HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 19 Oct 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:	Form 27C - Intervener's submissions
Filing party:	Defendants
Date filed:	19 Oct 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

BETWEEN:

CLIVE FREDERICK PALMER
First Plaintiff

and

STATE OF WESTERN AUSTRALIA
First Defendant

INTERVENER'S CONSOLIDATED SUBMISSIONS (NORTHERN TERRITORY OF AUSTRALIA)

Part I: Certification

1. These submissions are in a form which is suitable for publication on the internet.

Part II: Intervention

2. The Northern Territory of Australia (**Territory**) intervenes pursuant to s 78A(1) of the *Judiciary Act 1903* (Cth). Leave of the Court is not required.

Part III: Argument

A SUMMARY

3. The Territory intervenes broadly in support of the *Quarantine (Closing the Border) Directions* (WA) (**Directions**), but only to advance argument concerning the proper approach to s 92 of the *Constitution*, and specifically to dispute the Plaintiffs' submission that the Directions must be held invalid because they impose a restriction *in terms* on the movement of people into Western Australia (PS at [10]-[13], [20], [23]). The Territory submits:

   (a) There has always been broad acceptance that some interference with the free movement of people, goods and communications across State borders is consistent with s 92 of the *Constitution*. But there has been little coherence in the formulation of the governing principles. These submission address in **Part B** the early authorities dealing with the regulation of movement across borders.

(b) *Cole v Whitfield* (1988) 165 CLR 360 provided coherence to s 92 by bringing to the forefront of analysis the mischief to which s 92 is directed but left unresolved the freedom of intercourse. These submissions address *Cole v Whitfield* in **Part C**.

(c) Authorities post-*Cole v Whitfield* have not reached an accepted rationalisation of the freedom of intercourse. These submissions analyse the several attempts to do so in **Part D**.

(d) The freedom of intercourse guaranteed by s 92 is concerned with injuncting laws having the purpose of interfering with the movement of people, goods and communications across State borders. It is not infringed by every law which *in terms* applies to interstate movement or uses, as a criterion of its operation, the existence of a State border. State laws which are directed to the protection of people within their limited territorial jurisdiction from disease and which, as an incident of achieving that purpose, impose a burden on interstate movement do not offend s 92, provided that the law is reasonably appropriate and adapted to that legitimate purpose. In **Part E** we propose an approach to the freedom broadly aligning with the views of Brennan J in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and Dawson J in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

4. The Territory makes no submission as to the application of s 92 to the Directions on the facts found by Rangiah J on remitter.

B EARLY FREEDOM OF MOVEMENT CASES

5. Early freedom of movement cases are not consistent with the Plaintiffs' submission that a law which *in terms* restricts the movement of people, goods and communications across State boundaries will always be invalid.

6. The freedom of movement guaranteed by s 92 of the *Constitution* was first considered by the High Court in *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 (***Smithers***). The case concerned the validity of a State law which created an offence for a person, recently convicted of a serious offence in another State, entering New South Wales. The primary issue in the case was whether "intercourse" carried its historical meaning,[1] confined by reference to trade and

[1] *The Shorter Oxford English Dictionary on Historical Principles*, (3rd ed, 1984), 'intercourse'. See also *Gibbens v Ogden* 22 US 1 (1984) at 189-190.

commerce, or whether it extended to social movement and communication unconnected to commerce. The Court was unanimous that the law was invalid, but divided evenly as to why.

7. Griffith CJ found (at 109) that state legislative power to exclude undesirable entrants was constrained "*to some extent* by the mere fact of federation". In short reasons following, Griffith CJ articulated why the exclusion could not be *justified* on the ground of necessity. Similarly, Barton J reasoned (at 109-110) that "the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation" and concluded that the law could not be *justified* by reference to a legitimate purpose. Section 92 was unnecessary to resolve the issue on the approach of Griffith CJ and Barton J. And the relevant freedom was derived from, and evoked in support of, the federal union; and not free trade or any incidental economic freedom of movement.

8. By contrast, Isaacs and Higgins JJ approached the issue by reference to s 92. They began by rejecting an interpretation of 'intercourse' in s 92 as confined to dealings in trade and commerce. Their conclusion in that respect, which has been endorsed since, either explicitly or by implication in *Cole v Whitfield* (1988) 165 CLR 360 and *AMS v AIF* (1999) CLR 160, should not now be challenged.

