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

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

APPLICATION BY JEREMY RICHARD LUDLOW

FOR LEAVE TO BE HEARD AS AN *AMICUS CURIAE*

Part I: Internet publication

1. This submission is in a form suitable for publication on the internet.

Part II: Asserted basis of application

2. The author, Jeremy Richard Ludlow (**Amicus**), applies for leave to be heard in writing as an *amicus curiae* in partial support of the Plaintiffs. In particular, the Amicus applies for leave to contend, on the basis submitted below, that question (a) should be answered along the following lines:

> "The States and self-governing Territories lack the sovereign power, either by executive act or by legislation, or by a combination of the two, and either unilaterally or in combination with any other State or self-governing Territory, to close their external borders to entry by humans (whether aliens or non-aliens) for any purpose (except, in the case of a self-governing Territory, where assent to the relevant proposed law of the Territory was reserved by the Administrator, and given by the Governor-General in the exercise of the sovereign executive power of the Commonwealth). The Directions are wholly invalid for that reason. As there is no otherwise valid portion of the Directions on which s 92 of the Constitution could possibly operate, the Directions are not also invalid on the basis that they impermissibly infringe s 92."

3. The basis of the Amicus's application is as follows. The Plaintiffs contend that the Directions are invalid because they impermissibly infringe s 92. Their contention

must be based upon an assumption that the Directions are otherwise valid.[1] That assumption, in turn, must be based upon a premise that the States are sovereign, with essentially unlimited powers, subject only to the national Constitution.[2]

4. For the reasons set out in this document, and especially in the next paragraph of this document, however, this Court simply cannot accept or act on that premise.[3] It is not merely a false premise; it is also a premise the Court has already firmly rejected, in a long line of coherent authority that goes back at least as far as the *Engineers' case*,[4] and includes an uncontroversial aspect of an important case this Court decided as recently as February this year.[5] But the Directions are still invalid.

5. The Directions are invalid because the First Defendant has never had any sovereign powers in respect of its external borders. In particular, it has never had the sovereign power that it would need to have to set its own borders, or to move them, or, crucially, to close its borders to entry by humans (either aliens or non-aliens).[6]

6. The only circumstance in which the First Defendant may ever have had any relevant sovereign power of any description would have been if, unusually, the sovereign British government had specially delegated the relevant sovereign power, either by special instructions to a British-appointed State Governor, or by the giving of personal assent by the relevant sovereign British monarch to the relevant proposed law of the First Defendant, in each case on the advice of the relevant monarch's sovereign British Ministers. However, the *Emergency Management Act 2005* (WA), under which the Second Defendant purported to make the Directions, was assented to by a Western Australian-appointed State Governor.[7]

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[1] "Section 92 operates by invalidating what would otherwise be a valid exercise of legislative power where the law imposes an impermissible burden on a protected interstate transaction": see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (Brennan J) (**Nationwide News**).

[2] As to the limits imposed on the States by the national Constitution, see, eg, ss 90, 92 and 117, or consider, eg, the implied freedom of communication.

[3] See *Albert v Lavin* [1982] AC 546.

[4] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 – a more recent case than *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 (**Smithers**), on which the Plaintiffs place much reliance in support of their s 92-based contentions.

[5] *Love v The Commonwealth* [2020] HCA 3 (**Love v The Commonwealth**).

[6] See, especially, pars [36], [37] and [42] below.

[7] See *Australia Acts 1986* (Imp and Cth), s 7: Since 1986, State governors have been appointed by Her Majesty in right of the relevant (non-sovereign) Australian State, on the sole advice of the Premier of the relevant State; the sovereign British government is no longer involved in any such appointments.

Part III: Why leave to be heard as amicus curiae should be granted

7. First, and as submitted above, the Plaintiffs are making submissions based upon a premise the Court has firmly rejected. Although the Court therefore cannot accept those submissions, that does not mean that the Court must also refuse to answer the questions reserved in a manner favourable to the Plaintiffs.[8]

8. These proceedings are more than just a civil dispute between parties. They also raise constitutional issues of fundamental importance to many thousands, if not millions, of Australians, including the Amicus. It is therefore more than usually important that in these proceedings the Court be willing:

10 a. to hear from any person willing to make contentions about the relevant law that differ from those of the parties;

b. to consider whether those contentions are correct; and

c. to come to a final and definitive conclusion on the constitutional issues of fundamental importance at a suitable level of abstraction to be of benefit to those many thousands, if not millions, of Australians.[9]

9. In the end, the Court is entitled, and indeed required, to take its own view of the law relevant to the validity of the Directions, because Judges are more than mere selectors between rival views of the law presented by the parties.[10] The Court also has jurisdiction and power to give any answer to the questions reserved that it considers

20 to be correct in law, if that answer is more than merely hypothetical and would likely be of at least some benefit to at least one of the parties.[11]

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[8] One crucial reason why the Court can still answer the questions is that the Plaintiffs' submissions, at par [55] c), expressly seek "Such further or other orders as the Court deems appropriate".

[9] See *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529, at 548 (McGarvie J). See also *Private R v Cowen* [2020] HCA 31, in which both Gageler J (at [107]) and Edelman J (at [153]) held that the practice of this Court to decline to resolve constitutional issues not squarely presented by the facts is not inflexible. Further, as several States and the Northern Territory have intervened in the present proceedings, a very narrow answer to question (a) would not quell the controversy between the parties, which really revolves around the issue specifically addressed by the Amicus's proposed answer.

[10] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at [13] (Brennan CJ); *Roberts v Bass* (2002) 212 CLR 1, at [143] (Kirby J); *Coleman v Power* (2004) 220 CLR 1, at [243] (Kirby J); *Fingleton v The Queen* (2005) 227 CLR 166, at [140] (Kirby J).

[11] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. See also *Annetts v McCann* (1990) 170 CLR 596, and the Plaintiffs' express request for "Such further or other orders as the Court deems appropriate". Additionally, the controversy between the parties, including, crucially, the Plaintiffs and the Northern Territory, will not really be quelled if the Court were to give only a narrow answer to question (a).

