



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 28 May 2021 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: B52/2020
File Title: Palmer v. The State of Western Australia
Registry: Brisbane
Document filed: Form 27C - Intervener's submissions
Filing party: Interveners
Date filed: 28 May 2021

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**

BETWEEN:

CLIVE FREDERICK PALMER
Plaintiff
and
STATE OF WESTERN AUSTRALIA
Defendant

**SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**

PARTS I, II AND III — CERTIFICATION AND INTERVENTION

1. These submissions are in a form suitable for publication on the internet.
- 10 2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

PART IV — ARGUMENT

A SUMMARY

3. In this proceeding, the Commonwealth adopts its written submissions filed in *Mineralogy v Western Australia* (B54/2020), including the submission that it is unnecessary to determine the validity of the provisions of Pt 3 of the Agreement Act other than the “determinative provisions”.¹ The Commonwealth further contends that none of the additional arguments made by Mr Palmer render Pt 3 invalid.
- 20 4. The dominant theme in Mr Palmer’s submissions is that Pt 3 is improperly focused on him. That focus is said to involve discrimination based on residence contrary to s 117 of the Constitution, a bill of pains and penalties contrary to Ch III of the Constitution or, more generally, the exercise of judicial power (in a Ch III matter or otherwise) to quell a dispute involving him. Mr Palmer also raises the prospect of inconsistency between provisions of Pt 3 and a number of laws of the Commonwealth.
5. In summary, the Commonwealth makes the following submissions:
- 5.1. Part 3 does not discriminate on the basis of interstate residence and, therefore, s 117 is not engaged (because, were Mr Palmer a resident of Western Australia, the operation of Pt 3 would be unchanged);
- 30

¹ That Commonwealth adopts the defined terms used in its *Mineralogy* submissions.

- 5.2. Part 3 does not involve an exercise of judicial power, and it does not purport to determine any question of guilt; and
- 5.3. the vaguely stated arguments as to potential inconsistencies between the Agreement Act and various Commonwealth laws do not properly arise for determination in this proceeding.

B SECTION 117

B.1 Principles

6. Not “every kind of differential treatment by a State of a resident of another State amounts to the imposition of a disability or to discrimination within the meaning of s 117”.² The primary sense of “discrimination” as manifested in the text and interpretation of the Constitution, including s 117, is “discrimination between”.³ The essence of that notion is “the unequal treatment of equals or the equal treatment of those who are not equals”.⁴
7. To determine whether a State law infringes s 117, it is necessary to ask and answer the following two questions.
- 7.1. *First*: does the State law subject the person to a disability or discrimination that would not be equally applicable to the person if he or she were a resident of that State? In answering that question, it is necessary to focus on the “practical operation” of the law.⁵ In particular, it is necessary “to examine the operation of the impugned law, action or policy, to decide whether the discrimen it chooses concerns the State residence of the person who invokes its provisions”.⁶
- 7.2. *Second*: if there is disability or discrimination “attributable” to residence, is that disability or discrimination “appropriate and adapted” to the attainment of a

² *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 at 485 (Dawson and Toohey JJ); see also at 478 (Deane and Gaudron JJ).

³ *Permanent Trustee v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at [88]-[89] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), cited in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [66] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

⁴ *Permanent Trustee* (2004) 220 CLR 388 at [89] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), quoting *Austin v Commonwealth* (2003) 215 CLR 185 at [118] (Gaudron, Gummow and Hayne JJ). See also *Palmer v Western Australia* (2021) 95 ALJR 229; [2021] HCA 5 at [31] (Kiefel CJ and Keane J), [98] Gageler J, [184] (Gordon J) and [236] (Edelman J).

⁵ *Sweedman* (2006) 226 CLR 362 at [59] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

⁶ *Sweedman* (2006) 226 CLR 362 at [65] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

legitimate objective?⁷ An objective will be “legitimate” unless the State law provides for different treatment of an out-of-State resident simply because he or she is not a resident of the State. If the answer to that second question is “yes”, s 117 is not infringed.

