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

MINERALOGY PTY LTD ABN 65 010 582 680
Second Plaintiff

and

THE STATE OF WESTERN AUSTRALIA
First Defendant

CHRISTOPHER JOHN DAWSON
Second Defendant

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

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PARTS I, II & III: CERTIFICATION AND INTERVENTION

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

2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART IV: ARGUMENT

A. INTRODUCTION

3. On 15 March 2020, the Minister for Emergency Services for Western Australia declared a state of emergency under the *Emergency Management Act 2005* (WA) (the **EM Act**) over the whole of Western Australia, to address the pandemic caused by SARS-CoV-2. The declaration enabled the State Emergency Coordinator (the **Coordinator**) to exercise powers for the purpose of "emergency management": ss 67 and 72A (the **emergency management purpose**); and for the purpose of containing a "hazardous substance" or ensuring that a person does not "pose a serious risk to the life or health of others" because of a hazardous substance": s 70 (the **hazardous substance purpose**).[1]

4. On 5 April 2020, pursuant to ss 67, 70 and 72A of the EM Act (the **Authorising Provisions**), the Coordinator made the *Quarantine (Closing the Border) Directions* (WA) (the **Directions**): **WA [7]**. The Directions were made for the purposes specified in the Authorising Provisions in a dynamic environment and on the basis of complex information.

5. In determining the remitted question, Rangiah J recognised that addressing the risk posed by the entry of SARS-CoV-2 into Western Australia necessarily involves "making predictions about what may happen in the future in hypothetical scenarios".[2] After hearing evidence from five experts over the course of three days, his Honour observed "[t]here are many uncertainties about whether the disease might enter [Western Australia], the ways it might spread and the effectiveness of measures for the control of its entry and spread".[3] Those uncertainties arise partly because of the nature of the virus and partly because of the

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1 Being a "chemical, biological or radiological substance" (or any other substance) "that is capable of causing loss of life, injury to a person, or damage to the health of a person or to the environment": EM Act, s 3 (definition of "hazardous substance").

2 *Palmer v Western Australia (No 4)* [2020] FCA 1221 (**Factual Findings**) at [72]: CB 148; see also at [236]: CB 186.

3 Factual Findings at [72]: CB 148.

"vagaries of human behaviour",[4] and are compounded by the fact that the extent of various outbreaks across Australia is in a "state of flux".[5]

6. As his Honour accepted, the "precautionary principle"[6] is an "accepted principle of management of a pandemic which involves the potential for grave public health risks": **WA [10]**.[7] That principle is particularly apt in the context of the present pandemic, where COVID-19 has only recently emerged in the human population, and thus "the clinical, epidemiological and scientific knowledge base in respect of the disease is limited" and there are "a number of uncertainties about the disease".[8]

7. What is known is that SARS-CoV-2 is highly infectious and is transmitted exponentially.[9] If no measures are implemented to prevent spread of the virus, the growth rate is approximately 2.3–2.5 (that is, every infected person will infect on average 2.3–2.5 contacts): **WA [9]**.[10] If the disease were introduced into Western Australia, transmission within the community may be able to be controlled, or it may be uncontrolled for at least some period of time: **WA [18]**.[11] If an outbreak of SARS-CoV-2 were to be "left uncontrolled for any substantial length of time, outbreaks will cause very severe consequences for the health of the Western Australian population", and in the worst-case, those consequences could be "catastrophic".[12]

8. In a similar context, Roberts CJ of the United States Supreme Court recently observed:[13]

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." ...

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4 Factual Findings at [237]-[238]: CB 186; see also at [240]: CB 187.

5 Factual Findings at [12]: CB 133.

6 "[T]he precautionary principle states that action should be taken to prevent harm 'even if some cause and effect relationships are not fully established scientifically'": World Health Organization, *The Precautionary Principle: Protecting Public Health, the Environment and the Future of our Children*, quoted in Factual Findings at [73]: CB 149.

7 Factual Findings at [76]: CB 150.

8 Factual Findings at [95]: CB 153.

9 Factual Findings at [89]: CB 152.

10 Factual Findings at [89]: CB 152.

11 Factual Findings at [83]: CB 151; see also at [297]-[299]: CB 197-198.

12 Factual Findings at [109]: CB 157; see also at [302]: CB 198.

13 *South Bay United Pentecostal Church v Newsom* 590 US __ at 2 (2020) (citations omitted). See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 (***Castlemaine Tooheys***) at 472-473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

> When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad."

9. Victoria contends that those observations are apt in the Australian constitutional context in circumstances where, under the EM Act, the Authorising Provisions confer broad discretionary powers on the Coordinator for the purposes of emergency management.

10. Victoria submits that the Question Reserved can be answered by focusing on the legislative scheme (here, the Authorising Provisions), rather than any particular exercise of statutory power (here, the Directions). That focus is consistent with the Court's approach to analogous issues in *Wotton v Queensland*[14] and, more recently, *Comcare v Banerji*.[15]

10 11. In any event, Victoria's submission is that, regardless of whether the Court's attention is directed to the Authorising Provisions or to the Directions themselves, the measures taken by Western Australia do not infringe s 92.

B. THE QUESTION RESERVED

12. The Question Reserved for the Court comprises two distinct sub-questions:

(1) **First**, are the Authorising Provisions invalid (in whole or in part) because they impermissibly infringe s 92 of the Constitution?

(2) **Second**, are the Directions invalid (in whole or in part) because they impermissibly infringe s 92 of the Constitution?

13. These submissions explain the relevant analytical framework: **Part C**; set out the legislative
20 framework of the EM Act, including the Authorising Provisions: **Part D**; identify some general principles governing s 92 of the Constitution: **Part E**; and apply the analytical framework to the Authorising Provisions by reference to those principles: **Part F**.

14. As to the first sub-question, the answer is "no". The Authorising Provisions are not invalid, to any extent, by reason of s 92. The Plaintiffs do not contend otherwise: see **PS [9], [55(a)]**.