10. The Amicus is contending for a view of the law that differs radically from the views for which the parties contend, relies upon a much wider range of case law, and, if accepted, would lead not only to an outcome favourable to the Plaintiffs, but also to a definitive determination that all of the States *and* self-governing Territories have no sovereign power to close their borders to entry by humans (whether aliens or non-aliens) for any purpose.[12] Such a determination would bring to an end what is submitted below to be a fifth wave of very damaging unlawful Australian colonial or State border closures,[13] and would also necessarily prevent the occurrence of any sixth or subsequent wave of such unlawful border closures.

11. Secondly, and alternatively, the Amicus is contending that the Court should accept the Plaintiffs' general contention, namely that the Directions are wholly invalid, but on the basis of radically different submissions from those on which the Plaintiffs are relying. Those two sets of submissions are so different from each other that acceptance of one set would require rejection of the other set. Unless it is clear that the Amicus's proposed submissions cannot be accepted (and the Amicus says that that is not so), then the Court should therefore hear from the Amicus.

12. Thirdly, the present proceedings are broadly similar to *Project Blue Sky Inc v Australian Broadcasting Authority*,[14] in which the Court gave leave to an *amicus curiae* to make submissions. In that case, the appellant made submission A in support of legal outcome A, the *amicus curiae* made submission B in support of a broadly similar, but different, legal outcome B, and the respondent made submission C in support of legal outcome C. By majority, this Court accepted submission B, and therefore made orders implementing outcome B.

13. Fourthly, it is highly desirable that the Court hear submissions in the present proceedings from the perspective of a person who is ordinarily resident in Western Australia and currently present in Western Australia, but not acting for one of the parties. As demonstrated by the factual information about the Amicus set out in the accompanying Notice of Constitutional Matter, the Amicus is such a person.

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[12] Except, in the case of a self-governing Territory, where assent to the relevant proposed law of the Territory was reserved by the Administrator, and given by the Governor-General in the exercise of the sovereign executive power of the Commonwealth.

[13] See pars [30] and [31] below.

[14] (1998) 194 CLR 355.

14. In *Betfair Pty Limited v Western Australia*,[15] in which this Court held, 7-0, that certain laws of the First Defendant were invalid because they impermissibly infringed s 92, there were two plaintiffs. The first plaintiff, Betfair, was a Tasmanian company that wanted to engage in trade or commerce with persons located in Western Australia. The second plaintiff, Mr Erceg, was such a person. Both plaintiffs were held to be unconstitutionally inconvenienced by the impugned laws, in different ways. In the present proceedings, the two Plaintiffs are equivalents only to Betfair, and there is no equivalent to Mr Erceg. The Amicus is willing, in effect, to be a non-party equivalent to Mr Erceg for the purposes of these proceedings. At least arguably, he even has standing to intervene in the proceedings.[16] However, he applies only for leave to be heard as an *amicus curiae*.

15. Fifthly, the Attorney General for the Commonwealth (**Attorney General**), who intervened at an earlier stage in these proceedings, has since, and very unusually, possibly even uniquely, withdrawn that intervention. The Commonwealth has not only a statutory power, by the Attorney General, to intervene in these proceedings, but also a very old and important common law duty, as the sovereign power of Australia, to protect Australian citizens, and aliens lawfully present within Australia,[17] including the First Plaintiff. That common law duty applies not only when a citizen is abroad, but also when a citizen or lawful alien is in Australia, and in particular where a citizen or lawful alien is or may be affected by unconstitutional conduct of a State or self-governing Territory. As the Commonwealth by the Attorney General is no longer complying with that duty, this Court, which is part of the judicial arm of the Commonwealth, should provide the First Plaintiff with the required assistance on the Commonwealth's behalf by giving the Amicus leave to assist him. The First Plaintiff needs such assistance from the Commonwealth and the Amicus, because his own lawyers are making submissions on his behalf based upon a premise that this Court has previously firmly rejected.

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[15] (2008) 234 CLR 418 (**Betfair**).

[16] See *Dyson v Attorney-General (No 1)* [1911] 1 KB 410, at 423; *Dyson v Attorney-General (No 2)* [1912] 1 Ch 158, at 166.

[17] *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL), at 366 (the appellant in that case was better known as 'Lord Haw Haw'). So, eg, in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, the Commonwealth complied with its common law duty by bringing the successful claim in that case.

16. Sixthly, the Amicus is suited by qualifications and experience to make the submissions he makes in this document.

17. The Amicus is a Practitioner of the Supreme Court of Western Australia. He was admitted to practice in 1990, and has practised mainly civil litigation in Federal, Western Australian and other Courts, including the Supreme Courts of New South Wales and Victoria and this Court, and including as counsel. He also has an Arts degree majoring in Australian and European history and politics.

18. In 1984, the Amicus was part of a group of Australian scholarship students who visited Berlin as guests of the West Berlin Senate. The group travelled between West Germany and Berlin along an *Autobahn* corridor similar to that recently created by the State of New South Wales for ACT residents wishing to travel from Victoria to the ACT. In Berlin, the group crossed the Berlin Wall several times.

19. In 1995, the Amicus appeared as counsel for Mr Brian Easton at the hearings of what was known variously as the Easton Royal Commission and the Marks Royal Commission;[18] it examined the circumstances surrounding the presentation of a petition by Mr Easton to the Legislative Council of Western Australia in February 1993. The Amicus also appeared for Mr Easton at various Court hearings associated with the Royal Commission.[19] About a year earlier, the Legislative Council had committed Mr Easton to a term of imprisonment for breach of parliamentary privilege. The Amicus understands that Mr Easton is the only person to have been imprisoned by an Australian House of Parliament since Fitzpatrick and Browne in 1955.[20] In acting for Mr Easton, the Amicus became familiar with State constitutional law, and in particular with the powers of the States.[21]

20. In *Attorney-General v Marquet*,[22] the Amicus applied to the Supreme Court for leave to make submissions as an *amicus curiae*, but that application was unsuccessful, as

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[18] Western Australia. Report of the Royal Commission into the Use of Executive Power, November 1995, Annexure 1, page 135.

[19] See *Easton v Griffiths* (1995) 69 ALJR 669; 130 ALR 306 (Toohey J); *Halden v Marks* (1995) 17 WAR 447 (FC).