8. The application of s 117 to this case is resolved by the answer to the first question. For completeness, however, the Commonwealth notes that the second question recognises that “there will be circumstances in which need for regulation of activity ... in order to protect the public in a State, requires that conditions be prescribed which may have a greater impact on out-of-State residents than residents of the legislating State”.⁸ In that way, the second question recognises that the object of s 117 is “to foster the concept of Australian nationhood, recognizing at the same time the capacity of the States to govern their own communities which is an essential feature of the federation”.⁹

B.2 Application of s 117 in the present case

9. Determining whether a statute discriminates based on residence “does not depend upon the motives or intentions of the Minister or individual members of the legislature” (see also **WA/B52 [19]**).¹⁰ That is not to deny that Pt 3 of the Agreement Act must be considered in its context, which includes the parliamentary debates. That context may assist in fixing the legal meaning of the statutory text. However, “it is the operation and effect of the law which defines its constitutional character, and the determination thereof requires identification of the nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes”.¹¹
10. Applying that approach, none of the provisions of Pt 3 on their face, or in their practical operation, subject Mr Palmer to a disability or discrimination that would not be equally applicable to him if he were a resident of Western Australia. Focussing on the central provisions of Pt 3, their legal and practical operation relates to the “first Balmoral South proposal” and the “second Balmoral South proposal” and disputes connected with those

⁷ *Sweedman* (2006) 226 CLR 362 at [66] (Gleeson CJ, Gummow, Kirby and Hayne JJ). See also *Street v Queensland Bar Association* (1989) 168 CLR 461 at 491-492 (Mason CJ), 510-511 (Brennan J), 548 (Dawson J), 573-574 (Gaudron J).

⁸ *Street* (1989) 168 CLR 461 at 493 (Mason CJ).

⁹ *Goryl* (1994) 179 CLR 463 at 486 (Dawson and Toohey JJ).

¹⁰ See, by analogy, *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [12] (the Court); *Sweedman* (2006) 226 CLR 362 at [65] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

¹¹ *H A Bachrach* (1998) 195 CLR 547 at [12] (the Court).

proposals. Those proposals were purportedly made pursuant to the Agreement, to which Mineralogy and International Minerals (the “Project Proponents”¹²) were parties. The operation of the provisions does not turn on Mr Palmer’s control, ownership or directorship of Mineralogy or his directorship of International Minerals.¹³ While Mr Palmer is specifically named in the indemnity provisions of Pt 3,¹⁴ the fact that he is a resident of the State of Queensland¹⁵ has no bearing on the operation of the Act.

11. Accordingly, the first question in the s 117 analysis must be answered “no”. That answer follows irrespective of any attempt by Mr Palmer “to attribute malevolent designs” to the Western Australian Attorney-General or to other persons who promoted or supported the legislation.¹⁶ Accordingly, s 117 of the Constitution is not engaged. It is therefore not possible for the Court to determine the second question, because the premise for that question (ie, discrimination based on out-of-State residence) does not exist.

C CHAPTER III

12. The Commonwealth refers to its submissions in *Mineralogy* at paragraphs 13 to 21 concerning relevant Ch III principles and, in particular, its submissions regarding the separation of judicial power.

C.1 Bill of pains and penalties

13. Mr Palmer contends that Pt 3 operates to impose “punishment” upon him. From that premise, it is said that it is a “bill of pains and penalties”, which the State Parliament lacks legislative power to enact (PS [71]-[72]). In substance, this argument is simply the judicial power argument advanced in the *Mineralogy* proceeding in a different form. It should be rejected for the reasons set out in paragraphs 18 to 19 of the Commonwealth’s submissions in that proceeding.
14. Even leaving aside those arguments, Mr Palmer’s contention fails at its premise, for not all “hardship or distress inflicted upon a citizen by the State constitutes a form of

¹² Agreement Act, s 7.

¹³ SC [6] (SCB 5).

¹⁴ See Agreement Act, ss 14-16 and 22-24. For the reasons given in the Commonwealth’s *Mineralogy* submissions at paragraph 61, it is unnecessary to consider the validity of those provisions in these proceedings (aside from s 14(4)).

¹⁵ SC [7] (SCB 4).

¹⁶ *HA Bachrach* (1998) 195 CLR 547 at [12] (the Court).

punishment”.¹⁷ To the limited extent that Pt 3 affects the rights or liabilities of Mr Palmer himself, that affect cannot properly be characterised as “punishment”.

15. To the extent that it is necessary to consider the concept of a “bill of pains and penalties” separately, the Court in *Haskins v Commonwealth* explained that the appropriate approach to legislation that is said to match that description is to look at whether its provisions legislatively “determine any question of guilt, or make crimes of any acts” (see also **WA/B52 [30]**).¹⁸ None of the provisions of Pt 3 have that operation, including because they are principally concerned with contractual rights.