15. As to the second sub-question, because the powers conferred by the Authorising Provisions can only be exercised for the emergency management purpose and the hazardous substance purpose, the discretion given to the Coordinator **cannot** be exercised "in a manner obnoxious

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14 (2012) 246 CLR 1.

15 (2019) 93 ALJR 900.

to the freedom guaranteed by s 92".[16] That is, the Authorising Provisions "comply with the constitutional limitation upon the legislative power of the State".[17] That conclusion marks the end of the **constitutional** inquiry. Therefore, the answer to the second sub-question is "does not arise in this proceeding".[18]

16. There might be a separate question — "for agitation in other proceedings"[19] — about whether the Directions comply with the **statutory limits** of the Authorising Provisions. That is not a "a constitutional question, as distinct from a question of the exercise of statutory power".[20] It is not a question raised by the Question Reserved.

17. In the alternative to the above analysis, the submissions consider the application of s 92 to the Directions: **Part G**. On that approach, the second sub-question should be answered "no": **WA [80]**; cf **PS [9]**.

C. ANALYTICAL FRAMEWORK

C.1. Statutory powers and constitutional limitations

18. Section 92 limits the scope of the legislative and executive power of the States.[21] However, "it does so, at least in the case of a [repository] exercising statutory power, by limiting the scope of legislative power".[22] The Directions are the product of the exercise of statutory power conferred by the Authorising Provisions. Accordingly, although the "putative burden" on the freedom guaranteed by s 92 is said to arise because of the Directions, that burden "has its source in statute".[23]

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16 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 607, 611, 614 (Brennan J). See also *Banerji* (2019) 93 ALJR 900 at 916 [44] (Kiefel CJ, Bell, Keane and Nettle JJ), 917 [50], 924–925 [96] (Gageler J), 945 [209] (Edelman J).

17 *Wotton* (2012) 246 CLR 1 at 16 [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

18 See *Wotton* (2012) 246 CLR 1 at 34 (Answer to Questions 2 and 3).

19 *Wotton* (2012) 246 CLR 1 at 14 [24], 16 [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

20 *Wotton* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

21 See *Cole v Whitfield* (1988) 165 CLR 360 at 394 (the Court).

22 *Banerji* (2019) 93 ALJR 900 at 917 [51] (Gageler J), quoting *A v ICAC* (2014) 88 NSWLR 240 at 256 [56] (Basten JA). See also *Wotton* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

23 See *Wotton* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ):

19. The issue presented by the Question Reserved is therefore "one of a limitation upon legislative power".[24] Consistently with the approach taken in both *Wotton*[25] and *Banerji*[26] — which elaborated upon the approach first articulated by Brennan J in *Miller*[27] — the issue is to be resolved by asking whether the Authorising Provisions "operate to infringe" the freedom guaranteed by s 92 "across the range of their potential operations".[28] That approach is to be applied irrespective of whether the Directions are of a legislative or administrative character (cf **PS [21]**).[29] The important point is that the source of the power to make the Directions is found in statute, and that source is necessarily limited by the Constitution.[30] The Authorising Provisions cannot authorise the making of any directions that exceed those limits.

20. Applying the approach in *Wotton* and *Banerji* will determine whether the Authorising Provisions fall into one of three categories.

    (1) The **first** category consists of laws that confer a power that is incapable of being exercised in a manner consistent with s 92. Such a law will operate to infringe s 92 in **all** of its potential operations. A law would fall into this category, for example, "if the statutory purpose, or the criteria governing the exercise of the discretion, were necessarily offensive to s 92".[31]

    (2) The **second** category consists of laws that, by their terms, confer a power that "is so constrained that its exercise **cannot** be obnoxious to the freedom guaranteed by s 92".[32] One way, but not the only way, in which such a constrained conferral may be

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24 See *Wotton* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

25 *Wotton* (2012) 246 CLR 1 at 9-10 [10], 13-14 [21], 16 [31] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Brown v Tasmania* (2017) 261 CLR 328 at 443 [356] (Gordon J).

26 *Banerji* (2019) 93 ALJR 900 at 915-916 [44] (Kiefel CJ, Bell, Keane and Nettle JJ), 925 [96] (Gageler J), 945-946 [210] (Edelman J).

27 (1986) 161 CLR 556 at 607, 611, 614. See also *AMS v AIF* (1999) 199 CLR 160 at 176 [37] (Gleeson CJ, McHugh and Gummow JJ), 233 [221] (Hayne J); *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 (***Sportsbet***) at 316 [12], 317 [14] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

28 *Banerji* (2019) 93 ALJR 900 at 917 [50] (Gageler J).

29 Similarly, it was not relevant in *AMS* (1999) 199 CLR 160 that the statutory provisions authorised an exercise of judicial power.

30 cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at 373 [104] (Gummow J). It can be noted that the passage quoted by Gummow J from *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 594 was directed to the question whether a regulation was positively supported by a head of power, not whether the regulation infringed a limitation on power.

31 Stellios, "*Marbury v Madison*: Constitutional limitations and statutory discretions" (2016) 42 *Australian Bar Review* 324 at 331; see also at 335, referring to "Category 1".

32 See *Miller* (1986) 161 CLR 556 at 607 (Brennan J).

achieved is by conditioning the exercise of the power by reference to criteria that reflect the language and scope of the constitutional limitation, such that the scope of the power is "calibrated to the constitutional test".[33] If a law falls into this second category, **none of** its potential operations will infringe s 92. The law will thereby comply "with the constitutional limitation, without any need to read it down to save its validity".[34] Any "complaint" about an exercise of power under a law of this kind will not raise a constitutional question.[35]

(3) The **third** category consists of laws that, by their terms, allow for the possibility that the power "**might** be exercised in a manner obnoxious to the freedom guaranteed by s 92".[36] In other words, a law in this category confers a power that is "susceptible" of exercise in a manner consistent with s 92, but the power is "insufficiently controlled" by the terms of the law to ensure that the power will always be exercised in a manner consistent with s 92.[37]

21. If a law falls into the third category, it will be necessary to consider whether the law can be "read down" to ensure that the law is within constitutional power.[38] If the law can be read down, the law will be valid, and the question will be whether a particular exercise of the power "falls within the scope of the discretion as so read down".[39] That question will contain a constitutional dimension. If the law cannot be read down, the law (and thus any exercise of the power) will be invalid.