[20] See *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 (**Fitzpatrick and Browne**).

[21] The Amicus considers that Mr Easton, who was imprisoned for refusing to obey an order to apologise, was wrongfully imprisoned, because in the Amicus's view the Legislative Council had no power to make such an order. However, Mr Easton lacked the resources to challenge his imprisonment, and therefore did not do so.

[22] *Attorney-General (WA) v Marquet* (2003) 217 CLR 545; see also *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 (FC).

it had been made outside a time limit set by an order made in his absence and of which he was not aware. He also applied to this Court for leave to make such submissions, and understands that that application was unsuccessful as he had not been given leave to do so by the Supreme Court.

Part IV: Submissions the Amicus seeks leave to make

Overview

21. The submissions in this Part should be read together with the submissions in Part II.

22. As submitted above, this Court has previously rejected, and therefore cannot act upon, the premise on which the Plaintiffs contend that the Directions are invalid.

23. In particular, this Court emphatically rejected that premise in 2006, in the joint judgment of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in the *Work Choices case*,[23] in which their Honours quoted and applied a passage from the judgment of Windeyer J in 1971 in the *Payroll Tax case*[24] including:

> "The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation."

24. To that authority should be added an important part of the judgment of Barwick CJ (Owen J concurring) in the Payroll Tax case.[25]

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[23] *New South Wales v The Commonwealth* (2006) 229 CLR 1, at [54] (**Work Choices case**).

[24] *Victoria v The Commonwealth* (1971) 122 CLR 353 at 395-396 (**Payroll Tax case**).

[25] "… the Constitution does not represent a treaty or union between sovereign and independent States. It was the result of the will and desire of the people of all the colonies expressed both through their representative institutions and directly through referenda to be united in one Commonwealth with an agreed distribution of governmental power. The whole "agreement" or as it is sometimes called "the compact" of the people of the colonies was to be and was expressed in an Act of the Imperial Parliament not in any sense as a treaty or an agreement of union, or as a confederation of States but as a statutory Constitution under the Crown.": Payroll Tax case, at 371 (Barwick CJ; Owen J concurring at 405). The Amicus submits that this dictum is consistent with the wording of the preamble and covering clauses to the national Constitution, which make clear that the States themselves were not parties to federation but conscripted to it, under an agreement between their *people* and the Imperial Parliament. In the case of all States other than the First Defendant, the conscription was implemented by a proclamation of Queen Victoria (see covering clauses 3 and 5), and in the case of the First Defendant by the same proclamation, upon Queen Victoria being satisfied that the *people* (but not necessarily also the legislative, executive or judicial arms of the government) of Western Australia had agreed thereto (see again the same covering clauses) (emphasis added).

25. Further, in February this year this Court delivered judgment in Love v The Commonwealth, in which it held, by a 4-3 majority, in effect, that even the Commonwealth, which is a sovereign State, has no power to deport an Australian Aborigine, and therefore also held, by implication, that the Commonwealth also has no power to turn away an Australian Aborigine at the national border.

26. In that case, Edelman J noted, in effect, that in the course of argument the Commonwealth had conceded, in effect, that the Commonwealth could not refuse admission to, or deport, a person born to Australian parents in Australia who had not renounced his or her Australian citizenship[26] (in these submissions, such persons, together with Australian Aborigines, are referred to as **Constitutional Non-Aliens**). His Honour went on to observe, correctly, that no party or intervener in that case had disputed that concession, no member of this Court had questioned it, and that the concession was "entirely correct".[27] The reasons of his Honour and several other

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[26] [2020] HCA 3, at [395] (Edelman J).

[27] The reason why, as Edelman J accepted, that concession is entirely correct is related to the point made by Barwick CJ in the Payroll Tax case quoted in note 25 above, namely that the Constitution is not a treaty between sovereign States, but an agreement between the people and the Imperial Parliament to which the States were conscripted. Thus, there is a class of humans, namely Constitutional Non-Aliens, who simply cannot be excluded or deported from Australia by the Commonwealth. The existence of that class is a matter of the proper construction of various terms of the Constitution, the preamble and the covering clauses that refer expressly to "the people" and to related matters. In particular, the preamble refers to "the people", and section 51 refers expressly to "naturalisation and aliens" and "immigration and emigration". Insofar as the status of Constitutional Non-Aliens is derived from case law, the Australian case law begins no later than the landmark case of Smithers, which followed the earlier landmark decision of the Supreme Court of the United States in *Crandall v Nevada*, 73 U.S. (6 Wall.) 35 (1868) (**Crandall**). Importantly, the Australian case law also includes *Pochi v Macphee* (1982) 151 CLR 101 at 109 (**Pochi v Macphee**), in which Gibbs CJ (with whom Mason and Wilson JJ concurred) held, in effect, that certain humans are beyond the reach of the Commonwealth's "aliens" power to exclude and deport, and Love v The Commonwealth, in which all seven members of this Court accepted the correctness of that aspect of Pochi v Macphee. See Love v The Commonwealth, at [7] (Kiefel CJ), [50] and [64] (Bell J), [87] (Gageler J), [168] (Keane J), [236] and [252] (Nettle J), [310] and [311] (Gordon J), [401], [433] and [466] (Edelman J, who also points out, at [433], that the dictum of Gibbs CJ had earlier repeatedly been accepted as correct). For a detailed discussion of the relevant provisions and case law up to 2013, see Pillai, Sangeetha, 'Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited' (2013) 39 *Monash University Law Review* 568. In Love v The Commonwealth, all members of this Court accepted, in effect, that the Commonwealth cannot deny entry to, or deport, persons born to Australian parents in Australia who have not renounced their allegiance to Australia, and a 4-3 majority of the Court held, further, that the Commonwealth similarly cannot deny entry to, or deport, Australian Aborigines even if they are not statutory non-aliens (ie citizens). The real issue raised by the present

members of the Court in that case also indicated,[28] in reliance upon the authority of a 1906 decision of this Court,[29] that the power to refuse a person entry to a territory, or to deport a person from a territory, is a sovereign power.

