



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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

No. B26 of 2020

B E T W E E N:

CLIVE FREDERICK PALMER
First Plaintiff

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

10

AND

THE STATE OF WESTERN AUSTRALIA
First Defendant

CHRISTOPHER JOHN DAWSON
Second Defendant

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DEFENDANTS' OUTLINE OF ORAL SUBMISSIONS

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Date of Document: 3 November 2020

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Part I: SUITABILITY FOR PUBLICATION

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

Part II: SUBMISSIONS

The Reserved Question

2. The only aspect of the reserved question to be decided is whether the *Quarantine (Closing the Border) Directions (Directions)* are wholly or partly invalid because they contravene s 92 of the Constitution. The defendants submit that the Directions are wholly valid. The validity of the *Emergency Management Act* does not arise.

The Factual Nature of the Plaintiffs' Case

- 10 3. The plaintiffs' primary submission is that the intercourse freedom in s 92 means that interstate intercourse shall be absolutely free of any burden which is "aimed at" or "pointed directly at" a cross-border movement. This language is used in the Plaintiffs' Submissions, 22/9/2020 (**PS**), at [10]-[14], [23], [24], [42], [43], [48].
4. The plaintiffs do not explain what conceptual test is described by a burden "aimed at" or "pointed at" cross-border movements, but instead rely upon two particular precedents to illustrate this: *Smithers (JBA 10/60/3594)* and *Gratwick (JBA 6/36/1996)*.
5. The words "aimed at" or "pointed at" might mean: (a) a burden upon cross-border movements which adopts the cross-border movement as the criterion of operation
20 (ie, a "criterion of operation" test); or (b) a burden upon cross-border movements to achieve a legitimate purpose, but where (objectively) the law goes beyond what is reasonably necessary to achieve that purpose and it may be inferred that the true purpose is to burden interstate intercourse (ie the "objective purpose" test).
6. In their Reply Submissions, 27/10/20, (**RS**) [3], the plaintiffs expressly reject the "criterion of operation" test, and say that the test is correctly captured by the submissions of Tasmania and the Northern Territory. These effectively state the "objective purpose" test: Tasmania's Submissions, [4](c), [25]-[26]; Northern Territory's Submissions, [13], [32], [35]-[36], [38].
7. The plaintiffs accept that the health of Australian residents of a particular State is
30 a proper matter of executive and legislative concern of that State, subject to constitutional limits: RS [5]. That is consistent with cases such as *Ex parte Nelson (No 1) (JBA 6/34/1926)*.

8. The plaintiffs say that, whatever test of reasonable necessity is applied, it may be inferred that the objective purpose of the Directions is to burden interstate trade or commerce, as the Directions "are indiscriminate and unconcerned with the presence or absence of such risk between one Australian State or Territory and another": RS [6]. This submission should be rejected.
9. The Directions are not indiscriminate. They have been amended 8 times. Since commencement, there have been a suite of exemptions which allow travellers from other Australian jurisdictions to enter WA. Between Amendments 2 and 8 (9/7/20 - 30/10/20), a much narrower set of exemptions applied to travellers from Victoria.
10 Between Amendments 3 and 7 (19/7/20 – 2/10/20), a similarly narrow set of exemptions applied to travellers from NSW. See **JBA 2/14/290-340** for Amendments 2 to 7 (particularly amendments to para 5(e)); **Supplementary CSB 156-160** for Amendment 8. Objectively, these amendments reflected the course of the pandemic and spikes in coronavirus cases: **CSB 2/240-241**.
10. Applying entry restrictions to travellers from Australian jurisdictions with no cases is still presently justified, where there are other Australian jurisdictions which have recently had cases of unknown sources of community infection. That is because:
20 (a) "border-hopping" between Australian jurisdictions is a real, and not fanciful, risk: *Palmer (No 4)* (**CSB 1/193**) [272]; (b) any alternative strategy based upon detection of localised hotspots inevitably suffers from a lagtime, which allows transmission of several generations of disease: *Palmer (No 4)* (**CSB 1/153**) [93]; (c) rapid uncontrolled transmission resulting from the introduction of a single infected individual to a community has occurred in multiple settings where there is otherwise good surveillance and testing control: *Palmer (No 4)* (**CSB 1/196**) [292]; and (d) it is appropriate to adopt a "precautionary approach" where there is substantive uncertainty and important harms are plausible: *Palmer (No 4)* (**CSB 1/149**) [74].
11. While there are any Australian jurisdictions with recent cases of community transmission, the Directions are reasonable and no objective inference can be
30 drawn that they have a purpose of burdening freedom of interstate intercourse.
12. Relaxation to entry restrictions has been forecast if the number of cases of community transmission throughout all Australian jurisdictions continues at a very low level for 14 days (ie one incubation period), until 14 November 2020: **Supplementary CSB 411-415**. Entry restrictions will be relaxed for jurisdictions

with no community transmission. This further confirms that the objective and reasonable purpose of the Directions is to prevent the spread of COVID-19.

The Proper Test for the Intercourse Freedom

13. No decision of the Court establishes that a direct burden upon interstate intercourse, imposed by using cross-border movements as a criterion of operation, will always be constitutionally invalid.
14. *Smithers* (JBA 10/60/3594) and *Gratwick* (JBA 6/36/1996) were both cases where the law preventing cross-border movements could not be justified by reference to any permissible aim.
- 10 15. The judgments of Dawson J in *ACTV* (JBA 4/20/866) and Brennan J in *Nationwide News* (JBA 9/52/3083) support the objective purpose test, not the criterion of operation test.
16. In *AMS v AIF* (JBA 3/17/488) and *APLA* (JBA 3/17/583) a distinction is drawn between laws which proportionately or reasonably burden the intercourse freedom and laws which go beyond what is proportionate or reasonable (ie the objective purpose test). Neither suggest any substantive distinction between direct and indirect burdens.

The Proper Test of Proportionality

- 20 17. No case expressly decides whether a law will be consistent with the intercourse freedom if it is reasonably appropriate and adapted, or proportionate to, a legitimate purpose (ie a looser test of proportionality); or whether the means adopted by the law to achieve a legitimate purpose must not go beyond what is necessary or appropriate (ie a more stringent test of structured proportionality).
18. No sharp distinction is drawn between these two tests in *ACTV* (JBA 4/20/866), *Nationwide News* (JBA 9/52/3083), *Cunliffe* (JBA 6/32/1656), *AMS* (JBA 3/17/488) or *APLA* (JBA 3/17/583).
19. However, assessment of alternative means for the purposes of s 92 was affirmed in in *Monis v The Queen* (JBA 8/50/2834) [347], *Attorney-General (SA) v Adelaide City Corporation* (JBA 4/19/775) [65], *Brown v Tasmania* (JBA 5/25/1294) [290].
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Dated: 3 November 2020



J A Thomson SC, Solicitor-General for WA



J D Berson