9. Underlying the reasoning of Isaacs J in the case lay an assumption as to the existence of a "personal freedom to pass a State line" based on "common citizenship" (at 113).[2] Such a right resembles very much the implied freedom posed by Murphy J in *Buck v Bavone* (1976) 135 CLR 110 at 137 which has not been endorsed more widely by this Court, albeit substantially on the ground (since overturned in *Lange v ABC* (1997) 189 CLR 520) that s 92 "leaves no room for an implication of the kind suggested" (*Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 569 per Gibbs CJ). A broad and unqualified freedom of that nature, if it exists at all, must have roots going well beyond s 92 and at least having regard to s 117 and the structure of the federation. The context of s 92, appearing in Chapter IV of the Constitution headed "Finance and Trade" and its terms, which do not govern trade, commerce and intercourse between States and Territories, and which do not take effect until "the imposition of uniform duties of

[2] See also Higgins J at 118-119.

customs" tell strikingly against the attribution of such a right to the terms of s 92 alone.

10. In a succession of cases[3] following *Smithers*, this Court has repeatedly stated that s 92 must be consistent with some laws which interfere with the free movement of people, goods and communications across State borders in furtherance of a range of legitimate objectives, including protecting the State and those within from disease, famine, and the introduction of dangerous goods. The Privy Council has expressed similar views.[4]

11. In *Ex parte Nelson (No. 1)* (1928) 42 CLR 209, the Court upheld the validity of a proclamation prohibiting the importation of cattle from areas with suspected diseases unless certain conditions as to dipping, obtaining travel permits and provision of information were complied with. The proclamation did not offend s 92 because its purpose was not to obstruct trade or movement in cattle across the border, but to protect against the spread of disease amongst cattle (at 218-219). The majority (Knox CJ, Gavan Duffy and Starke JJ) said that the "establishment of free trade between the States is perhaps the most notable achievement of the *Constitution*: yet it would be a strange result, if that achievement had stripped the States of power to protect their citizens from the dangers of infectious and contagious diseases, however such dangers may arise" (at 218). A statement to similar effect was made by the plurality (Gavan Duffy CJ, Evatt and McTiernan JJ) in *Tasmania v Victoria* (1935) 52 CLR 157 at 168, although in that case the impugned law went beyond what was necessary, and infringed s 92 (at 218-9). In *Connare; Ex parte Wawn* (1939) 61 CLR 596 at 623 Evatt J explained the difference between the outcome in the two cases by reference to what we would now describe as proportionality testing, leading to a conclusion that the law in *Tasmania v Victoria* was "neither a genuine nor a relevant provision in relation to imported potatoes [but rather] an almost undisguised prohibition of trade in potatoes".

12. The freedom of intercourse arose again in *Gratwick v Johnson* (1945) 70 CLR 1, a case on which the Plaintiffs place considerable reliance. There the Court was

---

[3] *Duncan v Queensland* (1916) 22 CLR 556 at 597-8 per Barton J, 650-651 per Powers J; *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530 at 550-551 per Knox CJ, Isaacs and Starke JJ, 568 per Gavan Duffy J, 569 per Rich J; *Connare; Ex parte Wawn* (1939) 61 CLR 596 at 609 per Latham CJ and 620 and 627-628 per Evatt J.

[4] *James v Cowan* (1932) 47 CLR 386 at 396-7; *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 at 641.

considering the validity of a Commonwealth wartime administrative order which prohibited travel by rail or commercial passenger vehicle from one State to another, from a State to the Territory, or between border stations, except under permit issued by the Director-General of Land Transport. The asserted justification of the order was that it was necessary to ensure the availability of the railways for defence use. The order applied exclusively to intercourse involving a commercial transaction through the purchase of a ticket for travel. The Court unanimously concluded that the order was invalid by reason of s 92.

13. Latham CJ began (at 12) by identifying that the order "imposes a barrier to [interstate] transit and access, as distinguished from other [ie intrastate] travelling, because, and only because, it is inter-State". This was fatal to any justification based on wartime needs since a law only applying to travel across borders is not 'suitable' (*Preston v Avery* (2019) 93 ALJR 448 at [6]) for that end. His Honour then (at 13) referred to the general consensus in the authorities governing s 92 that not all laws which burden or restrict interstate trade, commerce or intercourse infringe s 92 and posed the solution as *characterising* the impugned law. In that context, his Honour referred (at 13-14) to the distinction between laws "directed against" interstate movement and those incidentally affecting it. This language should not be understood as describing the legal operation of the law but rather its characterisation or "real object". In the absence of a genuine justification, his Honour concluded that the impugned order was properly characterised as a burden on the freedom of intercourse.