C.2 Section 75(iv)

- 10 16. Mr Palmer contends that Pt 3, or certain provisions of it, infringe the limitation on State legislative power identified in *Burns v Corbett*¹⁹ (**PS [35]-[59]**). Part of the premise of that submission is that Pt 3, or certain provisions of it, amount to an exercise of judicial power by the Western Australian Parliament. For the reasons set out in paragraphs 18 to 19 of the Commonwealth’s submissions in *Mineralogy*, that premise is incorrect. There being no exercise of judicial power by the Western Australian Parliament at all, that Parliament cannot have exercised judicial power in respect of a matter within s 75(iv) of the Constitution.

D SECTION 109

- 20 17. Mr Palmer contends that Pt 3, or certain provisions of it, are invalid by reason of s 109 of the Constitution because they are inconsistent with various Commonwealth Acts (**PS [79]-[106]**).

D.1 Principles

18. The “starting point” for determining whether there is inconsistency must be “an analysis of the laws in question and their true construction”.²⁰ It is necessary to begin with the Commonwealth law, before turning to consider the State law.²¹ Only once both laws have

¹⁷ *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [17] (Gleeson CJ).

¹⁸ (2011) 244 CLR 22 at [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Duncan v New South Wales* (2015) 255 CLR 388 at [43] (the Court).

¹⁹ (2018) 265 CLR 304.

²⁰ *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500 at [52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ); *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

²¹ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 467 [54] (the Court); *Outback Ballooning* (2019) 266 CLR 428 at [73] (Gageler J); *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [258] (Gummow J).

been construed can it be determined whether a “real conflict” exists between the two laws.²² Such a conflict may arise in a number of ways, including where: (1) conflicting duties are imposed by the two legislatures; (2) there is something in the nature of a right or privilege conferred by one legislature, and the other legislature seeks to impose some additional restrictions on the exercise of that right or privilege; or (3) where the Commonwealth law is intended as a complete, exhaustive or exclusive statement of the law governing a subject matter, and the State law governs the same subject matter.²³ In all of these cases, the State law “alters, impairs or detracts” from the operation of the Commonwealth law.²⁴

D.2 Approach to Mr Palmer’s claims of inconsistency

- 10 19. Section 8(4)(a) of the Agreement Act operates so that any provision in Pt 3 that would be inconsistent with a Commonwealth law, and that would be invalid to that extent by reason of s 109 of the Constitution, is to be partially disapplied to the extent necessary to avoid that inconsistency. For that reason, it is not to the point that s 7 of the Interpretation Act “does not speak to the situation where the issue is not one of the absence of State legislative power, but is one of the extent of inconsistency, by operation of s 109 of the Constitution, of a State law made in exercise of concurrent power” (PS [82]), because s 8(4)(a) speaks directly to that very situation.
- 20 20. Section 8(4)(a) is important in determining the appropriate approach to Mr Palmer’s arguments based on s 109 of the Constitution, because it has the effect of engaging the general principles set out in the Commonwealth’s *Mineralogy* submissions at paragraphs 51 to 54 concerning the circumstances in which the Court ought not, as a matter of practice, determine constitutional questions. Applying those principles to Mr Palmer’s s 109 arguments, if a provision of Pt 3 would only have an invalid operation in circumstances that have not arisen, and that may never arise, then the Court should not decide those arguments. That follows because, even if those circumstances were to arise in the future, s 8(4)(a) would be engaged to avoid Pt 3 having that invalid operation, leaving the balance

²² *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [42] (the Court); *Bell Group* (2016) 260 CLR 500 at [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

²³ *Outback Ballooning* (2019) 266 CLR 428 at [32]-[33], [45] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [70]-[71] (Gageler J), [105]-[107] (Edelman J); *Momcilovic* (2011) 245 CLR 1 at [240]-[245], [261] (Gummow J).

²⁴ *Jemena* (2011) 244 CLR 508 at [39] (the Court); *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at [59] (the Court); *Outback Ballooning* (2019) 266 CLR 428 at [72] (Gageler J), [105] (Edelman J).

of Pt 3 unaffected.²⁵ In effect, s 8(4)(a) provides a ready answer to the analysis that would otherwise need to be undertaken about whether the remaining parts of Pt 3 were intended to operate in accordance with their terms, for s 8(4)(a), together with s 8(5), makes plain that the legislature intended all other operations of Pt 3 to continue in the absence of any invalid operations (see also **WA/B52 [39]**; cf **PS [106]**).²⁶

21. The result is that the Court should not determine any question of s 109 inconsistency unless it is satisfied that there are facts in the Special Case that reveal that the alleged inconsistency has actually arisen. Once that is appreciated, it is clear that none of Mr Palmer's s 109 arguments need to be determined. That point is underscored by the lack of any specificity in the articulation of the alleged inconsistencies.

