reference
24 Jun 2020	WA CHO advises that, <i>“Proposals to open the borders to jurisdictions with no community spread, such as South Australia and the Northern Territory, if legally viable, could be considered on public health grounds, as the risk of re-introduction from these jurisdictions remains very low.”</i> and <i>“Until community spread is eliminated in the affected jurisdictions, which will require at least a month to confirm (two 14-day incubation periods}, or reduced to such low levels as to pose a minimal risk, such as in New South Wales, where rapid containment measures have prevented further spread, opening of the interstate borders is not recommended.”</i>	
22 Jul 2020	Trial of facts before Rangiah J	CB Vol. 1, p.128
25 Aug 2020	Findings of fact by Rangiah J	CB Vol. 1, p.127
16 Sep 2020	Third Amended Defence maintains pleas in pars 14, 15 and 39C notwithstanding Rangiah J’s findings as to matters in 39C	CB Vol. 1, p.38
25 Sep 2020	WA CHO advice to Premier of WA provides review of risk by jurisdiction as at 16 September 2020 recommending broadening exemptions and consideration to opening borders to jurisdictions with very low risk (e.g. given of SA, but clearly also applicable to Tasmania, NT, ACT)	

Date	Event	Reference
14 Oct 2020	WA CHO advice to second defendant notes there has been no community spread in any jurisdiction except NSW and Victoria for more than 28 days but recommends maintenance of Directions	
26 Oct 2020	WA CHO advice to second defendant notes there has been no community spread in any jurisdiction except NSW and Victoria for more than 28 days but recommends maintenance of Directions	
28 Oct 2020	WA CHO advice to Premier of WA recommends changes to Directions and opening of borders to visitors from jurisdictions that have had no community cases from unknown source for 28 days	
30 Oct 2020	WA Premier announces proposed changes to Directions	