



## HIGH COURT OF AUSTRALIA

24 February 2021

### PALMER v THE STATE OF WESTERN AUSTRALIA [2021] HCA 5

On 6 November 2020 the High Court answered questions referred to it in a special case concerning whether the *Quarantine (Closing the Border) Directions* (WA) ("the Directions") and/or the authorising *Emergency Management Act 2005* (WA) ("the Act") were invalid (in whole or in part) for impermissibly infringing s 92 of the *Constitution*. Today the Court published its reasons for joining in those answers.

On 15 March 2020 the Minister for Emergency Services for Western Australia declared a state of emergency in Western Australia in respect of the COVID-19 pandemic. Section 56 of the Act empowered the Minister to declare a state of emergency provided, among other things, they were satisfied of the occurrence of an emergency and that extraordinary measures were required to prevent or minimise "loss of life, prejudice to the safety, or harm to the health, of persons". Section 67 relevantly empowered an authorised officer, "[f]or the purpose of emergency management" during a state of emergency, to direct or prohibit the movement of persons into an emergency area. The Directions, issued by the State Emergency Coordinator, took effect from 5 April 2020. Pursuant to paras 4 and 5, they prohibited entry of persons into Western Australia unless they were the subject of exemption.

In proceedings commenced on 25 May 2020 in the original jurisdiction of the High Court, the plaintiffs sought a declaration that the Act and/or the Directions were invalid, either wholly or in part, by reason of s 92 of the *Constitution*. Section 92 relevantly provides that "trade, commerce, and intercourse among the States ... shall be absolutely free". The plaintiffs claimed that the Directions imposed an effective burden on the freedom of intercourse by prohibiting cross-border movement, or alternatively that the Directions imposed an effective discriminatory burden with protectionist effect and, as a consequence, contravened the freedom of trade and commerce. On 6 November 2020, the High Court answered the principal question stated for its opinion to the effect that ss 56 and 67 of the Act in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic complied with each limb of s 92, that the exercise of the power to make paras 4 and 5 of the Directions did not raise a constitutional question, and that as no issue about the authorisation of the Directions by the statutory provisions was raised, there was no other question for determination by a court.

Today the High Court unanimously, in separate judgments, found that the principal question reserved could be answered by reference to the provisions of the Act authorising the Directions. Section 92 was concerned with freedom from unjustified burdens of a discriminatory kind. The Court accepted that s 67 did impose a burden on interstate intercourse. However, by reference to the purpose of the provisions and the statutory constraints on the declaration of a state of emergency and the making of directions, the Court found that the burden was justified and the provisions, at least in their application to an emergency constituted by a hazard in the nature of a plague or epidemic, did not infringe the constitutional limitation in s 92.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*