14. Rich J (at 16) arrived at the same characterisation describing the order as a "direct and immediate invasion of the freedom" in which the "facts … in the immediate case" establish no adequate justification for the law.

15. While Starke J began (at 17) with a very broad statement of the effect of s 92 – "the people of Australia are thus free to pass to and fro among the States without burden, hindrance or restriction" – he immediately qualified that by reference to a statement from *James v Commonwealth* (1936) 55 CLR 1 at 59 that "every case [involves] a question of fact, whether there is an interference with this freedom of passage", and a recognition that there is no "'precise and inflexible interpretation' of s 92". The statement of principle following has to be understood by reference to those qualifications and the essentially conclusory nature of a characterisation of the law as being 'pointed directly at the act of entry': "legislation pointed directly at the passing of people to and fro among the States … contravenes the

provisions of s 92. It is immaterial, as I understand the cases, that the object or purpose of the legislation, gathered from its provisions, is for the public safety or defence … or any other purpose". By way of further qualification, his Honour referred to the judgment of Evatt J in *Willard v Rawson* (1933) 48 CLR 316 at 335 in connection with this statement to a passage where Evatt J eschewed any strict test in relation to s 92 and lay down a series of principles to guide its application on a case by case basis.

16. Dixon J (at 19-20) drew particular attention to the suitability issue referred to above, concluding (at 20) that the "character" of the order was one which detracted from the freedom. And McTiernan J (at 21-22) reached a similar view.

17. None of the judgments in *Gratwick v Johnson* endorse the inflexible principle apparently advocated by the plaintiffs (PS [25]) that a law which, solely as a matter of form, is "aimed at" or "directed to" movement across State borders is always invalid by reason of s 92.

18. Cases following continued to admit the validity of laws burdening the movement of people, goods and communications across State borders where the true purpose of the law was the protection of the State.[5]

C *COLE V WHITFIELD* (1988) 165 CLR 360

19. Against that background, *Cole v Whitfield* (1988) 165 CLR 360 established that a law offends s 92 of the *Constitution* if (at 394) it imposes "discriminatory burdens of a protectionist kind" or (at 394) if its effect is "discriminatory against interstate trade and commerce in that protectionist sense" or (at 407) "if its effect is discriminatory and the discrimination is upon protectionist grounds". Six points are presently relevant.

20. *First*, the test in *Cole v Whitfield* is one of characterisation.[6] A law will not be invalid unless it can be *characterised* as protectionist; that is, unless its "true purpose" is protectionist.[7] That character must be determined objectively, and by

---

[5] *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 at 641; *Mansell v Beck* (1956) 95 CLR 550; *Fergusson v Stevenson* (1961) 84 CLR 421 at 434-5 per Dixon, Williams, Webb, Fullagar and Kitto JJ; *Chapman v Suttie* (1963) 110 CLR 321 at 341 per Menzies J.

[6] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at [37]-[38], [46] per French CJ, Gummow, Hayne, Crennan and Bell JJ, [61] per Heydon J and at [110] and [120] per Kiefel J; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [178] per Gummow J and [423]-[424] per Hayne J

[7] *Castlemaine Tooheys* (1990) 169 CLR 436 at 471-472 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

reference to its practical operation, not its legal effect (at 400-401).[8] That may involve difficult questions of fact and degree (at 399-400).

21. *Secondly*, a law will not have a protectionist character if it is enacted for a non-protectionist purpose for which it is reasonably appropriate and adapted (*Castlemain Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471-473 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ). Proportionality testing is used in this context as a gauge of the objective purpose of the law,[9] sometimes described as its "true operation" (*Cunliffe v Commonwealth* (1994) 182 CLR 272 at 315 per Brennan J) or "substantial effect" (*Cole v Whitfield* at 409).

10 22. *Thirdly*, *Cole v Whitfield* recognised that, since "absolutely free" cannot sensibly mean free of any and all regulation, the interpretive task left by the *Constitution* to the courts is "to identify the kinds or classes of legal burdens, restrictions, controls or standards from which the section guarantees the absolute freedom" (at 394).

