HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B26 of 2020

BETWEEN:

CLIVE FREDERICK PALMER
First Plaintiff

and

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

and

STATE OF WESTERN AUSTRALIA
First Defendant

and

CHRISTOPHER JOHN DAWSON
Second Defendant

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Filed on behalf of the Attorney-General for the State of Queensland, intervening

19 October 2020

Document No: 10814503

PART I: Internet publication

1. These submissions are in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in this proceeding in support of the defendants pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. In support of the submission that the *Quarantine (Closing the Border) Directions* (WA) ('Directions') and the *Emergency Management Act 2005* (WA) do not infringe s 92 of the Constitution, Queensland makes three points.

5. ***First***, the plaintiffs' primary submission – that a law which in terms restricts movement across a State border is invalid and 'cannot be justified on any terms'[1] – ought to be rejected. It is not supported by *Gratwick v Johnson* ('*Gratwick*'), *R v Smithers; Ex parte Benson* ('*Smithers*'), or subsequent authority. It would reintroduce into s 92 concepts recognised as unworkable in *Cole v Whitfield* ('*Cole*').

6. ***Second***, it should now be accepted that s 92 has the consequence that:
   (a) a law which has the *object* or *purpose* of erecting a State border as a barrier against freedom of intercourse will be invalid; as will a law which has that *effect*, unless it is 'reasonably required' to achieve a legitimate purpose.[2]
   (b) Structured proportionality is a useful tool of analysis to determine whether a burden on intercourse among the States is 'reasonably required'. Where such a burden is not reasonably required, it may be possible to describe the law as having, as its 'true' object or purpose, impeding interstate intercourse.

7. That approach neither treats the intercourse limb as governed by the content of the trade and commerce limb, nor posits 'a strict correspondence' between the two limbs.[3]

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[1] Plaintiffs' Submissions, [11] ('PS').
[2] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 191-6 (Dawson J) ('*ACTV*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 56-9 (Brennan J).

Instead, it recognises that the constitutional values underpinning both limbs of s 92 may be restricted by the same law, and in such a case, both values should be weighed in the balance when considering the validity of the law. The weight accorded to each will differ with the context. The approach above is preferable to applying two different tests to the same law (rendering the less stringent standard irrelevant); or testing the validity of a law exclusively by reference to only one test (which would require the Court to ignore one of the constitutional values burdened by the law).

8. ***Third***, the key question in this case is whether the burden placed by the Directions and the *Emergency Management Act* on free interstate intercourse is reasonably required for the legitimate purpose of limiting the spread of COVID-19 and protecting public health. The application of the analytical tool of structured proportionality demonstrates that the answer to that question is 'Yes'. To the extent (if any) that the law has a protectionist effect, the burden on interstate trade and commerce is similarly justified.

STATEMENT OF ARGUMENT

The plaintiffs' reliance on *Smithers* and *Gratwick* is misplaced

9. 'Cases involving s 92 proceed upon an acceptance that the freedoms guaranteed by that section are not absolute.'[4] Even when it comes to the intercourse limb of s 92, it is not the case that 'every form of intercourse must be left without any restriction or regulation in order to satisfy the guarantee of freedom.'[5] Indeed, it would be a strange result if s 92 'stripped the States of power to protect their citizens from the dangers of infectious and contagious diseases, however such dangers may arise'.[6]

10. The plaintiffs submit that there is an 'unbroken line of authority', beginning with *Smithers* and *Gratwick*, to the effect that laws which are 'aimed at' or 'directed to' movement across a border '[can]not be justified on any terms'.[7] The plaintiffs appear to interpret the phrases 'aimed at' and 'directed to' as identifying laws which have an 'intended legal operation'[8] of restricting movement across a State border. Yet the submission that laws which operate by reference to the criterion of a State border are

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[3] *Cole* (1988) 165 CLR 360, 387-8, 394 (the Court).
[4] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 136 [444] (Kiefel J, albeit in dissent in the result). See also *Monis v The Queen* (2013) 249 CLR 92, 190 [267] n 331 (Crennan, Kiefel and Bell JJ).
[5] *Cole* (1988) 165 CLR 360, 393 (the Court).
[6] *Ex parte Nelson [No 1]* (1928) 42 CLR 209, 218 (Knox CJ, Gavan Duffy and Starke JJ).
[7] PS [11].
[8] PS [45].

incapable of justification, even if they are necessary to achieve a compelling purpose,[9] is inconsistent with authority, as *Ex parte Nelson [No 1]* demonstrates.[10] It is sufficiently clear that the phrases 'aimed at' and 'directed to', have been used in the authorities to describe laws which restricted interstate intercourse as an end in itself, or were not shown to be reasonably required for a legitimate purpose.

11. The plaintiffs place primary reliance on *Gratwick*.[11] In *Gratwick*, clause 3(a) of a Ministerial order made under the *National Security (Land Transport) Regulations 1944* (Cth) prohibited interstate travel by rail or commercial passenger vehicle without a permit granted by the Director-General of Land Transport.[12] The power to grant a permit was not limited by express criteria: it was held to be a 'completely arbitrary discretion not shown to be related to any purposes of defence'.[13] Clause 3(a) was unanimously held to be invalid for infringing s 92.

12. *Gratwick* was decided when the law in relation to s 92 was as stated in *James v Commonwealth*.[14] Although, as Dixon J recognised, the principles to be applied then remained contested, elusive and unsettled.[15] That alone is enough to reject the suggestion that *Gratwick* forms part of an 'unbroken line' of authority. In any event, the key to the invalidity of clause 3(a) was not its criterion of operation, but the nature of the discretion to grant a permit: it was 'completely arbitrary'.[16] The arbitrary nature of the discretion meant that the clause could not be seen as providing 'any general system of regulation'[17] of the kind which had been upheld in earlier cases.[18] It was a '*mere* prohibition'.[19] Using more recent language, the point might be explained as one

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[9] PS [11].
[10] (1928) 42 CLR 209. See also *Tasmania v Victoria* (1935) 52 CLR 157, 168-9 (Gavan Duffy CJ, Evatt and McTiernan JJ), 177-8 (Starke J).
[11] PS [10], [11].
[12] *Gratwick* (1945) 70 CLR 1, 10.
[13] Ibid 15 (Latham CJ). See also at 19 (Dixon J).
[14] [1936] AC 578; (1936) 55 CLR 1.
[15] *Gratwick* (1945) 70 CLR 1, 19 (Dixon J).
[16] Ibid 15 (Latham CJ).
[17] Ibid 14-16 (Latham CJ).
[18] Ibid 15 (Latham CJ), referring to *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30 and *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327.
[19] *Gratwick* (1945) 70 CLR 1, 15 (Latham CJ) (emphasis added). On this distinction, see *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 639-41 (Lord Porter, delivering the advice of the Privy Council) ('*Bank Nationalisation Case*').