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33 Stellios, "*Marbury v Madison*: Constitutional limitations and statutory discretions" (2016) 42 *Australian Bar Review* 324 at 335, referring to "Category 3"; but see also "Category 2".

34 *Wotton* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

35 *Wotton* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Banerji* (2019) 93 ALJR 900 at 925 [96] (Gageler J).

36 *Miller* (1986) 161 CLR 556 at 611 (Brennan J) – emphasis added.

37 *Miller* (1986) 161 CLR 556 at 605 (Brennan J). Cf *Wotton* (2012) 246 CLR 1 at 14 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

38 See *Wotton* (2012) 246 CLR 1 at 9-10 [9]-[10] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217 (***Betfair [No 2]***) at 282 [91], 296 [140] (Kiefel J). See also *Banerji* (2019) 93 ALJR 900 at 946 [211] (Edelman J); *Interpretation Act 1984* (WA), s 7.

39 *Banerji* (2019) 93 ALJR 900 at 925 [96] (Gageler J). Cases that have applied the constitutional analysis directly to regulations can be understood by reference to this third category. For example, in *APLA*, the impugned regulations were made pursuant to the general regulation-making power: see (2005) 224 CLR 322 at 341 [2]. See also *Cole* (1988) 165 CLR 360 at 379-380 (the Court); *Levy v Victoria* (1997) 189 CLR 579 at 611 (Toohey and Gummow JJ); *Sportsbet* (2012) 249 CLR 298 at 317 [14] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

C.2. Authorising Provisions are in the Second Category

22. It is plain that the powers conferred by the Authorising Provisions do not fall within the first category: it cannot be said that, in all cases, an exercise of the power under the Authorising Provisions will necessarily infringe s 92. Thus, the first question to be answered is:

(1) Are the powers conferred by the Authorising Provisions confined by the statutory criteria in a way that ensures the powers can **only** be exercised in a manner **consistent** with s 92? (*Do they fall within the second category of laws, as identified at paragraph 20(2) above?*)

As explained in Part F below, that question should be answered "yes". The Court can answer the Question Reserved on that basis, without undertaking a separate assessment of whether the Directions themselves infringe s 92.

23. However, if the Court answers the first question "no", it will be necessary to answer a second question:

(2) Are the powers conferred by the Authorising Provisions **susceptible** of exercise in a manner **consistent** with s 92; and, if so, can they be read down to ensure that the powers can only be exercised in a manner consistent with s 92? (*Do they fall within the third category of laws, as identified at paragraph 20(3) above?*)

24. If, contrary to Victoria's submission, it is necessary to answer this second question, it should be answered "yes". In that event, it will be necessary to ask a third question:

(3) Are the Directions authorised by the Authorising Provisions, as "read down"? That will require the terms of the Direction themselves to be assessed against s 92, through the proxy of the Authorising Provisions (as read down).

25. If that question is reached, it should be answered "yes". Both the second and third questions are considered in Part G.

D. THE EM ACT

26. Part 5 of the EM Act is headed "State of emergency". Division 1 is headed "State of emergency declaration". The Minister may "declare that a state of emergency exists in the whole or in any area or areas of the State": s 56(1). An initial state of emergency declaration remains in force for only 3 days after the time it first has effect, unless it is extended by the Minister: s 57(b). Except in limited circumstances not presently relevant, the extension must not exceed 14 days: s 58(4).

27. The Minister must not make a declaration under s 56 unless the Minister, among other things, "is satisfied that an emergency has occurred, is occurring or is imminent" and "is satisfied that extraordinary measures are required to prevent or minimise … loss of life, prejudice to the safety, or harm to the health, of persons": s 56(2)(b), (c)(i). An "emergency" is defined to mean "the occurrence or imminent occurrence of a hazard which is of such a nature or magnitude that it requires a significant and coordinated response": s 3 (definition of "emergency"). A "hazard" is defined to include "a plague or an epidemic": s 3 (definition of "hazard").

28. The reference in s 56(2) to "extraordinary measures" directs attention to the powers governed by Pt 6, which is headed "Emergency powers". Division 1 is headed "Powers during … state of emergency". It applies if a "state of emergency declaration is in force": s 65.[40] Division 1 confers a range of emergency powers on "authorised officers", of which the Coordinator is one: s 3 (definition of "authorised officer"); see also s 10. Within Div 1, the Authorising Provisions are as follows:

(1) Section 67(a) relevantly provides:

> For the purpose of emergency management during … [a] state of emergency, [the Coordinator] may … direct or, by direction, prohibit, the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area.

(2) Section 70(1)(b) relevantly provides that the Coordinator "may direct any person who has been exposed, or any class of person who may have been exposed, to a hazardous substance … to remain quarantined from other persons for such period, and in such reasonable manner" as specified by the Coordinator. A direction of that kind may be given only for the purpose of "ensuring that the hazardous substance is contained" or "ensuring that a person to whom the direction is given does not pose a serious risk to the life or health of others … because of the hazardous substance involved".

(3) Section 72A(2) relevantly provides:

> For the purposes of emergency management during … [a] state of emergency, [the Coordinator] may take, or direct a person or a class of person to take, any action that the officer considers is reasonably necessary to prevent, control or abate risks associated with the emergency.

29. As is evident, the Authorising Provisions confer, in broad terms, discretionary powers on the Coordinator to give directions for the purpose of "emergency management" during a "state

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[40] Subject to any limitation in a declaration under ss 52 or 58, which are not presently relevant.

of emergency". As explained in Part F below, those purposive limitations provide the reason why the powers conferred by those provisions can be exercised only in a manner consistent with s 92 of the Constitution, and thus fall within the second category of laws (being those identified at paragraph 20(2) above).