23. *Fourthly*, the Court rejected an individual rights theory of s 92 in favour of a free trade theory (*Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217 at [42]-[50] per French CJ, Gummow, Hayne, Crennan and Bell JJ). The Court also expressly abandoned any doctrine embodying a criterion of operation or based on unsatisfactory distinctions between direct and indirect burdens in favour of a practical operation test (*Cole v Whitfield* at 400-403). This swept away or revised

20 much of the discourse in earlier decisions concerning s 92. Earlier statements of principle must be understood by reference to the new approach to s 92.

24. *Fifthly*, the approach to s 92 which (re-)emerged in *Cole v Whitfield* was expressly grounded in an historical and purposive approach to the provision, with the Court declaring (at 391) that "[t]he purpose of the section is … to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries". The *Cole v Whitfield* test of compatibility of a law with s 92 was derived from that identification of the mischief with which s 92 was concerned.

---

[8] See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [168] per Gummow J and [422] per Hayne J; *Castlemain Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

[9] See also *Attorney-General (SA) v Corporation of City of Adelaide* (2013) 249 CLR 1 at [65] per Bell J; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at [110] per Kiefel; *Cole v Whitfield* at 408.

25. Subsequently in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [21]-[32], the plurality (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) revisited the historical context in which s 92 was enacted. Their Honours (at [18]) acknowledged that traditional analyses of protectionism may not always be appropriate in an era of convenient travel across Australia and instantaneous commercial communication via the internet, and preferred framing the inquiry by reference to "those persons who from time to time are placed on the supply side or the demand side of commerce and who are present in a given State at any particular time". The characterisation of a law as protectionist means that it is one which privileges the interests of such persons. This more recent formulation highlights the distinction between s 92 and s 117 of the *Constitution*.

26. *Sixthly*, *Cole v Whitfield* at 387-388 and 393 expressly put to one side as "not necessary now to consider" the question of the freedom of intercourse between the States as guaranteed by s 92. And in doing so, "the judgment left open the character of the burdens imposed by laws which impair the freedom of interstate intercourse" (*Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1 at 57 per Brennan J).[10]

27. Notwithstanding that *Cole v Whitfield* did not directly concern itself with the freedom of intercourse guaranteed by s 92, the reasons of the Court (at 393) endorse a more extensive freedom of intercourse than given to trade and commerce. That endorsement is tied to a statement of principle from the judgment of Starke J in *Gratwick v Johnson* as to the freedom to pass to and fro among the States. It must be viewed in the context in which it appears in that judgment as discussed above at paragraph [15]. The endorsement is conditional ("if it is to have *substantial* content"). It is also qualified by the subsequent statement of principle that, although personal movement cannot "generally speaking" be impeded, there are "legitimate" ends which might require its restriction, and much will depend on "the form and circumstance of the intercourse involved".

D RECENT DECISIONS

28. Since *Cole v Whitfield* this Court has considered the unresolved question of intercourse within s 92 on a number of occasions. The authorities do not reveal a settled or accepted approach "to identify the kinds or classes of legal burdens,

---

[10] See also *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 307 per Mason CJ.

restrictions, controls or standards from which the section guarantees the absolute freedom" (*Cole v Whitfield* at 394).

29. ***Street v Queensland Bar Association* (1989) 168 CLR 461:** In *Street v Queensland Bar Association* the Court was asked whether barrister admission rules in Queensland, which purported to require that a barrister practice principally in Queensland, infringed s 92 of the *Constitution*. The Court found the laws invalid by reference to s 117 of the *Constitution* and Mason CJ (at 494), Brennan J (at 503, 521), Deane J (at 534), Toohey J (at 551), Gaudron J (at 564-565) and McHugh J (at 576) found it unnecessary and undesirable to deal with the s 92 argument. Only Dawson J considered and rejected the argument based on s 92. The case is relevant because it highlights the intersection of s 92 with s 117.

30. ***Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (*Nationwide News*)**: In *Nationwide News* the validity of a Commonwealth law creating an offence to use words calculated to bring (a member of) the Industrial Relations Commission into disrepute was at issue. It was alleged that a publication in a national newspaper had contravened this provision. An argument put in defense of the publication was that the offence provision contravened s 92 in its application to interstate intercourse and communication. Since the offence provision could not be characterised as protectionist in the *Cole v Whitfield* sense, the Court was invited to take up the suggestion in *Cole v Whitfield* that s 92 guaranteed a more extensive freedom of intercourse and that, notwithstanding the particular publication was made in the course of a commercial enterprise, that a more extensive intercourse freedom should be applied to invalidate the law.