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proceedings is whether (notwithstanding the Court's very recent unanimous conclusion in Love v The Commonwealth that there is a class of Constitutional Non-Aliens that includes at least persons born to Australian parents in Australia who have not renounced their allegiance to Australia) the States and self-governing Territories can independently and unilaterally deny entry to, or expel, Constitutional Non-Aliens, with the result that Constitutional Non-Aliens are really only constitutionally immune from being denied entry to, or from being expelled from, the Jervis Bay Territory (which is non self-governing) and the external Territories (which are also non self-governing). The Amicus submits, in reliance in part upon a long line of United States authority referred to in note 55 below and also involving Crandall, that the answer to that question is "no", because the status of Constitutional Non-Alien should be held by this Court to give the holder of such status a constitutional right of entry to, and a constitutional immunity from being expelled from, every State and self-governing Territory (subject only to a valid law of the Commonwealth, or of a State or Territory, providing for the extradition of a person in connection with the due administration of criminal justice, or a valid law of the Commonwealth providing, eg, for "quarantine", or the conferral of sovereign independence on a Territory). More specifically, the answer is "no" because the national Constitution is, as was held by Barwick CJ in the Payroll Tax case, an agreement between the "people", being the predecessors to today's Constitutional Non-Aliens, and the Imperial Parliament (to which the States were not parties, and in respect of which the States were mere conscripts, with the consequence that Constitutional Non-Aliens are of a higher status in Australia's national Constitutional arrangements than are the States). See again Crandall, which confirms that the people of a federation have certain federal privileges and immunities that limit the powers of the States, and in particular prevent the States from closing their borders to entry by humans, and note that Quick & Garran cite Crandall under the heading "Federal Privileges and Immunities".

[28] [2020] HCA 3, at [6] (Kiefel CJ), [74] (Bell J) and [404] (Edelman J); see also at [348] (Gordon J).

[29] *Robtelmes v Brenan* (1906) 4 CLR 395 (**Robtelmes v Brenan**). In that case, this Court held that in 1906 the Commonwealth had power to make a law providing for the deportation of an alien, even though the Commonwealth was not then a sovereign State, because in 1900 the relevant sovereign State, the United Kingdom, had given the Commonwealth an express power to make laws for "naturalisation and aliens" with effect from 1901, and had therefore delegated to the Commonwealth its sovereign power to deport aliens from Australia. See also *Attorney General for the Dominion of Canada v Cain* [1906] AC 542 (PC) (**Cain**), which, a few months earlier, had reached the same conclusion, for the same reasons, in relation to the federal government of Canada. As is submitted below, no such express power has ever been given by *any* sovereign State to *any* of the States or self-governing Territories of the Commonwealth, and it follows that the States and self-governing Territories have *never* had any sovereign power unilaterally to deny entry to, or deport, an alien, for any reason. Further, and as is also submitted below, no sovereign State has ever given *any* of the States or self-governing Territories any express power unilaterally to make any law hindering or reducing the inherent rights of a British subject, or a Constitutional Non-Alien, or a statutory non-alien (ie a citizen under a law of the Commonwealth), and therefore the States and self-governing Territories similarly lack *any* sovereign power unilaterally to deny entry to any such person, for any reason (except, in the case of a self-governing Territory,

27. Despite that very recent authority, in a case that was very widely publicised, and also despite the earlier longstanding and coherent line of case law in this Court referred to above to the effect that the States have never been sovereign bodies, the Second Defendant, on behalf of the First Defendant, proceeded less than two months later to create the Directions, in which the First Defendant purports:

    a. to exercise a pretended but clearly non-existent sovereign power to deny almost all humans, including aliens and Constitutional Non-Aliens (and even Constitutional Non-Aliens ordinarily resident in Western Australia, such as the Amicus), a right of entry to Western Australia, which occupies approximately one third of the territory of the Commonwealth;[30] and

    b. to provide, in effect, for some of those humans to be deported from that part of Australia, over which the First Defendant is *not* sovereign, in the exercise of the very same pretended but non-existent sovereign power.[31]

28. In essence, the Directions are wholly invalid for the simple reason that the First Defendant has no sovereign powers to exercise, and therefore has no power to close its borders to entry by humans for any reason. The combined effect of Robtelmes v Brenan, the Payroll Tax case, the Work Choices case, and the uncontroversial parts of Love v The Commonwealth, especially when also combined with the United States and Canadian case law referred to in this document, dictate that outcome.

29. These proceedings are therefore broadly similar to Fitzpatrick and Browne, in which this Court held that the case was one of considerable importance, but that its difficulty was not equal to its importance. In the circumstances, the Court should answer question (a) *ex tempore* in the manner for which the Amicus contends, at the conclusion of the hearing of these proceedings, without delay.[32]

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where assent to the relevant proposed law of the Territory was reserved by the Administrator, and given by the Governor-General in the exercise of the sovereign executive power of the Commonwealth).

[30] See the Directions, pars 4 and 5.

[31] See the Directions, par 6.

[32] In Fitzpatrick and Browne, the Court also delivered *ex tempore* reasons, but in these proceedings the Court may prefer to deliver its reasons later. Another reason why the Court should answer question (a) *ex tempore* is that these proceedings are listed to be heard in early November 2020. If the Court were to answer question (a) *ex tempore* in the manner for which the Amicus contends, then the several million humans who are presently effectively unlawfully imprisoned in Western Australia by the Directions will be able to begin immediately making any plans they may wish to make to depart from and return to Western Australia over the Christmas 2020 / New Year 2021 period. If, on the other hand, the Court were to reserve its decision, then those several

Some matters of history as to Australia's unlawful unilateral border closures

30. As submitted above, the Directions are part of a fifth wave of very damaging unlawful Australian unilateral border closures. The first three waves were targeted at Chinese aliens, and the two most recent waves, although allegedly directed at viruses, have really been targeted at humans rather than viruses, because they have essentially drawn no distinction between healthy humans and infected humans.