E. SECTION 92 — GENERAL PRINCIPLES

30. On current authority, s 92 contains two independent "limbs": the first directed to "interstate trade and commerce" and the second to "interstate intercourse": **WA [37]-[38]**. That distinction was drawn by the Court in *Cole v Whitfield*, where the Court explained that only a law that imposes a "discriminatory burden of a protectionist kind" will infringe the first limb, whereas the second limb affords a wider protection because the "constitutional guarantee of freedom of interstate intercourse, if it is to have substantial content, extends to a guarantee of personal freedom 'to pass to and from among the States without burden, hindrance or restriction' ...".[41]

E.1. Trade and commerce limb

31. "The freedom of interstate trade and commerce guaranteed by s 92 is freedom from imposition on that trade and commerce of discriminatory burdens of a **protectionist kind**".[42] It does not prohibit genuine non-protectionist regulation of interstate trade and commerce.[43] Consistent with that understanding of the freedom, a law will infringe s 92 if is properly *characterised* as "protectionist". As the plurality explained in *Castlemaine Tooheys*:[44]

> [W]e are concerned only with the **proper characterization of the law as protectionist or not**, in the sense described in *Cole v Whitfield*. Hence there is no place for a secondary test to invalidate laws which have been found to lack a protectionist purpose or effect. Rather, the two tests are combined as **one inquiry into the characterization of the law as protectionist, or otherwise**.

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41 *Cole* (1988) 165 CLR 360 at 393, quoting *Gratwick v Johnson* (1945) 70 CLR 1 at 17 (Starke J); see also at 387-388, 394 (the Court); *APLA* (2005) 224 CLR 322 at 353 [37]-[38] (Gleeson CJ and Heydon J), 390 [162] (Gummow J)

42 See *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 199 (the Court) (emphasis added), citing *Cole* (1988) 165 CLR 360 at 394, 398, 407-408 (the Court).

43 *Cole* (1988) 165 CLR 360 at 403 (the Court).

44 (1990) 169 CLR 436 at 471 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) (emphasis added). See also *APLA* (2005) 224 CLR 322 at 391 [168] (Gummow J), 461 [422] (Hayne J); *Betfair [No 2]* (2012) 249 CLR 217 at 265 [37]-[38] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 272 [61] (Heydon J), 288 [110], 290 [120] (Kiefel J).

32. A law will be properly **characterised** as "protectionist" if its "**true purpose**" is "protectionist".[45] In that way, "the purpose or object of the law is not merely a relevant factor but the crucial determinant of validity".[46] As Gummow J observed in *APLA*, "[t]he level of characterisation required by the constitutional criterion of object or purpose is closer to that employed when seeking to identify the mischief to redress of which a law is directed or when speaking of 'the objects of the legislation' ...".[47] In other words, "[t]he object or purpose of a law is what the law is designed to achieve in fact".[48]

33. If a law, in its terms, is designed to achieve a protectionist purpose, there is no difficulty in concluding that the law is protectionist in character and therefore invalid. However, the character of the law also needs to be assessed by reference to its "practical operation".[49] That is because, even if a law appears designed to achieve a non-protectionist purpose, its practical operation may reveal that, in truth, it has a protectionist purpose. In evaluating the practical operation of such a law, the Court will consider whether it has a protectionist effect, in that it discriminates against interstate trade and commerce to the advantage of intrastate trade and commerce. But a law will not be held to have a protectionist **purpose** merely because it has a protectionist **effect**.[50]

34. Instead, the identification of a protectionist effect forms part of the overarching "inquiry into the characterisation of the law as protectionist or otherwise".[51] That inquiry ultimately comprises two questions, both of which raise "issues of fact and degree":[52]

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45 *Castlemaine Tooheys* (1990) 169 CLR 436 at 471-472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also Simpson, "Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone" (2005) 33 *Federal Law Review* 445; Sonter, "Intention or Effect? Commonwealth and State Legislation after *Cole v Whitfield*" (1994) 69 *Australian Law Journal* 332 at 336-341.

46 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 195 (Dawson J). See also *Nationwide News v Wills* (1992) 177 CLR 1 at 94 (Gaudron J).

47 (2005) 224 CLR 322 at 394 [178]. See also *Brown* (2017) 261 CLR 328 at 362 [101] (Kiefel CJ, Bell and Keane JJ), 392 [208] (Gageler J), 432 [321] (Gordon J).

48 *McCloy v NSW* (2015) 257 CLR 178 at 232 [132] (Gageler J), citing *APLA* (2005) 224 CLR 322 at 394 [178] (Gummow J). See also *Spence v Queensland* (2019) 93 ALJR 643 at 665 [60] (Kiefel CJ, Bell, Gageler and Keane JJ).

49 *Cole* (1988) 165 CLR 360 at 399-400. See also *Betfair [No 2]* (2012) 249 CLR 217 at 265 [36], 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 288 [109] (Kiefel J).

50 See *Betfair [No 2]* (2012) 249 CLR 217 at 265 [36]-[37] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

51 *Castlemaine Tooheys* (1990) 169 CLR 436 at 471 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

52 *Cole* (1988) 165 CLR 360 at 407-408, 409 (the Court); *Betfair [No 2]* (2012) 249 CLR 217 at 265 [37] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

(1) Does the law have a protectionist effect, in that its effect is to discriminate in favour of intrastate trade as against interstate trade?[53]

(2) If so, is the law "reasonably necessary" to achieve a "legitimate non-protectionist purpose"?[54]

35. The second question identified in paragraph 34 above is directed to whether the law, despite having a discriminatory effect, is properly understood to have been enacted for a legitimate non-protectionist purpose.

(1) If that second question is answered "yes", the law will be valid. That will be the position if the burden imposed by the law is "reasonably necessary", for example, for "the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare".[55]

(2) If that second question is answered "no", the law will be invalid by reason of s 92. That is because, if a law is not "reasonably necessary" to achieve a legitimate purpose, it is a law that imposes a discriminatory burden in pursuit of an alleged non-protectionist purpose "**in a way or to an extent** which warrants characterization of the law as protectionist".[56]

E.2. Intercourse limb

36. There is no absolute guarantee of free movement of people across borders.[57] Thus, not every restriction on cross-border movement will contravene s 92.[58] Rather, only those laws "aimed

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53 *Cole* (1988) 165 CLR 360 at 408 (the Court).