involving 'suitability':[20] the arbitrary discretion revealed that the prohibition on interstate intercourse effected by the clause was not 'rationally connected' to the 'legitimate purpose' of defence.[21] Dixon J said:[22]

> The [Order] … does not profess to be concerned with priorities of travel upon transport facilities under excessive demand and it is certainly not confined to that matter. It does not, at all events so far as appears from its text or by evidence, depend in any degree for its practical operation or administration upon the movement of troops, munitions, war supplies, or any like considerations. It is simply based on the 'inter-Stateness' of the journeys it assumes to control …

13. In other words, the terms of clause 3(a) did not reveal any purpose other than the control of interstate journeys.[23] Latham CJ reasoned similarly,[24] as did Rich J, who said: 'No doubt cases may occur where the exigencies of war require the regulation of the transport of men and material. The facts, however, in the instant case show no such emergency'.[25] Consistently with what would later be decided in the *Communist Party Case*[26] and *Unions NSW [No 2]*,[27] the validity of the Order could not be established without evidence, or by simply pointing to the objects clause of the empowering regulation.[28]

14. This case does not share those key features of *Gratwick*. The rational connection between the Directions and the legitimate purpose of limiting the spread of COVID-19 is not only evident on the face of the Directions, it is established as a matter of fact by the findings of Rangiah J.[29]

15. The plaintiffs' reliance on *Smithers* is similarly misplaced. *Smithers* concerned the *Influx of Criminals Prevention Act 1903* (NSW), which made it an offence for a person

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[20] *Unions New South Wales v New South Wales [No 1]* (2013) 252 CLR 530, 556-7 [46]-[52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions NSW [No 1]*'); *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

[21] That was also the basis upon which the validity of the Order was attacked: the respondent submitted that the Order had 'no connection whatever, in itself, with the defence of the Commonwealth or with the prosecution of the war': *Gratwick* (1945) 70 CLR 1, 6.

[22] Ibid 19 (Dixon J).

[23] Cf *Unions NSW [No 1]* (2013) 252 CLR 530, 557 [52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[24] *Gratwick* (1945) 70 CLR 1, 13, 15 (Latham CJ).

[25] Ibid 16 (Rich J).

[26] *Communist Party Case* (1951) 83 CLR 1, 222 (Williams J): 'It is the duty of the Court in every constitutional case to be satisfied of every fact that existence of which is necessary in law to provide a constitutional basis for the legislation'.

[27] (2019) 264 CLR 595, 616 [45] (Kiefel CJ, Bell and Keane JJ), 622 [67] (Gageler J).

[28] *Gratwick* (1945) 70 CLR 1, 15 (Latham CJ). See also Starke J at 17: 'It is immaterial, as I understand the cases, that the object of purpose of the legislation, *gathered from its provisions*, is for the public safety or defence of the Commonwealth…' (emphasis added).

[29] *Palmer v Western Australia [No 4]* [2020] FCA 1221, 85 [366] (CB Vol 1, 215) ('*Palmer [No 4]*').

convicted of offences punishable by one year's imprisonment or longer, to enter New South Wales, for a period of three years following his release from prison. Griffith CJ held the law invalid in its application to the applicant: his offence was so minor that his exclusion from New South Wales 'for such a reason [could not] be justified on any … ground of necessity'.[30] The Chief Justice's reasons were based on *Crandall v Nevada*[31] and 'the mere fact of federation', not s 92. Logically, however, his Honour's reasons contemplate that s 92 also would not prevent the States from excluding 'undesirable inhabitants', 'to some extent'.[32]

16. Barton J agreed with Griffith CJ,[33] and indicated that the *Crandall* doctrine was 'probabl[y]' coterminous with the intercourse limb of s 92.[34] His Honour expressly denied any suggestion that s 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'. The power to takes such measures was to be limited by 'the existence of some necessity for the defensive precaution'.[35] That necessity was not shown in respect of the *Influx of Criminals Prevention Act*, either on 'the face of the … Act [or] the reasons by which its validity [was] supported.'[36]

17. It is true that Isaacs J described the freedom of intercourse guaranteed by s 92 as 'absolute', in the sense of being 'an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians'.[37] His Honour's reasons involved three key propositions, each of which must now be rejected. First, his Honour conceived of s 92 as a 'personal right'.[38] Second, Isaacs J regarded the 'purpose' of the law as indistinguishable from its 'effects', a position which is also now rejected.[39] Finally, his Honour reasoned that if

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[30] The applicant had been convicted in Victoria of being a person with insufficient lawful means of support: *Smithers* (1912) 16 CLR 99, 109.
[31] (1867) 73 US 35.
[32] *Smithers* (1912) 16 CLR 99, 109 (Griffith CJ).
[33] Ibid 109 (Barton J).
[34] Ibid 110 (Barton J).
[35] Ibid 110 (Barton J).
[36] Ibid 111 (Barton J).
[37] Ibid 117 (Isaacs J).
[38] Ibid 114 (Isaacs J).
[39] *Brown v Tasmania* (2017) 261 CLR 328, 362 [99] (Kiefel CJ, Bell and Keane JJ), 391-2 [208]-[209] (Gageler J), 432-3 [322] (Gordon J) ('*Brown*'); *Unions NSW [No 2]* (2019) 264 CLR 565, 656-7 [169]-[172] (Edelman J).

s 92 could be limited at all, its effect would be entirely undermined.[40] Amongst other authorities,[41] *Cole* shows why that proposition cannot be accepted.

18. The reasons of Isaacs J do articulate, however, the key vice of the *Influx of Criminals Prevention Act*. His Honour noted that the law applied where the person convicted:[42]

> may have entered upon a wholly reputable and honourable life; he may be desirous of passing, say, from Brisbane to Adelaide for the transaction of ordinary honest business; and yet, by the terms of this Act, he is liable to imprisonment, not only if he wishes to do business in New South Wales, but even if he merely passes through upon a railway, or comes to Sydney to take a ship to his destination, or after his imprisonment, say, in Victoria, he may wish to rejoin his family in New South Wales, where he is permanently resident, or to exercise his vote in a federal electorate, or attend a sitting of this Court, or desire access to any federal office.