31. The majority (at 23, 34 per Mason CJ, 82 per Deane and Toohey JJ) found that it was unnecessary to decide whether s 92 was infringed. Brennan J found that s 92 was not infringed.

32. Brennan J considered (at 57) that "[t]he general criterion of invalidity of a law which places a burden on interstate intercourse is that the law is enacted *for the purpose of burdening interstate intercourse*. If the law is enacted for some other purpose then, provided the law is appropriate and adapted to the fulfilment of that other purpose, an incidental burdening of interstate intercourse may not be held to invalidate the law". His Honour reformulated the general criterion in two ways. First, if a law imposes a burden *by reason* of the crossing of the border as in *R v Smithers; Ex parte Benson* and in *Gratwick v Johnson*, the law offends s 92. Assuming his Honour was not recycling the discarded criterion of operation test in

relation to s 92, "by reason of" appears to be another way of describing the objective purpose or characterisation of the law, and reflected an inquiry of the same mode as prescribed in *Cole v Whitfield*. And secondly, a law which has the effect of preventing or impeding the crossing of the border will be invalid if the circumstances are such as to show that that is its only or chief purpose. Brennan J recognised (at 58) categories of law which had validly burdened interstate movement, including laws protecting against disease and social harm. His Honour was here referring to laws of the kind discussed above at [10]-[11] and [18]. Justifying the existence of those limitations on the freedom, his Honour reasoned that "State borders … mark the territorial end of one area of legislative competence and the territorial beginning of another… The change in the legal regime on one side of the border may impose a burden that is not imposed on the other, but that is not enough in itself to amount to an impermissible burden".[11]

33. ***Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV*):** In *ACTV* once again the High Court (at 147 per Mason CJ, 176 per Deane and Toohey JJ, 224 per Gaudron J, 246 per McHugh) largely found it unnecessary to deal with an argument for invalidity based on s 92. The impugned laws purported to regulate broadcasting of political content. A majority of the Court found the laws invalid because they infringed the implied freedom of political communication. Only Dawson J considered s 92 of the *Constitution* and found that the laws did not infringe the freedom of intercourse guaranteed by that section.

34. Dawson J began by observing (at 191) that intercourse "embraces all forms of movement and communication and includes radio and television broadcasting". His Honour went on (at 192) to observe that acts of intercourse may equally be acts of trade and commerce but that intercourse extends beyond trade and commerce, and so it is necessary to give separate consideration to the intercourse freedom.

35. Recognising the coherence *Cole v Whitfield* introduced in relation to the freedom of trade and commerce, Dawson J set about trying to organise the freedom of intercourse under the same "mode of reasoning" (at 194). His Honour identified (at 192, 194) the relevant subject-matter with which the intercourse aspect of s 92 is concerned as "intercourse among the States. That is to say, it is confined to

---

[11] See also *R v Connare; Ex parte Wawn* (1939) 61 CLR 596 at 624 per Evatt JJ.

movement or activity across State borders." Functionally, this subject-matter is then posed (at 194-195) as the equivalent of free trade under the *Cole v Whitfield* test. A law having the purpose of impairing that subject-matter offends s 92. As such, the inquiry is whether the law is properly to be characterised as having the "real object" of "restricting movement [of people, goods or communication] across State borders" or whether the law merely does so only "incidentally" in the fulfilment of some other object. Consistent with *Cole v Whitfield*, the inquiry may be informed by proportionality analysis so that a law which is not reasonably appropriate and adapted to the fulfilment of its apparent purpose will not be characterised as a law for that purpose. Consequently, "movement across State borders is [not] immune from regulation" (at 194), provided the regulation is justified and proportionate.

36. Orienting the freedom of intercourse in this way cleaves to the statement of the purpose of s 92 identified in *Cole v Whitfield* at 391 and explained by reference to the history of the provision (see paragraph [24] above). Equally, confinement of the mischief with which the freedom of intercourse is concerned to the use of State borders as in themselves barriers to movement (at 192 and 194, citing *R v Smithers; Ex parte Benson* at 117 per Isaacs J) ties the freedom to the language of s 92 which its history (*Cole v Whitfield* at 390)[12] shows was a deliberate amendment of earlier broader language: "throughout the Commonwealth".