31. The five waves have been as follows:

    a. At an inter-colonial conference of the Australian colonies in 1880 and 1881, it was agreed in principle that they would enact uniform laws restricting Chinese immigration.[33] In NSW, an earlier such law had been reserved by the Governor for the personal assent of Queen Victoria, but, as Windeyer J noted in *Ex parte Leong Kum*,[34] the *Influx of Chinese Restriction Act 1881* (NSW) was given assent by the local non-sovereign Governor. As the 1881 Act provided for the imposition of an exorbitant tax on Chinese immigrants with a view to excluding them, the Amicus therefore submits, in reliance in part upon Crandall, that it was invalid.[35]

    b. In 1888, the executive arms of the colonies of New South Wales, South Australia and Victoria unilaterally closed the borders of those colonies to entry by Chinese immigrants.[36] Five challenges to the relevant unilateral closure were brought in the Full Courts of colonial Supreme Courts, four of them in New South Wales,[37] and the other in Victoria. All but one of the NSW challenges succeeded; the exception was Lau You Fat, which failed because the applicant relied upon Victorian letters of naturalisation as a British subject of Victoria, and it was held that those letters were of no effect outside

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million humans may eventually be denied the opportunity to make such plans in time for the Christmas / New Year period. As the effective unlawful imprisonment of those humans began when the Directions were made in early April 2020, the case for an *ex tempore* answer to question (a) is compelling.

[33] See Gageler, Stephen, "A tale of two ships: the MV *Tampa* and the SS *Afghan*" (2019) 40(3) *Adelaide Law Review* 615-626 (**Gageler article**), at 618-619.

[34] (1888) 9 LR (NSW) 250 (**Leong Kum**), at 263.

[35] The corresponding Acts of the other colonies were the *Chinese Immigrants Regulation Act 1877* (Qld), the *Chinese Immigrants Regulation Act 1881* (SA), and the *Chinese Act 1881* (Vic).

[36] See Gageler article, 618-625.

[37] *Ex parte Lo Pak* (1888) 9 LR (NSW) 221, 221 (**Lo Pak**); Leong Kum; *Ex parte Lau You Fat* (1888) 9 LR (NSW) 269 (**Lau You Fat**); *Ex parte Woo Tin* (1888) 9 LR (NSW) 493 (**Woo Tin**).

Victoria. The Victorian challenge succeeded before the Full Court,[38] but was overturned by the Privy Council on the grounds that the applicant was an alien who was complaining about being denied entry to Victoria, and, as such, had no right either to enter Victoria, or to bring proceedings in a British court. However, the Privy Council went to considerable effort to emphasise that it was not expressing any view on the substantive issues on which the applicant, it is submitted rightly, had succeeded before the Full Court.[39]

c. At an urgently arranged conference in Sydney in 1888, most of the colonies agreed to enact more restrictive anti-Chinese legislation than that which already existed. On 11 July 1888, the New South Wales Governor assented to the *Chinese Restriction and Regulation Act 1888* (NSW). Again, the Amicus submits that that Act was invalid because Queen Victoria did not personally assent to it on the advice of her sovereign British Ministers.

d. In 1918-1919, the "Spanish Influenza" entered and spread around Australia. Initially, the Commonwealth and the States entered into a 13-point plan in response to it. However, New South Wales later accused Victoria of breaching that plan, and unilaterally closed the New South Wales border with Victoria. As a leading historian later wrote, "[t]hereafter it was every State for itself … the Commonwealth endeavoured to reassert its authority but found it could do little more than threaten or cajole … [and] [o]n a range of domestic matters the Commonwealth … passed into recess."[40]

e. In March this year, Tasmania unilaterally closed its borders in response to another pandemic. Subsequently, all States except New South Wales and Victoria, and also the Northern Territory, followed suit. Additionally, Victoria procured New South Wales to close its border with Victoria. The Amicus submits that the above quote about 1918-1919 applies equally to this year, and that both the 1918-1919 and this year's border closures by the States were and are invalid for the reasons set out in this document.

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[38] *Toy v Musgrove* (1888) 14 VLR 349 (**Toy**).

[39] *Musgrove v Toy* [1891] AC 272 (PC).

[40] McQueen, Humphrey (1976). "Chapter 2.2: The 'Spanish Influenza' Pandemic in Australia 1912–19". In Roe, Jill (ed.). *Social Policy in Australia: Some Perspectives 1901-1975*. Stanmore NSW: Cassell Australia. pp. 131–147, at 133–135. ISBN 072697367X.

The limits of the grant of power to the self-governing Australian colonies

32. In the 19th century, the sovereign British Imperial government granted self-government to the six Australian colonies (now States). Except in the case of Tasmania, each was given an express power to make laws "for the peace, order [or welfare] and good government" of the relevant colony (**POGG power**).[41]

33. It is settled law that "within the limits of the grant", the words of the POGG power are not words of limitation, except perhaps in relation to territoriality.[42] However, in the present proceedings the "limits of the grant" are vitally important, because the grant of power to the Australian colonies was a grant not of sovereign independence, but merely of self-government within a world-wide Empire controlled by the sovereign Imperial Parliament at Westminster. It follows that the grant of power was subject to at least the following relevant implied limits.

34. First, the grant did not include any share of the Imperial Parliament's sovereignty. That sovereignty continued to be vested solely in the Imperial Parliament.[43] In that respect, the grant was fundamentally different from the grant given to the federal parliaments of Canada (in 1867) and Australia (in 1901), each of which, on a transitional basis, was *expressly* given certain sovereign powers, and in particular the sovereign power to make laws with respect to "naturalisation and aliens".[44]

35. Secondly, the grant was not a grant of, in effect, an 'option' to declare sovereign independence, whether by legislation or otherwise.[45] Even in relation to Canada and Australia at the federal level, a further Imperial law was required to grant such an

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[41] In Western Australia, see the *Constitution Act 1889* (WA), s 2(1); in Tasmania the power is implied. Since the initial grants of power, the wording of some of those grants (but not the POGG power granted to the First Defendant) has been amended. However, the limits of the grants were not affected by those amendments.

[42] See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 and *Duncan v New South Wales* (2015) 255 CLR 388, at [37] (The Court).

[43] *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (**Madzimbamuto**); see also the Payroll Tax case, at 395 (Windeyer J), in relation to the Australia of 1971: "There is dual authority but only one sovereignty."