19. Isaacs J's concerns about the law's over-breadth, like Griffith J's and Barton J's, suggest that the vice in the law was – in modern language – at necessity or adequacy of balance. Just as the disenfranchisement of prisoners serving three years or more had a disproportionate impact on the constitutional mandate of direct choice by the people in *Roach v Electoral Commissioner* (whether due to lack of a rational connection[43] or otherwise[44]), excluding people from interstate who had served a term of imprisonment up to three years previously would clearly have a disproportionate impact on the constitutional mandate of national unity. As explained in [30] below, disproportionality of that kind tends to indicate that the true purpose is illegitimate. That is, the manifest disproportionality of the laws in *Gratwick* and *Smithers* tends to indicate that they were actually 'directed to' impeding the free flow of people across State borders.

Other authority

20. Contrary to the plaintiffs' submissions, the course of subsequent authority does not confirm their interpretation of *Gratwick*. Much the opposite. For example, it was recognised by Dixon CJ, McTiernan and Webb JJ in *Hughes & Vale v New South Wales [No 2]*,[45] as it had been by the Privy Council in *Hughes & Vale Pty Ltd v New South Wales [No 1]*,[46] that an administrative discretion to exclude a person from carrying goods upon an inter-State highway might be consistent with s 92 where it was necessary

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[40] *Smithers* (1912) 16 CLR 99, 117 (Isaacs J).
[41] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *McCloy* (2015) 257 CLR 178.
[42] *Smithers* (1912) 16 CLR 99, 117 (Isaacs J).
[43] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 182 [23]-[24] (Gleeson CJ).
[44] Ibid 202 [95] (Gummow, Kirby and Crennan JJ).
[45] (1955) 93 CLR 127.
[46] (1954) 93 CLR 1, 32-33.

on grounds of public safety, or to limit the number of vehicles over certain routes.[47] As Brennan J explained in *Miller v TCN Channel Nine Pty Ltd*, that result was not inconsistent with *Gratwick*, because the law in *Gratwick* had not been defended on the basis it was necessary for the rationing of limited resources during wartime.[48]

21. In *Cole*, the Court cited *Gratwick* as authority for the proposition that s 92 extends 'to a guarantee of personal freedom "to pass to and fro among the States without burden, hindrance or restriction",' but made clear that the statement was not absolute.[49] The Court held that although 'some forms of intercourse' are relatively more 'immune' from legislative or executive interference than trade and commerce, restriction on intercourse remains possible. 'For example', it would be legitimate to 'restrict a pedestrian's use of a highway for the purpose of his crossing or to authorize the arrest of a fugitive offender from one State at the moment of his departure into another State'.[50] At least the second of those examples appears to contradict the plaintiff's submission, that laws which operate by reference to the criterion of a State border are invalid *per se*.

22. Moreover, *Cole* expressly rejected, as applicable to the trade and commerce limb, a test of the kind which the plaintiff now submits should apply to the intercourse limb:[51]

> The [criterion of operations] doctrine is highly artificial. It depends on the formal and obscure distinction between the essential attributes of trade and commerce and those facts, events or things which are inessential, incidental, or, indeed, antecedent or preparatory to that trade and commerce. This distinction mirrors another distinction, equally unsatisfactory, between burdens which are direct and immediate (proscribed) and those that are indirect, consequential and remote (not proscribed).

23. As the Court went on to note, the doctrine's focus on a law's 'legal operation' was unsatisfactory, as the development of the concept 'circuitous devices' demonstrated.[52] Further, the test was divorced from the constitutional values protected by s 92,[53] yet did not avoid questions about what limits on s 92 might be necessary for an 'ordered

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[47] (1955) 93 CLR 127, 166 (Dixon CJ, McTiernan and Webb JJ).
[48] (1986) 161 CLR 556, 603 (Brennan J).
[49] *Cole* (1988) 165 CLR 360, 393 (the Court).
[50] Ibid 393 (the Court).
[51] Ibid 401 (the Court). The test rejected in *Cole* had applied to 'intercourse', given that 'trade, commerce and intercourse' was then understood as one composite expression. See, for example, *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935) 95 CLR 550, 205 (Dixon J).
[52] *Cole* (1988) 165 CLR 360, 401 (the Court).
[53] Ibid 403 (the Court).

society'.[54] As it now has 'the advantage of hindsight',[55] the Court should decline the plaintiffs' invitation to reintroduce into s 92 a criterion of operation test.

24. In *Cunliffe v Commonwealth*, Mason CJ said that 'a law which in terms applies to movement across a border and imposes a burden or restriction is invalid,' but a law which imposes an '*incidental* burden in the course of *regulating* a [different] subject matter', will not fail if the burden were reasonably necessary and proportionate to 'the purpose of preserving an ordered society'.[56] That statement may represent the highpoint of post-*Cole* authority relied upon by the plaintiffs. Yet, as observed by Gleeson CJ, McHugh and Gummow JJ in *AIMS v AIF*, Mason CJ's reasons reflected the pre-*Cole* reasoning of the Privy Council in the *Bank Nationalisation Case*.[57] No clear distinction between laws which imposed a 'reasonable regulation', and those that did not, could be drawn from that case. As the Privy Council acknowledged, in determining whether a law was 'regulatory or something more, or whether a restriction [was] direct or only remote or incidental' the 'problem to be solved [was] often [] not so much legal as political, social or economic'.[58] It was a question which 'clearly involved the balancing of conflicting social interests', and 'necessitated value judgments on a fairly large scale'.[59] One form of 'regulation' so clear that their Lordships considered it should have been unnecessary to specify, was 'excluding from passage across the frontier of a State creatures or things calculated to injure its citizens'.[60]

25. *Cole* 'was intended to be the beginning of a wholly new approach to s 92',[61] but left open the question of 'what burdens, if any, can be imposed on interstate intercourse'.[62] Since *Cole*, there has not been a case in which it was necessary for the Court to consider the validity of a law which 'in terms' restricts movement across a State border. In the authorities subsequent to *Cole* (as in the authorities before it), there is significant support for the view that such laws will be valid where the restriction they impose upon

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[54] *Cole* (1988) 165 CLR 360, 403 (the Court). Cf, James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 153.
[55] *Cole* (1988) 165 CLR 360, 401 (the Court).
[56] *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307-8 (Mason CJ) ('*Cunliffe*') (emphasis added).
[57] *AMS v AIF* (1999) 199 CLR 160, 177 (Gleeson CJ, McHugh and Gummow JJ).
[58] *Bank Nationalisation Case* (1949) 79 CLR 497, 639.
[59] Stellios (n 54) 146-7.
[60] *Bank Nationalisation Case* (1949) 79 CLR 497, 641. See also *R v Connare; Ex parte Wawn* (1939) 61 CLR 596, 620 (Evatt J).
[61] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 456 [398] (Hayne J) ('*APLA*').
[62] *Cunliffe* (1994) 182 CLR 272, 307 (Mason CJ).

interstate intercourse is reasonably required for a legitimate end.[63] That view should now be accepted as the doctrine of the Court.