54 *Betfair [No 2]* (2012) 249 CLR 217 at 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 295 [136] (Kiefel J). See also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 (***Betfair [No 1]***) at 477 [102] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

55 *Castlemaine Tooheys Ltd* (1990) 169 CLR 436 at 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). That approach is consistent with US jurisprudence on the dormant commerce clause: see, for example, *Compagnie Francaise de Navigation a Vapeur v Louisiana State Board of Health*, 186 US 380 (1902); *Gibbons v Ogden*, 22 US (9 Wheat) 1 at 203 (1824); *Morgan's Steamship Co v Louisiana Board of Health*, 118 US 455 at 465 (1886). *Compagnie Francaise* has been cited in other contexts, in support of the more general proposition that the States have a compelling interest in protecting public health: see, for example, *Camara v Municipal Court of San Francisco*, 387 US 523 at 539 (1967); *Michigan v Tyler*, 436 US 499 at 509 (1978); *Kansas v Hendricks*, 521 US 346 at 366 (1997).

56 *Cole* (1988) 165 CLR 360 at 408 (the Court) (emphasis added), quoted in *Castlemaine Tooheys* (1990) 169 CLR 436 at 466-467 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) and *Betfair [No 2]* (2012) 249 CLR 217 at 269 [51] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

57 *APLA* (2005) 224 CLR 322 at 389-390 [161] (Gummow J).

58 *Cole* (1988) 165 CLR 360 at 393 (the Court). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) at 307 (Mason CJ), 384 (Toohey J).

at" or "directed to" interstate intercourse will infringe s 92. Consistent with the approach taken to the "trade and commerce" limb, that is a question of characterisation. A law will be "aimed at" or "directed to" interstate intercourse if the law has as its true purpose or object "the restriction of movement across State borders".[59] As noted by Dawson J in *ACTV*,[60] the laws considered in *Gratwick v Johnson*,[61] and *R v Smithers; Ex parte Benson*,[62] were laws of that kind: see **WA [59]-[67], [69]-[72]**.

37. It does not automatically follow, from the fact that a law in its terms operates by reference to movement across State borders, that the law's true purpose or object is the restriction of no more than movement across borders: cf **PS [23]**. To adopt that answer would be to return to the "criterion of operation" approach to s 92, which was discarded for its focus on form over substance: **WA [47], [53]**.[63] The modern approach recognises that a law that operates by reference to movement across State borders may nonetheless have a permissible purpose or object, such as the protection of public health.[64]

38. However, to determine if the true purpose or object of a law is impermissible, the Court needs to undertake an inquiry analogous to the one identified at paragraph 34 above.[65] The two questions to be addressed are:

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59 *ACTV* (1992) 177 CLR 106 at 194 (Dawson J) and *Nationwide News* (1992) 177 CLR 1 at 57 (Brennan J), both quoted in *APLA* (2005) 224 CLR 322 at 392-393 [173]-[174] (Gummow J); see also at 353 [38] (Gleeson CJ and Heydon J), 461 [420], 463 [427] (Hayne J); *Cunliffe* (1994) 182 CLR 272 at 366-367 (Dawson J).

60 *ACTV* (1992) 177 CLR 106 at 194 (Dawson J).

61 (1945) 70 CLR 1.

62 (1912) 16 CLR 99.

63 See *Cole* (1988) 165 CLR 360 at 384, 400-402 (the Court).

64 See, for example, *Ex parte Nelson [No 1]* (1928) 42 CLR 209 at 218 (Knox CJ, Gavan Duffy and Starke JJ). That approach is consistent with US law on freedom of movement pursuant to the dormant commerce clause. In *Zemel v Rusk* 381 US 1 at 14 (1965), Warren CJ said, for the majority: "The right to travel within the United States is … constitutionally protected … But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole".

65 See *Nationwide News* (1992) 177 CLR 1 at 57 (Brennan J).

(1) Does the law have the effect of restricting movement across State borders?

(2) If so, is that restriction "reasonably required" (that is, "reasonably necessary") to achieve a legitimate object, being an object that is not the restriction of movement across State borders?[66]

39. If Question 2 is answered "yes", the law cannot be said to have as its true object or purpose movement across borders in itself. That is, it cannot be said that the "state borders are… **of themselves** ... barriers to movement".[67] Rather, the law is to be understood as imposing "an incidental burden or restriction on interstate intercourse in the course of regulating a subject matter other than interstate intercourse".[68] A law that imposes a burden of that kind does not infringe s 92: **WA [34]**.

E.3. The concept of "reasonably necessary"

40. It is necessary to say something further about the meaning of "reasonably necessary", a central concept to Question 2 under the "trade and commerce" and the "intercourse" limbs.

41. In both contexts, it is important to bear in mind the purpose of the overarching inquiry — to characterise the law — when assessing whether a law is "reasonably necessary". That expression can have "different shades of meaning".[69] In the context of s 92, "reasonably necessary" is a label that is often equated with the expressions "reasonably appropriate and adapted" and "proportionate".[70] However, some care must be taken in drawing that equivalence because, as with "reasonably necessary" itself, each of those expressions may be used in different senses. "Whichever expression is used, what is important is the substance of the idea it is intended to convey."[71]

42. *Castlemaine Tooheys* establishes that the substance of the idea is directed to a comparison of "means and objects" to determine if the "true purpose" of the law is to "impose the

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66 See *AMS* (1999) 199 CLR 160 at 178-179 [43]-[46] (Gleeson CJ, McHugh and Gummow JJ), 233 [221] (Hayne J). See also *APLA* (2005) 224 CLR 322 at 353 [38] (Gleeson CJ and Heydon J), 394 [179] (Gummow J), 461 [420] (Hayne J), 482 [463] (Callinan J).

67 *ACTV* (1992) 177 CLR 106 at 194 (Dawson J) (emphasis added); *Nationwide News* (1992) 177 CLR 1 at 58-9 (Brennan J); *Cunliffe* (1994) 182 CLR 272 at 333 (Brennan J).