[44] See Robtelmes v Brenan, and Cain, cited in note 29 above. The *Federal Council of Australasia Act 1885* (Imp), s 15(i), implicitly recognised that the self-governing colonies had power to make laws in respect of "naturalisation of aliens", and that the colonies could therefore refer that power to the Federal Council. However, that power was *not* a sovereign power, and therefore it was held, correctly, in Lau You Fat (see par [31.b] and note 37 above) that Victorian letters of naturalisation were of no effect outside Victoria. Further, Edelman J in Love v The Commonwealth was correct in observing, at [404]-[405], that the "naturalisation and aliens" power, which is a sovereign power, was and is broader than the "naturalisation of aliens" power.

[45] See Madzimbamuto.

'option'.[46] Thus, any purported unilateral declaration of independence by an Australian colony would have been an illegal act of rebellion against the Crown.[47]

36. Thirdly, the self-governing colonies had no power to set their own external boundaries or to move them by annexing or surrendering territory.[48] Such matters were self-evidently matters for the Empire, not for individual colonies.

37. Fourthly, and crucially for present purposes, the self-governing colonies had no power to make laws for the unilateral closure of their borders to entry by humans,[49]

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[46] See the *Statute of Westminster 1931* (Imp), and the *Statute of Westminster Adoption Act 1942* (Cth).

[47] See the famous speech of Prime Minister Harold Wilson to the House of Commons on 11 November 1965 about Southern Rhodesia's unilateral declaration of independence (**UDI**). See also the United Nations Security Council Resolutions 216 and 217, both of which expressly described the UDI as "illegal".

[48] The external boundaries of the self-governing Australian colonies (now States) were set by various Imperial executive acts and Imperial statutes. These are described by Mason J and Jacobs J in *New South Wales v The Commonwealth (Seas and Submerged Lands case)* (1975) 135 CLR 337, at 459-461 and 481-484, respectively. To that description may be added, at least, the vaguely worded and apparently temporary *Western Australia Act 1829* (Imp). Importantly, in 1883 the colony of Queensland purported unilaterally to annexe the territory of Papua for the British Empire, but the sovereign British government refused to ratify that annexation. See also the *Australian Constitutions Act 1850* (Imp), the *Australian Colonies Act 1861* (Imp), and the *Colonial Boundaries Act 1895* (Imp), all of which were enacted on the assumption that the Constitutions of the Australian colonies conferred no legislative power in respect of external boundaries.

[49] As to British subjects, according to Quick & Garran: "In their political relations, … subjects of the Queen … are considered as inhabitants and individual units of the Empire over which Her Majesty presides. That is the widest political relationship known to British law. 'I am a British subject,' is equal in practical and Imperial significance to the proud boast of the Roman *'civis Romanus sum.'* Subjects of the Queen, or British subjects, have rights, privileges, and immunities secured to them by Imperial law, which they may assert and enjoy without hindrance in any part of the Queen's dominions, and in British ships on the high seas." As to aliens in particular (and also British subjects), see the judgments of Windeyer J in Lo Pak, at 244, and Leong Kum at 262-264, and of Williams J in Toy, esp at 419 ("… to say that [the *Constitution Act*] gives to this colony the same rights and powers in regard to all colonial and local affairs, and applicable thereto, as the British Government possesses in regard to the affairs of Great Britain, is the enunciation of a proposition which is not only startling but positively unintelligible to me."), and of Holroyd J (a'Beckett J concurring) in Toy, esp at 431 ("… supposing any treaty now to subsist between the Crown and any foreign State, whereby Her Majesty is obliged to permit the subjects of such State in time of peace to enter Victoria upon due observance of any conditions imposed upon their entry by any Statute having legal force in Victoria, that treaty cannot be violated by colonial legislation."), and of Wrenfordsley J in Toy, esp at 442 ("… this colony did not as a State receive any recognition from the Imperial Government with respect to its external relations; nor could such a recognition take place under its existing connection with the mother State …"). In those judgments, their Honours assert, *inter alia* that the relevant colonial Parliament had no sovereign power to make laws for the closure of the colony's borders to entry by at least alien humans, except where, unusually, assent to a proposed

because they were never given any express power in respect of "aliens" (as opposed to "naturalisation of aliens"[50]), and because, partly for that reason, they also had no power to hinder or reduce the inherent right of British subjects to enter all parts of the Empire, including the relevant self-governing colony.

38. Fifthly, the constitutions of the self-governing colonies generally included a provision under which the Governor could reserve a proposed law for the personal assent of Queen Victoria on the advice of her sovereign British Ministers. That was an acknowledgment that there were certain inherently sovereign acts that the colonies could not perform without the personal involvement of the sovereign.

The limits of the States' powers between 1901 and 1986

39. Between federation on 1 January 1901 and the coming into force of the *Australia Acts 1986* (Imp and Cth), the legislative (and executive) powers of the States continued to be subject to the sovereign power of the Imperial Parliament at Westminster. For that reason, the "limits of the grant" discussed under the previous heading continued to apply.

40. Additionally, the constitutions of the States became subject to the national Constitution,[51] which imposed further limits on the powers of the States, and corresponding limits on any self-governing Territories, including the following.

41. First, the States and self-governing Territories have no power unilaterally to secede from the federation, in particular because the federation is "indissoluble".[52]

42. Secondly, the States and self-governing Territories have no power unilaterally to close their borders to entry by humans, in particular because (a) Constitutional-Non Aliens have a constitutional right to enter every State and self-governing Territory

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law was given personally by Queen Victoria on the advice of Her sovereign British Ministers. See also, by comparison, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 2)* [2009] 1 AC 453, in which a majority of the House of Lords held that the law impugned in that case, by which British subjects were completely excluded from an Imperial territory, was valid because the POGG power in reliance upon which the law had been made had been exercised by the *sovereign* British monarch, on the advice of Her *sovereign* British Ministers, and related to a *non*-self-governing territory.

[50] See par [34] and, especially, note 44, above.

[51] See the Constitution, ss 106 and 107. See also par [23] above.

[52] See the preamble to the Constitution, and see also *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), which held, at 725, that Texas had no power unilaterally to secede because the Union was solemnly declared to "be perpetual." See also *Reference Re Secession of Quebec*, [1998] 2 SCR 217, which held that the Provinces of Canada cannot unilaterally secede, not even under the twentieth century doctrine of self-determination.

