HIGH COURT OF AUSTRALIA

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Details of Filing

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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

PLAINTIFFS' OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. The plaintiffs certify that these submissions are in a form suitable for publication on the internet.

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INTRODUCTION

1. Three alternate bases to test the validity of the Directions, upon their proper characterisation, against the intercourse limb of s. 92 arise on the competing arguments: whether they are directed or aimed at interstate intercourse; whether they are reasonably necessary in the course of the regulation of some matter other than interstate intercourse; the adaptation of the test from the implied freedom of political communication context.

2. On the facts found by Rangiah J the Directions offend s. 92 however tested.

THE DIRECTIONS

3. The Directions critically operate as follows: cl. 4 prohibits entry into Western Australia to anyone who is not an "exempt traveller"; cl. 5 prohibits entry even to an "exempt traveller" who meets certain conditions; cl. 6 requires persons who have entered WA contrary to cl. 4 or 5 to leave WA as soon as possible.

THE FACTS

4. The Directions were not responsible for the original elimination of COVID-19 in WA, but rather are relevant to any reintroduction of it: [123], [152], [352], [365 (c)].

5. The risks of reintroduction were measured against the precautionary principle; [73], [79], [296] – [300], [302], [365 (c)]. Qualitative assessments of risk were adopted in answering the remitted question; [253], [254]. Once there is no community transmission in a region COVID-19 can be considered eliminated, and that is as low a risk as one can hope for; [113], [117], [247].

6. Against those qualitative assessments, risks moderate and above, or unknown, warranted borders restriction; [263], [269] and [291]. Conversely, it follows, risks of very low (negligible) or low did not warrant border restrictions.

7. The probability of the reintroduction of COVID-19 to Western Australia in each of the following scenarios was the same: With the border restriction in place; [305]; By the use of hotel quarantine (had that been possible on that scale); [307], [325]-[326]; With the border restrictions completely removed and no other measures (excluding those jurisdictions moderate and above or uncertain); Vic [262], [263], NSW [208], [209], Tas (in fact lower) [270], [271], [274], SA [273], [277], ACT [279], [281], NT [282], [285], Qld [288], [291]; With the border measures removed but alternative measures in

place; [317]-[321]. Such alternative measures were reasonably practicable; [360].

8. Because of the differential risks of the various States and Territories in Australia, it "…may therefore be possible to ease the border restrictions with some State and Territories without a significantly increased risk of morbidity and mortality in the Western Australia population while there is ongoing community transmissions within other States and Territories." [365 (i)].

GRATWICK REMAINS APPLICABLE TO TESTING THE DIRECTIONS

9. *Gratwick* - 9.1 – 10.5 (the direction under consideration), Latham CJ 12.8, 13.9, 14.9 – 15.1, Rich J 16.2 – 16.4, Starke J 17.2, 17.5 – 17.8, Dixon J 19.6 – 19.9, McTiernan J 21.6, 21.9, 22.4; Tas [8], [24], NT [12]-[16], [58]; cf WA [35], [58]-[68], [73]-[74].

10. *Gratwick* was consistent with earlier decisions, in particular *Smithers* - Issacs J 117.5, Higgins J 118.5.

11. *Nelson* (not an intercourse case, so the relevant test is not the same in any event) is consistent with *Gratwick* and the plaintiffs' reliance upon it, as can be seen both from the statutory majority and the dissents – Higgins J 245.6 – 246.6 (provisions in question), 246.8 – 247.1, 247.3 – 247.5, Knox CJ, Gavan Duffy and Starke JJ 218.4 – 218.9, Issacs J 223.3, Powers J 253.1; NT [11]; cf WA [36], [48], Qld [10].

12. The distinction between direct infringement of s. 92 and incidental regulation was consistently applied up to *Cole* - *Tasmania* Gavan Duffy CJ, Evatt and McTiernan JJ 169.7, Dixon J 183.3; *Airlines Nationalisation* Latham CJ 61.2; *Bank Nationalisation* Dixon J 387.4, PC 639.7; *Cam & Sons* Dixon, Williams, Webb, Fullagar and Kitto JJ 455.4; *Hughes and Vale* PC 18.3; *Hospital Provident Fund* Dixon J 17.6; *Harris* Fullagar J 463.7 – and as below, continued with and from *Cole*.

13. The correctness of *Gratwick* was expressly recognised in *Cole*; *Miller* Brennan J 603.5 – 604.1; *Cole* Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ 393.5 – 394.1, 406.7 – 407.1; NT [27], in a manner rejecting any suggestion that the reasoning in *Gratwick* should be seen as criterion of operation test; cf WA [47], [53], Qld [22]-[23], SA [9]-[39].

14. *Gratwick* continues to be recognised as correct and authoritative through to *Cunliffe*; *ACTV* Dawson J 192.2 – 192.6, 192.8, 193 – 195.3, 195.8; *Nationwide News* Brennan J 57.5 – 57.8, 58.2 – 58.5, 58.9 – 59.2; NT [32], *Cunliffe* Mason CJ 307.6 – 308.2, Brennan J 333.4, Toohey J 333.5 – 333.9, Dawson J 366.5, Deane J 346.6 –

346.9, Gaudron J 392.8, McHugh J 396.1 – 396.5.

15. The authority between *Miller* and *Cunliffe* which had, amongst other things, recognised and relied upon the correctness of *Gratwick,* was then carefully considered in *AMS* and *APLA*, and none of the differences between the various judgments observed in those cases related to the applicability of *Gratwick*, which was again referred to in an unquestioned way; *AMS* Gleeson CJ, McHugh and Gummow J [40] – [43], [45], Hayne agreeing [221], Kirby J [162], [153], Gaudron J [101], [97], Callinan J [269], [276], [277] and [279]; *APLA* Hayne J [410], [420], [423], Gleeson CJ and Heydon J [38], Gummow J [173] – [178], Callinan J [462].

REASONABLY REQUIRED

16. If the Directions are properly characterised as incidental; or there is no distinction to be drawn between direct and incidental; the appropriate test is one of reasonable necessity; *AMS* Gleeson CJ, McHugh and Gummow JJ [45], Gaudron J [100] – [101], Hayne J [221] and Callinan J [277] – [278]; *Betfair No 1.* Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ [102]-[103].

ADAPTATION OF THE IMPLIED FREEDOM TEST

17. Reasonably required or necessary has been employed without demur as late as *APLA* and *Betfair No. 1*, long after *ACTV*, *Lange* and *Coleman* were decided. There is no rationale offered for why those cases should not continue to be followed. The implied freedom and the express prohibition are different; *AMS* Gaudron J [101]; *Rowe* Kiefel J [436], [440], [444]-[445]; *Murphy* French CJ and Bell J [37], Gordon J [297]-[301]; Tas [31]-[37]; cf WA [42]-[46], Qld [27]-[33], SA [8], [42], ACT [40]-[42].

18. If this were to be the test applicable, the one framed by Qld [33], after (2), is inappropriate, elevating structured proportionality to a test rather than a tool of analysis; cf *Brown*.

19. Upon the application of such test the Directions are not reasonably appropriate and adapted, and by the structured proportionality analysis, fail as early as the suitability stage. There is no rational basis, consistent with the findings of Rangiah J, for the Directions to preclude Tas, ACT, Qld (as at the date of the hearing), NT and SA. Similarly, this lack of rationality means they cannot be shown to be necessary or balanced; *McCloy* [2]; SA [47].

P Dunning **R Scheelings** **P Ward**