Discrimination is required for the burden on both limbs

26. A measure will burden the trade and commerce limb of s 92 if it discriminates against interstate trade to the competitive advantage of intrastate trade. This requires the plaintiffs to show a protectionist effect.[64] Queensland submits that, similarly, a burden on the intercourse limb requires discrimination, in form or effect, against interstate intercourse as compared to movement within the State.[65] This is so for three reasons. First, as a matter of text, s 92 'does not readily reveal any basis for treating one of the three elements of a composite expression … as connoting, let alone requiring, the application of some different test to be applied to the other elements'.[66] Second, because 'intercourse' in s 92 encompasses 'movement of essentially anything across State borders',[67] unless the intercourse limb turns on discrimination, it would entirely subsume the trade and commerce limb, and thereby undermine the restrictive effect of the decision in *Cole*. Third, unless discrimination is required to engage the intercourse limb, general laws may be held invalid insofar as they burden interstate movement, with the odd outcome that interstate movement is privileged over intrastate movement.[68]

Structured proportionality is the appropriate tool of analysis for both limbs of s 92

27. In *Betfair Pty Ltd v Western Australia* ('*Betfair [No 1]*'), Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ held that a criterion of 'reasonable necessity' applies when determining whether a burden on the trade and commerce limb is justified.[69] Their Honours held, '[t]hat view of the matter should be accepted as the doctrine of the Court'.[70] By 'reasonable necessity' their Honours meant the same criterion of 'reasonable necessity' that applies 'elsewhere in constitutional, public and private

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[63] *ACTV* (1992) 177 CLR 106, 191-6 (Dawson J). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 56-9 (Brennan J); *Cunliffe* (1994) 182 CLR 272, 333 (Brennan J), 366 (Dawson J).
[64] Protectionism for the trade and commerce limb ought not be abandoned for the reasons given in Jeremy Kirk, 'Section 92 in its Second Century' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law – Tributes to Professor Leslie Zines* (Federation Press, 2020) 253, 269.
[65] In line with the approach taken by Toohey J in *Cunliffe* (1994) 182 CLR 272, 384.
[66] *APLA* (2005) 224 CLR 322, 456-7 [402] (Hayne J).
[67] Kirk (n 64) 270 (emphasis omitted).
[68] Ibid 279.
[69] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 477 [102].
[70] Ibid 477 [103].

law',[71] as explained by Gleeson CJ in *Thomas v Mowbray*.[72] As his Honour said in that case, a criterion of 'reasonably necessary, and reasonably appropriate and adapted' applies equally to the implied freedom of political communication and 'would sometimes be described as a requirement of proportionality'.[73]

28. As for the intercourse limb, a majority of this this Court held in *APLA Ltd v Legal Services Commissioner (NSW)* that the test is whether the burden on free interstate intercourse goes further than 'reasonably required' to achieve a legitimate aim.[74] As Hayne J pointed out, as that is the same criterion that applies to the trade and commerce limb, the utility of distinguishing between the two limbs is 'much reduced'.[75]

29. Shortly after *Betfair [No 1]*, in *Rowe v Electoral Commissioner*, Kiefel J (as her Honour then was) noted that the necessity limb of structured proportionality inheres in the test of reasonable necessity for the purposes of s 92.[76] A majority of this Court later repeated that observation in *Monis v The Queen*, *Unions NSW v New South Wales [No 1]* and subsequent cases.[77] Further, in *McCloy v New South Wales*, a majority noted[78] that 'notions of balancing may be seen in *Castlemaine Tooheys Ltd v South Australia*'.[79] As noted in one journal article, 'The word "reasonable" implies some balancing of the importance of the end with the degree of the restriction. The word "necessary" implies that there are no alternatives available with less onerous an effect on the guarantee.'[80]

30. It has been said that the test in *Cole* involves a form of 'definitional' proportionality, which is different from the form of proportionality used to justify burdens on other

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[71] Ibid 477 [102] n 181.
[72] *Thomas v Mowbray* (2007) 233 CLR 307, 331-3 [20]-[26].
[73] Ibid 331 [19].
[74] *APLA* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 393-4 [177] (Gummow J), 461 [420], 463 [427] (Hayne J). See also *AMS v AIF* (1999) 199 CLR 160,178-179 [43]-[45] (Gleeson CJ, McHugh and Gummow JJ).
[75] *APLA (NSW)* (2005) 224 CLR 322, 461 [421] (Hayne J).
[76] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 134-5 [436]-[442] (albeit in dissent in the result).
[77] *Monis v The Queen* (2013) 249 CLR 92, 190 [268] (Crennan, Kiefel and Bell JJ); *Unions NSW [No 1]* (2013) 252 CLR 530, 556-7 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178, 210 [57] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328, 369 [129] (Kiefel CJ, Bell and Keane JJ); *Unions NSW [No 2]* (2019) 264 CLR 595, 615-6 [42]-[43] (Kiefel CJ, Bell and Keane JJ).
[78] *McCloy* (2015) 257 CLR 178, 219 [87] (French CJ, Kiefel, Bell and Keane JJ), quoted with approval in *Clubb v Edwards* (2019) 93 ALJR 448, 471 [72] (Kiefel CJ, Bell and Keane JJ). See also *Brown* (2017) 261 CLR 328, 422 [290] (Nettle J). See also Stellios (n 54) 57; Susan Kiefel, 'Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives' (2010) 36(2) *Monash University Law Review* 13-4.
[79] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 ('*Castlemaine Tooheys*').
[80] Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21(1) *Melbourne University Law Review* 1, 12.

constitutional freedoms.[81] However, logically, each of the steps of reasoning in structured proportionality assists in determining the true character of a law, including whether it is one which has the purpose or effect of imposing a discriminatory burden of a protectionist kind on interstate trade.[82] Where a law burdens interstate trade, it may be inferred that the true purpose is protectionism if: (1) the law does not help to achieve its avowed non-protectionist purpose, (2) there are other ways of achieving the avowed purpose without burdening interstate trade to the same extent, or (3) the imbalance between the protectionist effect and the avowed purpose is 'of such an overwhelming nature as to make it clear that the law could not reasonably be characterised as having been made with respect to the claimed legitimate purpose'.[83] Applying structured proportionality as a tool of analysis is therefore consistent with the test laid down in *Cole* in respect of the trade and commerce limb of s 92.