10 21.1. As to the laws relating to the "Commonwealth judicial process" (**PS [85]**),²⁷ questions of inconsistency would fall to be considered in proceedings in which the relevant Commonwealth laws are engaged. Mr Palmer has not identified any specific inconsistency in any actual proceeding.

21.2. In relation to Ch 5 of the *Corporations Act 2001* (Cth), Pts III-VI of the *Bankruptcy Act 1966* (Cth) and the *Personal Property Securities Act 2009* (Cth), those provisions have no present application to either Mr Palmer or the Plaintiffs in B54/2020, as Mr Palmer acknowledges (**PS [102]**).

20 21.3. In relation to Commonwealth criminal laws (**PS [103]-[105]**),²⁸ Mr Palmer has no standing to challenge s 20(8).²⁹ He has no "special interest" in whether Western Australia may be criminally liable for any particular conduct, and no such conduct has been identified.

²⁵ The situation is closely analogous to that which may require severance to be addressed at the outset as a threshold question: see *Clubb v Edwards* (2019) 267 CLR 171 at at [33]-[36] (Kiefel CJ, Bell and Keane JJ), [143]-[148] (Gageler J), [230] (Nettle J), [329]-[340] (Gordon J), [443] (Edelman J); *Knight v Victoria* (2017) 261 CLR 306 at [33] (the Court).

²⁶ cf *Bell Group* (2016) 260 CLR 500 at [72] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

²⁷ Identified as the Judiciary Act, the *Federal Court of Australia Act 1976* (Cth), the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), the *Service and Execution of Process Act 1992* (Cth), the *Evidence Act 1995* (Cth), the *High Court Rules 2004* (Cth) and the *Federal Court Rules 2011* (Cth).

²⁸ Identified as the *Crimes Act 1914* (Cth), *Criminal Code* (Cth) and *Director of Public Prosecutions Act 1983* (Cth).

²⁹ See, eg, *Zhang v Commissioner, Australian Federal Police* (2021) 95 ALJR 432 at [6] (the Court).

PART V — ESTIMATE OF TIME

22. It is estimated that a combined 1.5 hours will be required for the presentation of the Commonwealth’s oral argument in B52/2020 and B54/2020.

Dated: 28 May 2021



Stephen Donaghue
*Solicitor-General of the
Commonwealth*
T: (02) 6141 4139
E: stephen.donaghue@ag.gov.au

Frances Gordon
Owen Dixon Chambers West
T: (03) 9225 6809
E: francesgordon@vicbar.com.au

Thomas Wood
Owen Dixon Chambers West
T: (03) 9225 6078
E: twood@vicbar.com.au

10

20

30

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

BETWEEN:

CLIVE FREDERICK PALMER
Plaintiff
and
STATE OF WESTERN AUSTRALIA
Defendant

**ANNEXURE TO ATTORNEY-GENERAL OF THE COMMONWEALTH'S
SUBMISSIONS**

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the Commonwealth sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

No	Description	Version	Provision(s)
1.	Commonwealth Constitution	Current	Ch III, ss 75(iv), 109, 117
2.	Agreement Act		Pt 3
3.	<i>Interpretation Act 1984</i> (WA)	Current	ss 7, 8
4.	<i>Judiciary Act 1903</i> (Cth)	Current	
5.	<i>Federal Court of Australia Act 1976</i> (Cth)	Current	
6.	<i>Jurisdiction of Courts (Cross-Vesting) Act 1987</i> (Cth)	Current	
7.	<i>Service and Execution of Process Act 1992</i> (Cth)	Current	
8.	<i>Evidence Act 1995</i> (Cth)	Current	
9.	<i>Corporations Act 2001</i> (Cth)	Current	Ch 5
10.	<i>Bankruptcy Act 1966</i> (Cth)	Current	Parts III-VI
11.	<i>Personal Property Securities Act 2009</i> (Cth)	Current	
12.	<i>Crimes Act 1914</i> (Cth)	Current	
13.	<i>Criminal Code</i> (Cth)	Current	
14.	<i>Director of Public Prosecutions Act 1983</i> (Cth)	Current	