37. ***Cunliffe v Commonwealth* (1994) 182 CLR 272 (*Cunliffe*)**: In *Cunliffe* the Court considered the validity of a registration system for persons providing immigration assistance. It was argued (at 280) for the plaintiffs that prohibitions on the provision of immigration assistance by unregistered persons burdened the guarantee of free intercourse in s 92. As in *Nationwide News*, there was no foundation to characterise the law as discriminatory or protectionist and so, notwithstanding that the law applied equally to charitable and commercial immigration services, the plaintiffs confined their argument to the infringement of the freedom of intercourse. The Court concluded unanimously that the law did not infringe s 92, although a minority would have found the law invalid because it infringed the implied freedom of political communication.

---

[12] See also F R Beasley, 'The Commonwealth Constitution: section 92' (1948) 1 *University of Western Australia Annual Law Review* 97, 103-107.

38. Mason CJ said (at 307-308) a law will impermissibly burden the freedom of intercourse guaranteed by s 92 if it "in terms applies to movement across a [State] border and imposes a burden or restriction" or if it imposes an incidental burden or restriction on interstate intercourse in the course of regulating another subject matter where the burden or restriction is not reasonably necessary for the purpose of preserving an ordered society under a system of representative government and democracy, or is disproportionate to that end.

39. Mason CJ does not explain why a law applying "in terms" to movement across a border should *always* infringe s 92. That result is difficult to reconcile with the abandonment in *Cole v Whitfield* at 400-403 of the "criterion of operation" test and the law's renewed focus on practical operation and objective purpose.

40. Brennan J (at 333) repeated what he had said in *Nationwide News* at 58-59 that "the object of s 92 is to preclude the crossing of the border from attracting a burden which the transaction would not otherwise have to bear" and embraced what Dawson J had said in *ACTV*. Similarly, Dawson J (at 366) summarised his earlier views in ACTV and embraced what Brennan J said in *Nationwide News*.

41. Deane J (with whom Gaudron J agreed at 392) held (at 346) that "[t]he freedom of intercourse which the section demands is freedom within an ordered community and a law which incidentally and non discriminately affects interstate intercourse in the course of regulating some general activity .... will not contravene s 92 if its incidental effect on interstate intercourse does not go beyond what is necessary or appropriate and adapted for the preservation of an ordered society or the protection or vindication of the legitimate claims of individuals in such a society".

42. Toohey J (at 384) held that the impugned law, "neither in its terms nor in its operation ... impose[d] any burden on interstate intercourse which it would not impose, absent State borders" and so was beyond the scope of s 92. His reasoning can be seen as broadly consistent with the approach of Dawson and Brennan JJ.

43. McHugh J (at 395-396) reasoned from the "emphatic injunction" in s 92 that the section prohibits all regulation of interstate intercourse save for laws that are "necessary for the government of the nation or its constituent parts" in the sense that there is a "real social need" for the law and the restriction or burden on interstate intercourse is proportionate.

44. ***AMS v AIF* (1999) CLR 160**: In *AMS v AIF* the issue was whether or not an order prohibiting the mother of a child from changing the child's principal place of residence from the Perth metropolitan area to the Northern Territory engaged an

operational inconsistency with s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth). That provision contains an analogous freedom to s 92 but in reference to trade, commerce and intercourse between the Northern Territory and the States. *AMS v AIF* is the only authority since the bifurcation introduced by *Cole v Whitfield* where the impugned law was concerned exclusively with social or personal intercourse, without any commercial aspect. As with other decisions, the case was decided on other grounds.

45. The plurality (Gleeson CJ, McHugh and Gummow JJ) with whom Hayne J agreed (at [221]), did not decide the s 92 issue, being satisfied on other grounds that the order was invalid (at [46]-[47]). At [40]-[43], their Honours noted the different approaches to the freedom of intercourse adopted since *Cole v Whitfield* without expressing any preference. Their Honours accepted (at [46]) that a guardianship or custody order prohibiting personal travel could impermissibly burden the freedom of intercourse guaranteed by s 92. Their Honours framed the test that would apply in those circumstances as whether the law, having the practical effect of burdening the freedom of intercourse, imposed "an impediment greater that that reasonably required to achieve the object of the legislation."

46. Similarly Gaudron J held no concerns that personal travel amounted to intercourse within the meaning of s 92 and (at [101]) adhered to the view she had expressed by way of agreement with Deane J in *Cunliffe*. Her Honour described the test as more stringent than that applied in relation to an implied freedom which must accommodate the intrusion of some laws within the subject matter of the freedom.