31. It should now be accepted that structured proportionality is an appropriate tool of analysis for deciding whether a limit on the freedoms in s 92 is justified. That analysis ought to apply equally to the intercourse limb of s 92 as it does to the trade and commerce limb. The justification of limits on either limb 'is not to be approached as a matter of impression.'[84] Structured proportionality offers one way to avoid impressionistic judgments. Further, applying structured proportionality to both limbs is consistent with the observation in *Cole* that a burden on interstate intercourse will often be more difficult to justify.[85] This is because a discriminatory restriction on free movement over State borders is a particularly deep burden on s 92. 'Logically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate.'[86]

32. Applying the same tool of analysis to both limbs overcomes any perceived difficulty about which test should be applied where a law burdens both limbs of s 92.[87] Attempts to apply one limb to the exclusion of the other will inevitably mean that the intercourse

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[81] Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 143-4, 150-1.
[82] See *Castlemaine Tooheys* (1990) 169 CLR 436, 471-2 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[83] Kirk (n 80) 25. See also *Cole* (1988) 165 CLR 360, 408 (the Court) ('in a way or to an extent which warrants characterization of the law as protectionist').
[84] *McCloy* (2015) 257 CLR 178, 216 [75] (French CJ, Kiefel, Bell and Keane JJ).
[85] *Cole* (1988) 165 CLR 360, 393 (the Court).
[86] *McCloy* (2015) 257 CLR 178, 219 [87] (French CJ, Kiefel, Bell and Keane JJ).
[87] Cf *APLA* (2005) 224 CLR 322, 353-4 [39] (Gleeson CJ and Heydon J), 390-1 [165] (Gummow J), 457-8 [405]-[409] (Hayne J).

limb does all of the work that the trade and commerce limb does, or vice versa. If a law affects interstate intercourse as well as interstate trade and commerce, logically both impacts will be relevant to justification. In practice, that would involve assessing the law for compatibility against the values underlying both limbs of s 92, and weighing the proper purpose against the burden on both limbs of s 92. However, there will be cases where the overall burden on s 92 is not increased by the dual character of the burden. To the extent that the trade and commerce limb is engaged here, this is one such case.

33. Queensland submits that the questions of burden and justification in respect of s 92 of the Constitution should be approached in the following way:

(1) Is there a material[88] burden on s 92, in the sense that that the law discriminates, in form or effect, against interstate trade and commerce to the competitive advantage of intrastate trade and commerce, or against interstate intercourse compared to intrastate movement?

(2) Is the purpose of the law legitimate, in the sense that it is compatible with the purpose of s 92, being 'national unity',[89] or more specifically, is the purpose of the law neither protectionist nor 'the erection of State borders as barriers against freedom of intercourse'?[90]

(3) Is the law suitable in the sense that it exhibits a rational connection to its purpose, or the means selected are capable of realising its purpose?

(4) Is the law necessary in the sense that there is no obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on free trade and commerce or free intercourse?

(5) Is the law adequate in its balance in the sense that the benefit sought to be achieved by the law is not manifestly outweighed by its adverse effect on free interstate trade and commerce, or intercourse?

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[88] *Betfair [No 2]* (2012) 249 CLR 217, 272 [60]-[63] (Heydon J). See also *Cole* (1988) 165 CLR 360, 402, 409 ('substantial').
[89] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 82 (Deane and Toohey JJ).
[90] *Cunliffe* (1994) 182 CLR 272, 366 (Dawson J).

34. In line with the approach of a majority of this Court to the implied freedom,[91] this formulation avoids an overly granular approach to proportionality. That is particularly important in the present context for two reasons.

35. First, the State must be given latitude to act prophylactically, without the benefit of hindsight.[92] The context of the COVID-19 pandemic is a high degree of uncertainty about both functions of risk: the probability and the consequences of infection.[93] Epidemiologists agree that it is appropriate to apply the precautionary principle in precisely circumstances such as these.[94] Public officials must respond 'before confirmatory evidence is available', and 'the response does not admit of surgical precision.'[95]

36. Second, given that the factual matrix is in a 'state of flux',[96] a fine-grained approach would lead to the various measures taken by the States and Territories to deal with the COVID-19 pandemic coming in and out of validity frequently.[97] While s 92 may render invalid a law which was valid when passed due to a change in circumstances, s 92 is not so sensitive to such changes that the rule of law values of certainty and predictability are lost.[98]

The Directions are justified applying structured proportionality

Burden

37. The Directions restrict the free flow of people over State borders and not intrastate movement. They clearly burden the freedom of interstate intercourse guaranteed by s 92

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[91] *Comcare v Banerji* (2019) 93 ALJR 900, 913 [33], [35], 914 [38] (Kiefel CJ, Bell, Keane and Nettle JJ), 942 [194], 945 [205] (Edelman J); *Clubb v Edwards* (2019) 93 ALJR 448, 506-9 [266]-[275] (Nettle J), 548 [476]-[479], 551-2 [495]-[497] (Edelman J).

[92] *McCloy* (2015) 257 CLR 178, 251 [197] (Gageler J), 261-2 [233] (Nettle J); *Brown* (2017) 261 CLR 328, 421-2 [288] (Nettle J), 463 [422] (Gordon J); *Unions NSW [No 2]* (2019) 264 CLR 595, 639 [113] (Nettle J). Regarding hindsight in the specific context of COVID-19, see also *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, [455] (Burrage J) ('*Taylor*'), quoting *NAPE v Newfoundland (Treasury Board)* [2004] 3 SCR 381, 421 [96] (Binnie J for the Court).

[93] *Palmer [No 4]* [2020] FCA 1221, [78], [219], [366].

[94] Ibid [73]-[77], [302].

[95] *Taylor*, 2020 NLSC 125, [411] (Burrage J).

