HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 27 Oct 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	B26/2020
File Title:	Palmer & Anor v. The State of Western Australia & Anor
Registry:	Brisbane
Document filed:	Form 27E - Reply
Filing party:	Plaintiffs
Date filed:	27 Oct 2020

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

10

and

The State of Western Australia
First Defendant

Christopher John Dawson
Second Defendant

20

PLAINTIFFS' REPLY

Jonathan Shaw, Solicitor
17/240 Queen Street
Brisbane, QLD 4000

Telephone: (07) 3532 3849
Email: j.c.shaw@bigpond.com
Ref: Jonathan Shaw

PART I: CERTIFICATION

1. The plaintiffs certify that this reply submission is in a form suitable for publication on the internet.

PART II: ARGUMENT

Matters not in issue

2. Given the extent to which Western Australia, and to a greater extent Queensland and South Australia, have devoted much of their outline to issues not raised by the plaintiffs, it is as well to identify the following matters that are not in issue.

3. First, it is not in issue that the relevant test in respect of the intercourse limb is not one of criterion of operation, as is apparent from PS[24].[1] That the plaintiffs' analysis of *Gratwick* (and the cases of this Court that have followed it, including those post *Cole*[2]) is correct is reflected in the submissions of Tasmania[3] and the Northern Territory.[4]

4. Second, it is not in issue that if the Court were to hold that the test in order to determine whether a law violates s 92 is to be the same test as that to determine whether the implied freedom of political communication has been contravened, then structured proportionality is a tool of analysis available upon such inquiry that may (although not must) be used in answering that inquiry.[5]

5. Third, it is not in issue that the health of Australian residents of a particular State is a proper matter of executive and legislative concern of that State, within its constitutional limits. So much was said in terms at PS[20].

The directions fail whichever test is adopted

6. In short, regardless of the approach adopted, the directions contravene s 92 because their purpose is to preclude persons from all other Australian states (subject to certain exemptions) from entry into Western Australia, rather than precluding persons from a location of a particular risk of carrying COVID from entering Western Australia. In

---

1 See Defendants' Submissions (**DS**) [39], [47], [53], c.f. [67] – [68]; Qld [6], [10] – [13], [21] – [23]; SA [9] – [10], [16], [20], [26], [28] – [29], [35] – [36].
2 Plaintiffs' Submissions (**PS**) [12], [34] – [44].
3 [4(c)] and [24] – [26].
4 [13], [32], [35] – [36] and [38].
5 E.g. Qld [6(b)] and [31].

that sense they are indiscriminate and unconcerned with the presence or absence of such risk between one Australian State or Territory and another. Thus:

a) They offend the principles identified in *Gratwick* because of their blanket operation on all States, rather than by reference to a particular need, viz risk in a particular State or States;[6]

b) Similarly, will not meet any test of reasonable necessity, because they are indiscriminate between States, thus necessity does not feature in their purpose, and, obviously they could not be reasonable;

c) Were the test in the implied freedom of communication context to be adopted, for the same reasons, they would fail no later than at the suitability stage for that lack of rational connection.[7]

7. It is convenient at this point also to note that the assertion on occasion by the defendants that structured proportionality is a 'test' (DS [44], [46] and [52]) should be rejected. It is a tool of analysis, as is accepted by all intervenors who discuss it.

8. It is also at this point convenient to note that the submissions by Tasmania at [31] – [37] are, with respect, correct, and consistent with the plaintiffs' submission in this regard at PS[46]. There is a sound foundation for a more stringent approach to a law which affects the freedom of intercourse enshrined in s 92, compared with the implied freedom of political communication.

9. In the last successful case before this Court concerning the trade and commerce limb of s 92, *Betfair No 1*[8] was resolved by a comparison of the approach in Western Australia (prohibition [119]-[120]) with that taken in Tasmania (regulation ([111])). Plainly, regulation could not be characterised as 'equally effective' as prohibition (to use the language of the implied freedom test), in terms of giving effect to the purpose of protecting the 'integrity' of the a State's racing industry when faced with emergent new betting technologies ([109]). The Court nonetheless held ([110], [112]) that the test of 'reasonable necessity' – in the sense of proportionate or appropriate and adapted - was not satisfied given the existence of the Tasmanian alternative.

6 See also *Tasmania v Victoria* [1935] HCA 4; (1935) 52 CLR 157

7 See also Qld [33], SA [47], and NT [13]; c.f. ACT [44]. The plaintiffs' position is that were the directions to be styled in the manner described in the ACT submissions, or even styled as against coming from an area of identified risk, then they would meet a requirement of reasonable necessity.