68 *Cunliffe* (1994) 182 CLR 272 at 308 (Mason CJ).

69 *Mulholland v Australian Electoral Commissioner* (2004) 220 CLR 181 at 199 [39] (Gleeson CJ). See also *Thomas v Mowbray* (2007) 233 CLR 307 at 330-333 [19]-[26] (Gleeson CJ).

70 See *Betfair [No 1]* (2008) 234 CLR 418 at 476-477 [101]-[102] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

71 *Mulholland* (2004) 220 CLR 181 at 197 [32] (Gleeson CJ). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562 (the Court).

impermissible burden", rather than to attain a permissible purpose.[72] As part of that inquiry, the identification of alternative means may "**suggest** … that the purpose of the law is not to achieve that legitimate object".[73] However, the existence of such alternative means is not determinative, because the question is ultimately one concerning the characterisation of the law, assessed by reference to its purpose.

43. As expressly recognised in *Castlemaine Tooheys*, the more targeted role of "proportionality" in the context of s 92 is analogous to its role in the context of assessing whether a Commonwealth law is supported by a "purposive" head of legislative power.[74] It is also analogous to the question whether a Commonwealth law is supported by the incidental aspect of a head of legislative power,[75] and (arguably) the question whether a regulation made in furtherance of a purposive power is invalid.[76]

44. The more targeted role of "proportionality" in each of those contexts is distinguishable from the role of proportionality in the context of the implied freedom of political communication.

(1) In that latter context, the question whether a law is "adequate in its balance" is not concerned with the identification of the law's object or purpose.[77] As Nettle J recently explained, that inquiry is distinctly not directed to detecting an ulterior purpose.[78]

(2) Rather, the point of the "balancing" exercise in that context is to assess whether the burden imposed on the implied freedom is "justified", having regard to the importance of the "purpose of and benefit sought to be achieved by legislative provisions".[79] The

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72 *Castlemaine Tooheys* (1990) 169 CLR 436 at 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *ACTV* (1992) 177 CLR 106 at 143-144 (Mason CJ); *Cunliffe* (1994) 182 CLR 272 at 324 (Brennan J), 352 (Dawson J), 388 (Gaudron J).

73 *Castlemaine Tooheys* (1990) 169 CLR 436 at 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) (emphasis added). See also *Cunliffe* (1994) 182 CLR 272 at 388 (Gaudron J); *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 (***A-G (SA) v Adelaide City Corp***) at 42 [65] (French CJ).

74 (1990) 169 CLR 436 at 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), referring to the treaty-implementation limb of the external affairs power. See also *Nationwide News* (1992) 177 CLR 1 at 94 (Gaudron J); *Private R v Cowen* [2020] HCA 31 at [129]-[130] (Nettle J).

75 See *Spence* (2019) 93 ALJR 643 at 664-666 [59]-[69], 668 [81] (Kiefel CJ, Bell, Gageler and Keane JJ).

76 See *A-G (SA) v Adelaide City Corp* (2013) 249 CLR 1 at 38-40 [57]-[61] (French CJ).

77 *McCloy* (2015) 257 CLR 178 at 193-195 [2], 218-219 [83]-[87] (French CJ, Kiefel, Bell and Keane JJ).

78 *Clubb v Edwards* (2019) 93 ALJR 448 at 507–508 [268] (Nettle J), and the cases there cited.

79 *McCloy* (2015) 257 CLR 178 at 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

concern with "justification" in that context follows from the fact that the freedom of political communication is not "absolute";[80] rather, it is "defeasible".[81]

(3) In contrast, s 92 protects interstate trade, commerce and intercourse from laws that have a particular impermissible purpose. If a law has that impermissible purpose as its true purpose, the law cannot be "justified".[82]

45. Notwithstanding the above, if the Court concludes that a proportionality exercise analogous to that undertaken in the implied freedom context is appropriate in the context of s 92, that exercise may be undertaken using the "structured proportionality" approach adopted in *McCloy*, as refined and restated most recently in *Banerji*:[83] **WA [44]-[45]**; cf **PS [47]**.

F. SECTION 92 — APPLICATION TO THE AUTHORISING PROVISIONS

46. Applying the analytical framework identified in Part C above to the Authorising Provisions, and having regard to the general principles described in Part E above, it is clear that the Authorising Provisions are not invalid by reason of s 92 and that they fall into the second category of laws identified at paragraph 20(2) above.

F.1. All exercises of power will conform to the constitutional limit

47. The Authorising Provisions confer powers in broad terms. It is "not hard to conjecture" why that is so: in an emergency management context, "legislative foresight cannot trust itself to formulate in advance standards that will prove apt and sufficient in all the infinite variety of facts which may present themselves".[84] Thus, of necessity, "the area of the discretion must be large".[85] But, of course, the Authorising Provisions do not confer an "unbridled discretion" on the Commissioner.[86] The powers are limited by their express terms and the "subject matter, scope and purpose" of the legislation.[87]

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80 *Lange* (1997) 189 CLR 520 at 561 (the Court).

81 Simpson, "The Case for Improper Purpose as the Touchstone" (2005) 33 *Federal Law Review* 445 at 473.

82 See, by analogy, the approach in the context of Ch III: *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 344 [31]-[33] (Kiefel CJ, Bell, Keane and Edelman JJ). See also Simpson, "The Case for Improper Purpose as the Touchstone" (2005) 33 *Federal Law Review* 445 at 474-475, discussing the *Melbourne Corporation* principle.

83 But see Simpson, "Commentary on [Kirk, "Section 92 in its Second Century"]" in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) at 288–294; Chordia, *Proportionality in Australian Constitutional Law* (2020) at 149-151.

84 *Miller* (1986) 161 CLR 556 at 613 (Brennan J), quoting *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757 (Dixon J).

85 *Miller* (1986) 161 CLR 556 at 613 (Brennan J).