[96] *Palmer [No 4]* [2020] FCA 1221, [12]. See also *Taylor*, 2020 NLSC 125, [466] ('ever evolving'), [485] ('a moving target') (Burrage J).

[97] See *Clubb v Edwards* (2019) 93 ALJR 448, 546 [470]-[471] (Edelman J); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 92-3 [196]-[199] (Keane J).

[98] For example, in the remitted proceedings, Professor Blakely gave evidence that the risk of introducing COVID-19 from New South Wales to Western Australia as at 4 July 2020 would have been 0.004 per month, but that risk increased eightfold only 12 days later as at 16 July 2020, and tenfold when he again updated his calculations on 27 July 2020: *Palmer [No 4]* [2020] FCA 1221, [192], [199], [201], [207]. It cannot be that the validity of border closures with New South Wales altered in the course of only 12 days.

of the Constitution. It may be accepted that the burden is substantial, calling for a 'more convincing justification'.[99]

38. The plaintiffs also assert that the Directions burden free interstate trade and commerce because '[b]oth plaintiffs wish to enter Western Australia for business purposes'.[100] Putting aside that the subject of s 92 is interstate trade not traders,[101] and that the second plaintiff has a physical presence in Western Australia,[102] the relevant market identified by the plaintiffs appears to be 'all markets geographically located in WA and which are dependent on direct human presence as an important element of their business'.[103] It is not self-evident that the border closure operates to protect intrastate trade and commerce in all of those markets, or even a majority or average of those markets. The agreed fact that border closures have detrimentally affected the tourism, hospitality and services industries in regional Western Australia[104] tends to suggest the opposite. In any event, stated at that level of generality, if there is any burden on interstate trade, it would add no more to the burden on interstate intercourse. The fact intercourse may be undertaken in the course of trade and commerce is not sufficient to identify a distinct burden on the trade and commerce limb of s 92.

Compatibility

39. The stated purpose of the Directions 'is to limit the spread of COVID-19'.[105] The provisions of the Directions cohere with that purpose.[106] The Directions were made pursuant to ss 61, 67, 70 and 72A of the *Emergency Management Act 2005* (WA). The mischief at which the Act is directed is emergency situations such as the COVID-19 pandemic. Thus, the purpose of the Act is to provide for the management of emergency situations or states of emergency such as the present situation. The Directions and the Act do not seek to undermine national unity as an end in itself. Their purposes are therefore compatible with the value of national unity underlying s 92.

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[99] *McCloy* (2015) 257 CLR 178, 214 [70] (French CJ, Kiefel, Bell and Keane JJ). See also at 219 [87].
[100] PS 16 [49].
[101] *Betfair [No 2]* (2012) 249 CLR 217, 268 [50] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[102] Special case, 21 [75], 22 [78], [80].
[103] PS 17 [53].
[104] Special Case, 19 [66].
[105] Consolidated Directions, paragraph 1, CB Vol 4, 1449.
[106] *Palmer [No 4]* [2020] FCA 1221, [70] (Rangiah J). See also *Unions NSW [No 2]* (2019) 264 CLR 595, 657 [172] (Edelman J) (re relevance of stated purpose).

40. Indeed, this Court has long held that protecting 'public health' is a legitimate, non-protectionist purpose.[107] As Stephen J noted in *Permewan Wright Consolidated Pty Ltd v Trewhitt*:[108]

> The reason why public health has had such ready judicial acceptance as a proper area for valid legislative intervention, despite s 92, is, perhaps, because with it is associated a relatively long history of legislative intervention in the past, the fruits of which have led to a general acceptance by the community of the need for such legislation. Whether by a conscious use of judicial notice or by some less conscious absorption of community acceptance, there has at all events been a quite general judicial recognition of such laws as ones which may validly bear upon and restrict interstate trade.

Suitability

41. By reducing the number of people entering Western Australia, the Directions reduce the probability that infected people from other States and Territories will enter Western Australia, thereby limiting the spread of COVID-19 into Western Australia. It would have sufficed to show that it is 'reasonable to suppose' that the Directions are effective in limiting the spread of COVID-19 into the State, without requiring scientific proof.[109] On the remitter, Rangiah J went further and specifically found that the Directions have been, and continue to be, effective in achieving their purpose.[110]

42. The exemptions in the Directions do not sever that rational connection. The State is not relegated to eliminating all risk associated with COVID-19 if it reduces any risk.[111] Moreover, the epidemiological opinion accepted by Rangiah J was that the Directions are effective notwithstanding the categories of exemptions.[112] Recently, the Supreme Court of Newfoundland and Labrador held that similar exemptions in a similar border direction did not sever the rational connection to its public health objective.[113]

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[107] Eg *SOS (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529, 544 (Barwick CJ), 578 (Windeyer J), 596 (Walsh J); *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559, 581 (Barwick CJ), 600-1 (Gibbs J), 607, 615 (Mason J), 634 (Jacobs J); *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1, 24-5 (Stephen J), 36 (Mason J); *J Bernard & Co Pty Ltd v Langley* (1980) 153 CLR 650, 659 (Gibbs ACJ); *Ackroyd v McKechnie* (1986) 161 CLR 60, 69 (Gibbs CJ).

[108] *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1, 25 (Stephen J).

[109] *Taylor*, 2020 NLSC 125, [438] (Burrage J); *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, 594 [48] (McLachlin CJ for the majority).

[110] *Palmer [No 4]* [2020] FCA 1221, [151]-[157], [366].

[111] *McCloy* (2015) 257 CLR 178, 251 [197] (Gageler J). See also at 209-10 [54]-[56] (French CJ, Kiefel, Bell and Keane JJ), 262 [234] (Nettle J); *Brown* (2017) 261 CLR 328, 395 [222] (Gageler J), 462-3 [422] (Gordon J).

[112] *Palmer [No 4]* [2020] FCA 1221, [130], [252], [303]-[305], [366].

[113] *Taylor*, 2020 NLSC 125, [440]-[451] (Burrage J). Despite Hawaii's border restrictions containing exemptions, it too was found to bear a 'real or substantial relation to public health' in *Carmichael v Ige*, _F Sup 3 d (2020); 2020 WL 3630738, 6-7 (Otake J).