47. Kirby J considered (at [161]) the question as whether or not the practical burden and restriction on movement across the border was a permissible one within the meaning of s 92. His Honour cited the observations of Deane J in *Cunliffe*. Kirby J acknowledged (at [162]) that the task was one of characterisation of the impugned law. A law having some other purpose consistent with a well ordered society which imposed a burden or restriction on transborder movement only as an incidental and necessary effect of the attainment of that purpose would not infringe s 92 provided the means adopted to achieve that object was proportionate.

48. Callinan J noted (at [276]) that there were various formulations of the test to be applied in determining the scope of permissible regulation of intercourse under s 92. His Honour noted (at [278]) that the test proposed by McHugh J in *Cunliffe* was stricter than the test proposed by other Justices and placed less reliance on

proportionality. He concluded that he did not need to decide the correct test since s 92 was not engaged on any of them.

49. ***APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322 (APLA)*:** In *APLA* the impugned law prohibited legal advertising referencing or depicting personal injury. The question referred to the Full Court (at [17]) distinguished between the freedoms of intercourse and of trade and commerce. McHugh J (at [96]) and Kirby J (at [366]) did not consider s 92, since they found the law invalid on other grounds. None of the Justices found that s 92 was infringed by the law, applying either the trade and commerce or intercourse aspects.

50. Gleeson CJ and Heydon J began by observing (at [37]) that the reasoning in *Cole v Whitfield* denied that the freedoms of intercourse and of trade and commerce were co-extensive. They dealt with the trade and commerce aspect of s 92 shortly, there being nothing discriminatory or protectionist about the regulations. Their Honours then considered the intercourse aspect of s 92. By reference to the plurality judgment in *AMS v AIF* their Honours posed the test (at [38]) as whether the impediment to interstate intercourse imposed by the impugned law was greater than reasonably required to achieve the object of the law. That question was answered in the negative.

51. Gummow J began (at [161]) by noting the implied freedom of movement raised by Murphy J in *Buck v Bavone* (1976) 135 CLR 110 and dismissed by Mason J in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556. His Honour did not express a view on the difference of views,[13] noting that the plaintiffs confined their argument to s 92.

52. His Honour (at [173]) cited with apparent approval the reasoning of Brennan J in *Nationwide News* and in *Cunliffe* and also (at [174]) the similar views of Dawson J in *ACTV*. His Honour then referred to the plurality reasons in *AMS v AIF* which he described as the doctrine of the Court, a proposition with which Hayne J agreed (at [420]). It is apparent that Gummow J saw no inconsistency between the earlier views of Brennan J and Dawson J and the plurality reasons in *AMS v AIF*.

---

[13] In *Kruger v Commonwealth* (1997) 190 CLR 1 at 157 Gummow J denied the existence of an implied freedom of movement and association.

53. Gummow J (at [178]), in a passage which has been approved many time since,[14] considered what is meant by describing the "object" or "purpose" of a law for constitutional analysis of this kind, reasoning that the concepts resemble the notion of mischief, and are not limited to what the law does in its terms.

54. Hayne J began (at [399]) by recognising the distinction drawn in *Cole v Whitfield* between the freedom of trade and commerce and the freedom of intercourse, noting (at [400]) that the distinction was not one of fact since the concepts of trade, commerce and intercourse are overlapping, and (at [401]-[402]) that it was not based in the text of s 92.

10 55. After reviewing (at [410]-[415]) the different formulations proposed in the earlier authorities since *Cole v Whitfield*, Hayne J concluded (at [416]) that a law having no purpose or effect other than to impair interstate intercourse would infringe s 92. Such a law would be described as one "aimed at" interstate intercourse.

56. With some misgivings, Hayne J appeared to accept (at [421]-[420]) that the test to be applied in respect of a law burdening interstate intercourse in the fulfilment of some other legislative purpose is whether or not the law is necessary or appropriate and adapted to the fulfilment of its purpose, where purpose is to be assessed objectively.

57. Callinan J (at [462]) regarded the plaintiff's s 92 argument as "barely, if at all,
20 arguable". The argument was to be addressed on the basis of the test in *Cole v Whitfield*. His Honour noted (at [462]) that the laws were not "aimed [at]" interstate, trade, commerce or intercourse, their "real object" (at [463]) was to deter unnecessary litigation in a non-discriminatory way.