86 *Wotton* (2012) 246 CLR 1 at 10 [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

87 *Wotton* (2012) 246 CLR 1 at 9 [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

48. By their express terms, the powers conferred by the Authorising Provisions can only be exercised for the emergency management purpose: ss 67 and 72A; and the hazardous substance purpose: s 70; and only during an emergency situation or state of emergency: ss 65, 67, 70, 72A(2). That sets the Authorising Provisions apart from the provision with which Brennan J was concerned in *Miller*, which contained no express purposive limitation but empowered the Minister to grant a license "on such conditions … as are prescribed".

49. Rather, the Authorising Provisions have more in common with the provisions considered in *Cunliffe*, which provided that an applicant for registration as a migration agent was not suitable for registration if the Migration Agents Registration Board was satisfied that the applicant "is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance".[88] Brennan J described the power given to the Board as "discretionary", but said that its exercise was "controlled".[89] His Honour explained:[90]

> Where the validity of a law is attacked because it confers a discretion to refuse a licence to a person who may wish to exercise a freedom or immunity guaranteed by the Constitution, validity depends on whether the law creates a power which can be exercised by the repository to deny an applicant the freedom or immunity to which the applicant is constitutionally entitled. **But if the power is so confined, whether by express terms or by the purpose for which it is conferred**, that it cannot be exercised to impair the freedom or immunity **but only to achieve a constitutionally permissible purpose**, the discretion is not inimical to the validity of the law that confers it.

50. Those observations apply to the Authorising Provisions. Because the powers must be exercised for the purposes expressly identified in the provisions, the powers **cannot** be validly exercised for a "protectionist" or a "movement restriction" purpose (that is, a purpose prohibited by s 92). In that way, the purposive limit placed on the Authorising Provisions ensures that, so long as there is compliance with the statutory criteria, the outcome of the exercise of the power will be one that does not infringe s 92.[91]

51. If the powers were to be exercised, in truth, for an impermissible purpose, the exercise of the powers would not be for the emergency management purpose or the hazardous substance

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88 *Cunliffe* (1994) 182 CLR 272 at 313-314 (Brennan J).

89 *Cunliffe* (1994) 182 CLR 272 at 330 (Brennan J).

90 *Cunliffe* (1994) 182 CLR 272 at 331. Brennan J went on to reject a challenge to the law based on s 92, on the basis that the law was one of general application and "not **aimed** at interstate intercourse": at 333.

91 *Banerji* (2019) 93 ALJR 900 at 915-916 [44] (Kiefel CJ, Bell, Keane and Nettle JJ), 924-925 [96] (Gageler J).

purpose. Such a purpose would be "improper" in administrative law terms.[92] In those circumstances, the particular exercises of the power would be invalid for infringing the express statutory limit within the Authorising Provisions,[93] not because of the direct operation of s 92 of the Constitution. That does not mean the powers can be exercised for an unconstitutional purpose with impunity — their exercise is necessarily amenable to judicial review in the Supreme Court,[94] and thereby subject to "adequate control".[95] That can be contrasted with the provisions of the Order considered in *Gratwick*, none of which prevented the Director-General from exercising the powers conferred by that Order in a "completely arbitrary manner".[96]

10 52. The position is even clearer in relation to s 72A. Not only is the exercise of the power conferred by that section constrained by an express purpose requirement, the power may only be exercised by the Coordinator to give a direction that the Coordinator "considers is **reasonably necessary** to prevent, control or abate risks associated with the emergency". That mirroring of the language of the s 92 "test" identified at paragraph 34(2) above, removes any doubt that the power could be exercised for an impermissible purpose. That is because "the exercise of discretion [is] textually calibrated to the constitutional test".[97] In that sense, s 72A is analogous to one of the provisions considered by the Court in *Wotton*, which allowed for the imposition of such parole conditions as the parole board "reasonably consider[ed] necessary". In rejecting a challenge based on the implied freedom of political
20 communication, the Court's critical observation was that the text of the section was "akin" to that of the relevant constitutional test (namely, "reasonably appropriate and adapted").[98]

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92 See *Samrein v Metropolitan Water Sewerage and Drainage Board* (1982) 56 ALJR 678 at 679-680 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ). See also *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 620-621 (Latham CJ), 629-631 (Dixon J).

93 See *Banerji* (2019) 93 ALJR 900 at 915-916 [44] (Kiefel CJ, Bell, Keane and Nettle JJ). See also *Kruger v Commonwealth* (1997) 190 CLR 1 at 45 (Brennan CJ), 157 (Gummow J).

94 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

95 *Cunliffe* (1994) 182 CLR 272 at 331 (Brennan J). See also *Miller* (1986) 161 CLR 556 at 614 (Brennan J); *Wotton* (2012) 246 CLR 1 at 16 [31]-[32] (French CJ, Gummow, Hayne, Crennan and Bell JJ); Walker and Hume, "Broadly Framed Powers and the Constitution" in Williams (ed), *Key Issues in Public Law* (2017) at 168-170.

96 (1945) 70 CLR 1 at 15 (Latham CJ).

97 Stellios, "*Marbury v Madison*: Constitutional limitations and statutory discretions" (2016) 42 *Australian Bar Review* 324 at 337. See also *Public Health and Wellbeing Act 2008* (Cth), s 200(1)(d).

98 *Wotton* (2012) 246 CLR 1 at 16 [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ), see also at 34 [91] (Kiefel J); *A-G (SA) v Adelaide City Corp* (2013) 249 CLR 1 at 88 [216] (Crennan and Kiefel JJ).

F.2. Conclusion

53. Although expressed in general terms, the Authorising Provisions are valid and effective across the range of their operation. In every case, they can only be exercised for the emergency management purpose or the hazardous substance purpose, and therefore cannot be exercised for a purpose prohibited by s 92. That is sufficient to answer the Question Reserved "no".

G. SECTION 92 — ALTERNATIVE SUBMISSION

54. If, contrary to Victoria's submission above, the Court concludes that the statutory criteria specified in the Authorising Provisions do not ensure that the discretion conferred on the Coordinator will necessarily be exercised in a way that is consistent with s 92, then it will be necessary for the Court to consider the question posed at paragraph 23 above: can the Authorising Provisions be "read down" to ensure that they are within constitutional power?