(subject only to valid regulation),[53] and (b) the States and self-governing Territories have no power to reduce the inherent rights of statutory non-aliens (ie Australian citizens), which are conferred on them by express terms of, or by implication from, laws of the Commonwealth.[54] The most fundamental of all of those rights, as confirmed by landmark case law in the United States,[55] is of course the right to enter and remain in Australia, including every State and self-governing Territory.[56]

43. Thirdly, the States cannot hinder or interfere with the exercise of the executive power of the Commonwealth.[57]

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[53] See *Crandall v Nevada*, 73 U.S. (6 Wall.) 35 (1868) (**Crandall**), which was followed by this Court in *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 (**Smithers**). Crandall also held that the US States had no power to impose any form of tax on border crossings by humans. By analogy, the Amicus submits that the Australian States have no power to impose any such tax, or any similar 'fee', such as a compulsory "quarantine fee", on border crossings by humans. (Note also that Smithers refers to some extent to the "police power" of the States; however, the US constitutional law doctrine of "police power", which is associated with the doctrine of implied immunities, must now be considered as not applicable in Australia, in light of the Engineers' case, which rejected the doctrine of implied immunities.)

[54] The Amicus submits that this principle applies by analogy from the pre-Federation principle that prevented the self-governing colonies from hindering/reducing the rights of British subjects. See note 49 above. The principle is not that any such hindrance/reduction is invalidated by s 109, but, rather, that the States simply have no power, whether by laws or by executive acts, to hinder/reduce rights of Australian non-aliens.

[55] In *Sáenz v. Roe*, 526 U.S. 489 (1999), all nine members of the Court, including the two dissentients, held that citizens of the United States have a constitutional right to enter every State. Stevens J, writing for the majority, wrote that, "the 'constitutional right to travel from one State to another' is firmly embedded in [US] jurisprudence … [and] is … 'a virtually unconditional personal right, guaranteed by the Constitution to us all'." Rehnquist CJ, for the dissentients, wrote that if US citizenship means anything less than the right to enter, remain in, and leave, every State, then "it means nothing". In an earlier case in this line of case law, *United States v. Guest*, 383 U.S. 745 (1966), the Court had noted that this fundamental constitutional principle is derived *both* from the Fourteenth Amendment (which has no Australian equivalent) *and* from Crandall (which, as noted in note 53 above, was followed by this Court in 1912). The Court also observed that "Although the [United States] Articles of Confederation [of 1781] provided that 'the people of each State shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the [United States] Constitution [of 1787]. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." The Amicus submits that exactly the same principle applies to the national Constitution of Australia.

[56] Subject only to a valid law providing for the extradition of a person in connection with the due administration of criminal justice, or a valid law of the Commonwealth providing for, eg, "quarantine" or the conferral of sovereign independence on a Territory.

[57] See *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372, as explained in *Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410. The

44. Fourthly, any quarantine laws of the States cannot operate to hinder or prevent entry by humans in breach of the Crandall principle. In particular, any such laws must distinguish between healthy humans and infected humans, and must let the former enter the State without delay and impose only reasonable quarantine on the latter.[58] Any such State quarantine laws also cannot impose any "quarantine fee".[59]

The limits of the States' and self-governing Territories' powers since 1986

45. In 1942, the United Kingdom conferred on the Commonwealth sovereign power in respect of Australia backdated to 3 September 1939,[60] and in 1986, the United Kingdom relinquished its then existing sovereign power over the States.[61]

10 46. The effect of those two developments is more than simply that the States continued to have no sovereign power, and continued to be subject to the national Constitution. Crucially, a further effect is that the States cannot now receive any sovereign power specially delegated to them by the United Kingdom. Since 1986, the Governors of the States have been appointed by Her Majesty in right of the relevant non-sovereign State on the sole advice of the non-sovereign Premier of the relevant State,[62] and it is no longer possible for assent to a proposed law of a State to be reserved to Her Majesty on the advice of her British Ministers.[63]

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principle is not that any such interference by a State is invalidated by s 109, but, rather, that the States simply have no power, whether by laws or by executive acts, to engage in any such interference.

[58] In *Morgan's Steamship Co. v Louisiana Board of Health* 118 U.S. 455 (1886), the Court upheld a Louisiana quarantine law that provided for quarantine of persons entering Louisiana from either interstate or abroad, but did not place any significant obstacle to the entry of healthy persons, and required unhealthy persons only to undergo quarantine. Crucially, the Louisiana law, unlike the Directions the subject of the present proceedings, did *not* require that anyone actually be turned away. Earlier, in *Railroad Company v Husen*, 95 U.S. 465 (1877), the Court had declared invalid a law preventing the driving of cattle across the interstate borders into Missouri, because that law drew no distinction between healthy cattle and diseased cattle. In similar vein, this Court, in *Tasmania v Victoria* (1935) 52 CLR 157, declared invalid a law of Victoria that was (supposedly) intended to prevent the influx into Victoria of diseased Tasmanian potatoes, because that law drew no distinction between healthy potatoes and diseased potatoes.

[59] See again Crandall, which held that a US State cannot levy any tax on entry by a human to the State.

[60] See note 46 above.

[61] See *Australia Acts 1986* (Imp and Cth).

[62] *Australia Acts 1986* (Imp and Cth), s 7.

[63] However, where authorized by a valid law of the Commonwealth, the Governor-General now has the sovereign power, following a reservation by an Administrator of a self-governing Territory, to give assent to a proposed law of that Territory in the exercise of the sovereign executive power of the Commonwealth, and thereby delegate part of the sovereign power of the Commonwealth to that Territory.