E A TEST FOR THE FREEDOM OF INTERCOURSE

58. The freedom of intercourse guaranteed by s 92 of the *Constitution* is a freedom of movement of goods, people and communications across State borders. A necessary condition for a law to infringe the intercourse limb of s 92 is that it burdens or interferes with such movement. But that is not a sufficient condition. Section 92 injuncts only laws which take the border "as a reason in itself for such
30 interference" (*Smithers* at 113 per Issacs J) rather than as a "limit of the State's

---

[14] *Work Health Authority v Outback Ballooning* (2019) 266 CLR 428 at [72] per Gageler J; *Unions NSW v New South Wales* (2019) 264 CLR 595 at [171] per Edelman J; *Brown v Tasmania* (2017) 261 CLR 328 at [208] per Gageler J and at [321] per Gordon J; *McCloy v New South Wales* (2015) 257 CLR 178 at [132]-[133] per Gageler J; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at [36] per French CJ, Gummow, Hayne, Crennan and Bell JJ; *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at [307] per Kenny and Middleton JJ.

territorial jurisdiction" (*R v Connare; Ex parte Wawn* (1939) 61 CLR 596 at 624 per Evatt J). The difference is between laws having as their purpose (in the sense discussed by Gummow J in *APLA* at [178]) to divide or separate on State lines, and laws which incidentally do so in the course of regulating a subject-matter within the State. The former are laws the objective purpose of which is to impose a burden on movement as its own end. Equally this will include laws which burden the freedom of movement across State borders and are of no discernible objective or which, ostensibly having another purpose, are not reasonably appropriate and adapted to its fulfillment. The laws considered in *Smithers*, *Gratwick v Johnson* and *Tasmania v Victoria* would all fall within this class of law which the intercourse limb of s 92 proscribes.

59. In the present case, the question can be asked as whether or not the Directions are a law restricting the entry of people in Western Australia or a law controlling the spread of an infectious disease within Western Australia.

60. That question of characterisation must be answered by examination whether the Directions are reasonably appropriate and adapted to advance the objective of limiting the spread of COVID-19 in Western Australia. If they are then they do not infringe the intercourse limb of s 92 since they do not have a prohibited purpose. If the Directions fail proportionality testing then they are not properly characterised as a law regulating the spread of COVID-19, and are invalid.

61. Approaching the freedom of intercourse in this way brings a degree of balance to both limbs of s 92, since it places them on the same plane of reasoning. That coherence is especially desirable because of the broader view of protectionism adopted in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [18]. The freedom of intercourse so described is a natural companion to the freedom of trade and commerce so understood. Barriers to the movement of people, goods and communication across borders even of a non-protectionist kind pose a danger to free trade. A complimentary freedom of intercourse ensures that all such barriers are justified and proportionate.

62. Similarly, because both limbs of s 92 serve different, related purposes, this resolution resolves the difficulties[15] otherwise arising from the different tests for

---

[15] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 59 per Brennan J, 83-84 per Deane and Toohey; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [163]-[165], [172] per Gummow J, [404], [427] per Hayne J.

invalidity under each limb. A law must satisfy both tests of validity under s 92 to the extent they arise.

63. Insofar as this view of the freedom of intercourse is more limited than some earlier expositions, an explanation may be found in the recent acceptance that s 92 is "not intended to be exhaustive as to the rights of Australians to communicate with each other" (*ACTV* at 214 per Gaudron J) or to move about the Commonwealth. The implied freedom of communication on governmental and political matters protects some species of intercourse. Equally, s 117 protects against certain kinds of discrimination on grounds of residency which necessarily will encompass some acts of intercourse between the States. A freedom of interstate movement of the kind recognised in *Shaprio v Thompson* 394 US 618 (1969) (a freedom to move residence from one State to another without disability), if it has a direct parallel in the Australian context, is more closely aligned with s 117 than s 92. There is similarly now substantial recognition of an implied right of movement to the seat of government (*ACTV* at 213-214 per Gaudron; *Nationwide News* at 60 per Brennan J).[16] More controversial is any broader notion of freedom of movement of the kind recognised by Murphy J in *Buck v Bavone* (1976) 135 CLR 110 at 137 by implication from "the union of the people in an indissoluble Commonwealth". The emergence of some of these other freedoms answers much of the imperative to look for a broader freedom in s 92. It permits the Court to reorient the freedom of intercourse by reference to its particular mischief.

Part V: Estimate

64. The Territory does not require time for oral submissions.

Dated 19 October 2020

Trevor Moses
8982 4700
tmoses@williamforster.com

Lachlan Peattie
8999 6858
lachlan.peattie@nt.gov.au

[16] See also *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 109 per Griffith CJ, 109-110 per Barton J; *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 549-550.