Necessity

43. Rangiah J found all facts required for this Court to determine whether the Directions are reasonably necessary for the protection of the Western Australian population.[114]

44. On the remitter, Rangiah J accepted that 'border measures have additional value above and beyond other measures, as they are the only measures that prevent entry of disease.'[115] In particular, his Honour found that:

- The 'border restrictions offer a tangible and substantial layer of protection to the Western Australian community over the protection offered by the Common Measures'[116] (Common Measures being taken to mean a combination of Personal Isolation Measures, Containment Measures and Community Isolation Measures, as those terms are defined in the Special Case).
- The border restrictions are 'more effective' than a combination of exit and entry screening, face masks on planes, PCR testing and mandatory mask wearing for 14 days, especially taking into account the 'fallibility of each of these measures' and 'human failings'.[117]
- Relying on mandatory self-quarantining or mandatory hotel quarantining instead of the Directions would result in a 'substantially greater risk' of importing COVID-19 into Western Australia, especially taking into account the risk of 'leakage', documented cases of quarantine failures interstate, and the fact that the State's capacity to safely quarantine travellers is limited by resource constraints.[118]
- A targeted 'hotspot' regime would not be as effective as the Directions in preventing the spread of COVID-19 into Western Australia, given that 'there is necessarily a time-lag in identifying a hotspot', 'there are difficulties with geographical identification of a hotspot', and 'a hotspot regime may be more readily circumvented by people providing misleading information as to where they have travelled within the last 14 days.'[119]
- A 'travel bubble' regime suffers the weakness that people from States or Territories with community transmission may enter Western Australia via third

[114] *Palmer [No 4]* [2020] FCA 1221, [5], [24]. Cf PS [47].
[115] Ibid [163].
[116] Ibid [171]. For the definitions of the terms, see [137]-[138].
[117] Ibid [314]-[316], [366].
[118] Ibid [322]-[329].
[119] Ibid [337], [344]-[345], [350], [359], [366].

States or Territories. With multiple examples of this occurring, 'border hopping' is 'a real, and not fanciful, risk'.[120] One vivid example of border hopping is provided by the two infected people who returned to Queensland from Victoria via New South Wales on 21 July 2020. They lied about having travelled to Victoria and then remained in the Queensland community undetected for seven days.[121]

45. That the plaintiffs are unable to point to any other alternative productive of a significantly lesser burden on s 92 is 'enough to conclude that the impugned law is needed'.[122] It is telling that plaintiffs in other challenges to border restrictions in the US and Canada have also failed to point to an equally effective, less restrictive alternative.[123]

46. The concept of the 'domain of selections'[124] has particular resonance in the context of the polity's response to a global pandemic. The precautionary principle applied by epidemiologists stipulates that, 'from a purely public health perspective, all reasonable and effective measures to mitigate th[e] risk should ideally be put in place.'[125] For the purposes of necessity testing, the true comparison then is not between the Directions in isolation and other measures in isolation, but rather between different combinations of measures designed to address the risk posed by COVID-19.[126] Even without the benefit of Rangiah J's detailed findings of fact on the balance of probabilities,[127] the existence of a body of epidemiological opinion that State border restrictions are effective and have a protective effect beyond other measures[128] means that a combination of measures which includes border restrictions must be among the range of options open to the State (subject to adequacy of balance). That is, it follows that the Directions must be among the options for which there is a reasonable need.

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[120] Ibid [272]. See also at [280], [283], [290].
[121] Ibid [210], [288], [290], [345].
[122] *Unions NSW [No 2]* (2019) 264 CLR 595, 640 [117] (Nettle J).
[123] *Taylor*, 2020 NLSC 125, [454], [471]-[482] (Burrage J); *Bayley's Campground Inc v Mills*, _ F Supp 3d _(2020); 2020 WL 2791797, 9, 11 (Walker J); *Carmichael v Ige*, _F Sup 3 d _(2020); 2020 WL 3630738, 9 (Otake J).
[124] *Unions NSW [No 2]* (2019) 264 CLR 595, 640 [117] (Nettle J).
[125] *Palmer [No 4]* [2020] FCA 1221, [79].
[126] *Taylor*, 2020 NLSC 125, [467]-[471] (Burrage J).
[127] Which Queensland submits was not required for the defendants to discharge their onus of justification: *Unions NSW [No 2]* (2019) 264 CLR 595, 640 [117] (Nettle J); *Canada (Attorney-General) v Harper* [2004] 1 SCR 827, 874 [77] (Bastarche J for the majority) ('The legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case').
[128] *Palmer [No 4]* [2020] FCA 1221, [151], [362]. See also at [64](3.1), [117], [129], [131], [133], [136], [232].

47. The other integer of necessity testing is that any alternative measure must be equally practicable and available. As Rangiah J found, the alternative of hotel quarantine is 'not reasonably practical' because there are practical limits to the number of quarantine hotels the State can safely manage.[129] There was also evidence before his Honour that border closures have allowed Western Australia to relax other measures, allowing a return 'to a more normally functioning society with positive impacts on general health'.[130] It is self-evident that the alternative of more stringent lockdown measures would also have economic consequences.[131] This Court should be slow to find that an alternative is reasonably available, where that alternative would involve spending greater public funds[132] or would involve economic impacts for the State.

48. Finally, Rangiah J accepted the evidence of the Chief Health Officer for Western Australia that a travel bubble 'would make Western Australia dependent upon the decisions of the other States in circumstances where they may apply different standards or risk assessments'.[133] The feasibility of a travel bubble therefore turns on intergovernmental cooperation and agreement. The Constitution does not require a State to act to address the risks of COVID-19 only, if at all, with the consensus of other States, and not at all, if it does not obtain a consensus from other States.

Adequacy of balance

49. That leaves the value judgment in the final balancing stage of justification. In reliance on epidemiological expert opinion, Western Australia has decided to strike the balance taking into account the stochastic nature of COVID-19,[134] that rapid uncontrolled transmission can result from the introduction of even one infected individual,[135] and that 'in the worst-case scenario, there may be catastrophic consequences for the population.'[136]

50. Had the plaintiffs sought to make submissions about adequacy of balance, they would have been driven to argue that Western Australia should have weighed up the competing considerations differently and decided to bear a higher level of risk. That

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[129] Ibid [327]-[328], [360].
[130] Ibid [127]. See also at [136], [167].
[131] So much may also be inferred from the facts agreed in the Special Case at 16 [60]-[61].
[132] See *McCloy* (2015) 257 CLR 178, 211-2 [63] (French CJ, Kiefel, Bell and Keane JJ).
[133] *Palmer [No 4]* [2020] FCA 1221, [221], [270].
[134] Ibid [91], [104], [193], [297].
[135] Ibid [64](2), [89], [98], [103], [106], [108], [132], [165], [230], [292].
[136] Ibid [72]. See also at [79], [109], [366].

would, ultimately, have been a submission that Western Australia should have placed less value on human life.