55. Here, there is no difficulty in "reading down" the Authorising Provisions in the way explained by Brennan J in *Miller*. Even if the express purpose requirement discussed above is not sufficient to exclude the possibility of the power being exercised for an impermissible purpose, the language is plainly capable of being read in that way.[99] So much appears to be accepted by the Plaintiffs, who do not suggest the Authorising Provisions are invalid or seek a declaration to that effect: **PS [9], [55(a)]**.

56. Accordingly, it will then be necessary for the Court to consider the question posed at paragraph 24 above: whether the Directions themselves "fall within the scope of the discretion as so read down"?[100] In practice, that question is to be answered by assessing the Directions themselves against s 92 (as opposed to the Authorising Provisions).

G.1. Directions

57. Under the heading "Closure of the Border", cl 4 of the Directions relevantly provides that "[a] person must not enter Western Australia unless the person is an exempt traveller". The word "enter" is defined to include "disembark from an affected aircraft": cl 26; and "affected aircraft" means an "aircraft which originated from a place outside Western Australia": cl 19. Clause 27 of the Directions identifies a series of categories. If a person falls within one of

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99 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28] (the Court). See also *Wainohu v NSW* (2011) 243 CLR 181 at 231 [113] (Gummow, Hayne, Crennan and Bell JJ).

100 *Banerji* (2019) 93 ALJR 900 at 925 [96] (Gageler J).

those categories, and complies with any "specified terms or conditions",[101] the person will be an "exempt traveller".

58. However, even if a person is an "exempt traveller", cl 5 of the Directions provides that the person "must not enter Western Australia" if the person: has symptoms that indicate a person may have COVID-19;[102] has been assessed as a "close contact" of a person who has been diagnosed with COVID-19;[103] is awaiting the outcome of a test for COVID-19;[104] has received a "positive test" for COVID-19 and has not been certified as having recovered from COVID-19;[105] or has been in New South Wales or Victoria in the previous 14 days (subject to certain exceptions).

G.2. Directions comply with s 92

59. It is clear that the apparent object or purpose of cls 4 and 5 is to mitigate the risk to public health posed by COVID-19: **WA [68]**. That emerges from three matters.

(1) **First**, the context in which the Directions were made, namely during a state of emergency period relating to COVID-19.

(2) **Second**, as required by the Authorising Provisions, the Directions were made for the emergency management purpose and the hazardous substance purpose.

(3) **Third**, the nature of the exclusions of persons who would otherwise be "exempt travellers" permitted to enter, from entry into Western Australia. Each of those exclusions is specifically directed to persons who pose a risk of transmitting COVID-19 to other persons within Western Australia.

60. In light of that apparent legitimate purpose: **WA [55]**; it is necessary to determine whether, in truth, the Directions have an impermissible purpose for either the "trade and commerce" limb or the "intercourse" limb (see Question 2 in paragraphs 34 and 38 above).

61. Clauses 4 and 5 are "reasonably necessary" to achieve the legitimate purpose of managing the spread of COVID-19 during the period of the state of emergency. The findings made by

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101 As defined in cl 41, which permits the Commissioner (or an authorised person) to impose conditions on a particular exempt traveller, or some or all persons in a category of exempt traveller, in addition to or instead of any other terms and conditions imposed by or under the Directions.

102 See definition of "symptoms" in cl 44.

103 See definition of "close contact" in cl 23.

104 See definition of "test" in cl 46.

105 See definition of "positive test" in cl 34.

Rangiah J explain how the measures imposed by cls 4 and 5 achieve that public health objective.[106] There are no "equally effective" alternatives to cls 4 and 5 that would suggest those clauses are designed to achieve an impermissible purpose: **WA [19]-[25], [56]-[57], [75]-[76]**.[107] As Rangiah J found:[108]

(1) "If the border restrictions were replaced by a suite of measures including exit and entry screening, mandatory wearing of facemasks on aeroplanes, PCR testing on the second and twelfth days after entry and mandatory wearing of face masks for fourteen days after entry, they would be **less effective** than the border restrictions in preventing the importation of COVID-19."

(2) "If the border restrictions were replaced by that suite of measures plus a 'hotspot' regime, involving either quarantining or banning persons entering from designated hotspots, they would be **less effective** than the border measures in preventing the importation of COVID-19."

62. Accordingly, clauses 4 and 5 are not so "disproportionate to the attainment of the legitimate object" of the clauses as to indicate that the "true purpose" of the clauses is "not to attain that object but to impose an impermissible burden.[109]

PART V: ESTIMATE OF TIME

63. Victoria estimates it will require approximately 30 minutes for the presentation of oral submissions.

Dated: 19 October 2020

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106 Factual Findings at [151], [171], [366]: CB 167, 171, 216.

107 See *McCloy* (2015) 257 CLR 178 at 211 [58] (French CJ, Kiefel, Bell and Keane JJ). See also *Banerji* (2019) 93 ALJR 900 at 913 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

108 Factual Findings at [366] (emphasis added): CB 216; see also at [308]-[364]: CB 199-212.

109 See *Castlemaine Tooheys* (1990) 169 CLR 436 at 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B26 of 2020**

BETWEEN:

CLIVE FREDERICK PALMER
First Plaintiff

MINERALOGY PTY LTD ABN 65 010 582 680
Second Plaintiff

and

THE STATE OF WESTERN AUSTRALIA
First Defendant

CHRISTOPHER JOHN DAWSON
Second Defendant

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, Victoria sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Date in Force	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*		s 92
	Statutes		
2.	*Emergency Management Act 2005* (WA)	14 July 2017 — 15 March 2020	ss 56, 57, 58
3.	*Emergency Management Act 2005* (WA)	4 April 2020	ss 3, 10, 52, 57, 58, 65, 67, 70, 72A
4.	*Interpretation Act 1984* (WA)	12 September 2020	s 7
	Statutory instruments		
4.	Quarantine (Closing the Border) Directions (WA)	Consolidated version, as at 16 September 2020	cls 4, 5, 19, 23, 26, 27, 34, 41, 44, 46