The Directions

47. The Directions are made under an Act assented to by a Governor appointed after 1986. They are extreme. They are targeted at humans, not disease, and forbid entry to Western Australia by any human other than "exempt travellers". Even "exempt travellers" are forbidden to enter if they have "symptoms", an expression defined so vaguely that it includes symptoms of hay fever, and coughing by a person who wants to return to Western Australia after inadvertently swallowing sea water while swimming in the territorial sea (which is outside Western Australia). By and large, the Directions draw no distinction between healthy and diseased humans; all except "exempt travellers" are totally excluded. The discretions conferred by the Directions are essentially uncontrolled, and are not subject to any merits review, whether by any elected official or by the State Administrative Tribunal. Even where an "exempt traveller" is an officer of the Commonwealth, and required to be present in Western Australia, the "exempt traveller" is still forbidden from entry if he or she has hay fever, or any other of the vaguely defined "symptoms". The Directions therefore severely hinder the exercise of the executive power of the Commonwealth. Particularly (but not only) for that reason, the Directions, on their proper construction, should also be regarded as a constructive unilateral declaration of secession by the First Defendant from the Commonwealth, for an indeterminate and possibly even unlimited period. The Directions are therefore clearly wholly invalid on application of the principles referred to in pars [32] to [46] above.

Does the "intercourse" limb of s 92 still have work to do?

48. The submissions above implicitly raise an issue as to whether, if the submissions in this document to the effect that the States lack the sovereign power to close their borders to entry by humans (whether aliens or non-aliens) were accepted, the "intercourse" limb of s 92 would still have any work to do. That issue is important, and should therefore be addressed here. The Amicus submits that the "intercourse limb" would indeed still have much work to do, for the following reasons:

    a. The "intercourse" limb relevantly immunises "intercourse", and not merely physical movement by humans, from interference. "Intercourse" is a much broader concept than mere physical movement by humans; it also includes such things as postal communications and telecommunications.[64]

[64] Authority for this broad, and, it is submitted, correct, view of the meaning of "intercourse" in s 92 can be found in the judgment of Dixon J in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, at 380,

b. The "intercourse" limb also applies to the *Commonwealth*, in particular because the powers conferred by s 51 are expressly made "subject to this Constitution". So, eg, in *Gratwick v Johnson*[65] this Court held that the "intercourse" limb invalidated a law of the *Commonwealth*.

Is it true that 'potentially people will die' if the Plaintiffs win?

49. The submissions above also implicitly raise an important issue as to whether, if the submissions in this document are correct, anything can lawfully be done to limit or prevent the influx of infectious disease into Western Australia.[66]

50. The true position is that if the Plaintiffs win, then that will *not* prevent the taking of lawful and very powerful measures to protect all Australians from infection, because the *Commonwealth* has undoubted power under s 51 of the Constitution to make laws with respect to "quarantine", and has actually made such laws by enacting the *Quarantine Act 1908* (Cth) (now repealed) and the modern and highly sophisticated *Biosecurity Act 2015* (Cth). The *Commonwealth's* undoubted "quarantine" power includes a power to make quarantine laws dividing Australia into healthy areas and hotspot areas and limiting movement between them,[67] subject to the Constitution, and especially s 92. However, the *Commonwealth* cannot properly exercise its undoubted and very powerful "quarantine" power while any of the borders of the States or self-governing Territories are unlawfully closed.

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cited with approval by Brennan J in Nationwide News, see note 1 above. The Amicus submits that although the pre-federation Australian colonies (now States) were not sovereign, and therefore had no power unilaterally to turn humans away or deport humans, the colonies did have power to prohibit other forms of "intercourse" between the relevant colony and other places, and that the "intercourse" limb therefore does have work to do, at least in relation to any such prohibitions a State might try to impose now.

[65] (1945) 70 CLR 1 – as with Smithers, the Plaintiffs place much reliance upon this case in support of their s 92-based contentions – but this case was a challenge to a law of the *Commonwealth*, not a law of a State.

[66] The Premier of the First Defendant has brought that issue into sharp focus by making a scurrilous allegation that 'potentially people will die' if the Plaintiffs succeed in these proceedings. See, eg, Mayes, Andrea (28 July 2020). "Why is Clive Palmer trying to tear down WA's coronavirus border with the rest of Australia?". *ABC News website*. Retrieved 21 September 2020.

[67] For a law of the Commonwealth to be a "quarantine" law, the law does not need to divide areas into areas that include an area external to Australia. If the inclusion of an area external to Australia in a scheme of division of areas were necessary for a law to be a "quarantine" law, then the separate "quarantine" power in s 51 of the Constitution would be superfluous, because the "external affairs" power in s 51 would be sufficient to authorise any such "quarantine" law. Thus, the "quarantine" power clearly authorises 'internal' quarantine just as much as it authorises division of areas into areas that include an area external to Australia.

Question (b) – costs

51. The Directions were made solely by the Second Defendant, an unelected official.

52. Only 14 years ago, five members of this Court emphatically reiterated that the States have never been sovereign. In February this year, four members of this Court reiterated that the power to close borders to entry by humans is a sovereign power. Yet less than two months later, the Second Defendant made the Directions.

53. In making, and later enforcing and defending, the Directions, the Second Defendant has therefore been engaging in a fierce attack not only on the Commonwealth and its people, but also on this Court and the rule of law. The Second Defendant has also become yet another of a long line of officials of the First Defendant who have recently made or defended clearly unconstitutional laws of the First Defendant.[68]

54. The Second Defendant is the Commissioner for Police of the First Defendant. It is completely unacceptable for any such official to be behaving in the way the Second Defendant has been behaving. The Court's reasons for decision in these proceedings should therefore criticise the Second Defendant in emphatic terms.[69]

55. The Court should also order that the Second Defendant pay the Plaintiffs' costs of these proceedings, and that the Second Defendant be prohibited from seeking or accepting indemnity or contribution from the First Defendant in respect of costs. Further, the Court should order that there be no order for costs against the First Defendant, and that the First Defendant be prohibited from providing any indemnity or contribution towards the Second Defendant's liability for costs.

Part V: Time estimate

56. The Amicus seeks leave only to make the written submissions in this document.

Dated 25 September 2020

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[68] In each of *Western Australia v Commonwealth* (1995) 183 CLR 373, Betfair (2008) and Bell Group (2016), this Court held 7-0 that the laws of the First Defendant challenged in the relevant case were invalid.

[69] Suitable models for such criticism are the celebrated judgment of Darley CJ on behalf of the Full Court in Woo Tin (see the Gageler article, at 623-625), and the recent unanimous judgment of this Court in *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59; 362 ALR 1.