51. When determining the weight to be assigned to the proper purpose, Aharon Barak has said that regard should be had to 'the entire value structure of the particular legal system.'[137] Nettle J has suggested that '[a] court may be assisted in its assessment of adequacy in balance by reference to principles of the common law.'[138] Similarly, Edelman J has said that 'it may also be relevant to consider the systemic context in which the law was enacted, including, if Parliament has legislated to protect some right, the importance of the right within the legal system and the extent to which it is embedded in the fabric of the legal system within which Parliament legislates'.[139]

52. The common law places the highest importance on human life and calls for 'the most anxious scrutiny' where a person's life is at stake.[140] In terms of human rights, the right to life is 'the supreme right' and 'the prerequisite for the enjoyment of all other human rights'.[141] Further, because a pandemic may constitute a 'public emergency which threatens the life of the nation', at international law, the need to address a pandemic is capable of justifying derogations from all human rights except those that are absolute.[142]

53. The same is true in respect of equivalent rights to cross state borders in the US, Canada and Europe. Courts in those constitutional systems have long recognised that interstate mobility may be curtailed considerably to protect public health, and have placed great weight on the need to address major public health crises.[143] Moreover, in the face of scientific uncertainty, courts have also afforded the state some additional leeway to err

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[137] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 349.
[138] *Clubb v Edwards* (2019) 93 ALJR 448, 508 [272].
[139] Ibid 552 [496].
[140] *R v Secretary of State for the Home Department; Ex parte Bugdaycay* [1987] AC 514, 531 (Lord Bridge).
[141] Human Rights Committee, *General comment No 36 – Article 6: right to life*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) 1 [2].
[142] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4. 'Public health' is also expressly included as a proper purpose for limits on freedom of movement in art 12(3).
[143] In the US, see: *Licence Cases*, 46 US (5 How) 573, 576 (Taney CJ), 628 (Woodbury J) (1847); *Compagnie Francaise de Navigatoin a Vapeur v Louisiana Board of Health*, 186 US 380, 400 (White J) (1902); *Bayley's Campground Inc v Mills* _ F Supp 3 d _ (2020); 2020 WL 2791797, 8 (Walker J), citing *Jacobson v Massachusetts*, 197 US 11 (1905). In Canada, see: *Winner v SMT (Eastern) Ltd* [1951] SCR 887, 920 [119] (Rand J, whose reasoning on interprovincial mobility rights has been cited with approval in post-*Charter* cases). In Europe, see: *Commission v Germany* (C-141/07) [2008] 3 CMLR 48, 1513-4 [47]-[50].

on the side of caution.[144] Most recently, the Supreme Court of Newfoundland and Labrador upheld a border direction analogous to Western Australia's. At the adequacy of balance stage, the Court 'ask[ed] whether the harm done by restricting travel to the province outweighs the benefit to the public gained through the prevention, or at least reduction of COVID-19 in the province.' Given the sheer importance of addressing COVID-19, the Court said that '[t]o ask the question, is to answer it.'[145]

54. In terms of Australian constitutional values, in *Clubb v Edwards*, Kiefel CJ, Bell and Keane JJ identified 'the dignity of members of the sovereign people' as a weighty proper purpose.[146] The preservation of 'the people' in ss 7 and 24 of the Constitution must rank at least as highly as their dignity, as must the continued existence of the States as functioning bodies politic.[147]

55. Ultimately, it is difficult to imagine a weightier proper purpose than addressing the risks posed by the pandemic of a disease which has very high mortality, is highly infectious, has known and substantial pre-symptomatic and asymptomatic transmission, and for which no specific prevention or cure has yet been identified.[148] If there were ever a case in which the Court should be slow to disturb the balance struck by the Parliament or the executive in addressing a risk of that magnitude, it is this case.

Dated 19 October 2020.

Part V: TIME ESTIMATE
56. It is estimated that 20 minutes will be required for the presentation of Queensland's oral argument.

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[144] In the US, see: *Bayley's Campground Inc v Mills* _ F Supp 3 d _ (2020); 2020 WL 2791797, 8 (Walker J), citing *Gonzales v Carhart*, 550 US 124, 163 (2007). See also *South Bay United Pentecostal Church v Newsom*, 140 S Ct 1613 (Mem) (Roberts CJ) (2020). In Europe, see: *Commission v Germany* (C-141/07) [2008] 3 CMLR 48, 1514 [51]; *Commission v Kingdom of the Netherlands* (C-41/02) [2006] 2 CMLR 11, 332 [43]; *Venturini v Varese* (Court of Justice of the European Union, Fourth Chamber, C-159/12, C-161/12, ECLI:EU:C:2013:791, 5 December 2013) [59].

[145] *Taylor*, 2020 NLSC 125, [491] (Burrage J).

[146] *Clubb v Edwards* (2019) 93 ALJR 448, 475 [99] (Kiefel CJ, Bell and Keane JJ).

[147] See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

[148] *Palmer [No 4]* [2020] FCA 1221, [74], [84]-[89]. For this reason, the New Zealand High Court found that lock down directions in response to COVID-19 were clearly proportionate (albeit not authorised by law in that case): *Borrowdale v Director-General of Health* [2020] NZHC 2090, [97], [290].

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B26 of 2020

BETWEEN:

CLIVE FREDERICK PALMER
First Plaintiff

and

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

and

STATE OF WESTERN AUSTRALIA
First Defendant

and

CHRISTOPHER JOHN DAWSON
Second Defendant

ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney-General for the State of Queensland sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

Number	Description	Date in Force	Provision
Constitutional provisions			
1	*Commonwealth Constitution*		s 92
Statutes			
2	*Emergency Management Act 2005* (WA)	4 April 2020 (current version)	ss 61, 67, 70 and 72A
3	*Influx of Criminals Prevention Act 1903* (NSW)	30 November 1911	s 3
4	*Judiciary Act 1903* (Cth)	25 August 2018 (current version)	s 78A
5	*National Security (Land Transport) Regulations 1944* (Cth)	2 October 1944	
Statutory instruments			
6	*Quarantine (Closing the Border) Directions* (WA)	Consolidated version, as at 16 September 2020	