8 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 (***Betfair No. 1***)

Material Facts

10. The inference sought to be drawn by the defendants at par [13(b)] that a moderate risk of importation of COVID-19 exists from "*a jurisdiction with <u>at least one</u> reported case of community transmission within the past 28 days*" (emphasis added) is not supported by any finding of fact by Rangiah J, nor by the common meaning of the word "moderate". Rangiah J found a moderate risk of importation from NSW based on there being 160 active cases with an unknown number of those cases being from an unknown source.[9] On the ordinary meaning of "moderate", it cannot reasonably be said, as is contended by the defendants at par [17(a)-(c)], that the existence of "at least one" reported case of community transmission from an unknown source in Sydney or Melbourne within the past 28 days gives rise to a "moderate" risk of a person travelling to Western Australia whilst infectious from "other parts of Australia overall", or from NSW or Victoria. The risk is not homogenous across each State, nor across the rest of Australia.

11. If the relevant test is whether the closure of the WA border pursuant to the Directions is "reasonable", as the defendants contend, then they must fail given Rangiah J's finding[10] that the defendants failed at trial to prove their allegation that the restrictions imposed on interstate travel could only be eased while there is no community transmission within other States and Territories.

12. Although the defendants and the intervenors focus on the finding of Rangiah J at [350] that a targeted quarantine or "hotspot" regime would be less effective than the current Directions in reducing the risk of importation of COVID-19 into Western Australia, that finding is subject to the following. First, Rangiah J found, at [252], that the current Directions are substantially, but not completely, effective. Secondly, his Honour found, at [349] that a hotspot regime could also substantially reduce the risk of importing the disease. Thirdly, the experts agreed ([247]) and his Honour found, at [270]–[285], that aside from the risk of "border-hopping", there was a very low or negligible ([247], [254]) risk of importation of COVID-19 into Western Australia from South Australia, Tasmania, the ACT or the NT if the current Directions were to be removed completely – not even replaced with a hotspot regime. His Honour only

[9] *Palmer v State of Western Australia (No 4)* [2020] FCA 1221 (***Palmer (No. 4)***) at [264].
[10] *Palmer (No. 4)* [365(i)], referring to par [39C(i)] of the Second Amended Defence.

upgraded the overall risk for the ACT and NT to "low" because of the possibility of a person transiting those jurisdictions from NSW, Victoria or Queensland to WA whilst infectious with COVID-19 ([247], [280], [283]), and for SA because of its self-quarantine regime for persons arriving from Victoria rather than guarded hotel quarantine ([276]). Given that Queensland has since passed 28 days without a case of community transmission, it must also be the case that the risk of importation from Queensland is also very low or negligible (apart from border-hopping) if the Directions were to be removed altogether.

13. Therefore, as at the date of Rangiah J's findings of fact, the only non-negligible risk of importation of COVID-19 into Western Australia from SA, Tasmania, the ACT or the NT came from persons transiting from other States; and the only non-negligible risk currently existing is from persons travelling from NSW or Victoria (or, more accurately, from regions in those States where there has been recent community transmission). Further, that risk has diminished substantially since Rangiah J's findings with the substantial reduction of case numbers in those States, and it is a risk that Rangiah J found could further be substantially reduced by a hotspot regime. In the circumstances, it cannot be said that the Directions remain "reasonably required" today (if they ever were, which need not be decided).

14. The same outcome of an absence of reasonable necessity may be determined by a comparison of the prevalence of COVID-19 between those jurisdictions that have only calibrated border restrictions, such as the Australian Capital Territory, Northern Territory, Queensland and South Australia and Western Australia.

Legal argument

15. Rather than directly challenging past authority of this Court, the defendants seek to reconcile the earlier decisions in *Smithers*[11] and *Gratwick*[12] concerning direct infringement of s 92 with later authorities considering indirect infringement, by positing a "reasonable regulation" exception to s 92. Two things may be said in response:

 a) **First**, the Directions do not "regulate" interstate travel, they prohibit it for all except limited categories of exempt travellers. The distinction between

[11] *R v Smithers; ex parte Benson* [1912] HCA 96; (1912) 16 CLR 99 (**Smithers**).
[12] *Gratwick v Johnson* [1945] HCA 7; (1945) 70 CLR 1 (**Gratwick**).

regulation and prohibition is important. As Latham CJ said in the *Airlines Nationalisation case*[13], "*…simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid.*" The defendants and interveners rely[14] on *Ex parte Nelson (No. 1)*, as an instance of permissible prohibition. However, as the plurality noted in *Tasmania v Victoria*,[15] that case was one of regulation, not prohibition.[16]

b) **Secondly**, an implied "reasonable" exception to direct infringement of a constitutional freedom is an even lesser standard than the propounded implication of a "necessary" exception that was firmly rejected by this Court in

10 the *Engineers' case*.[17] "*There can be no room for implication in the face of express provision.*"[18]

16. The primary basis of the submissions of the State of Victoria rests on the misconception that this case falls squarely under this Court's decision in *Wotton v Queensland*.[19] No other State or Territory adopts that submission. Executive

---

13 *Australian National Airways Pty Ltd & Guinea Airways Ltd v Commonwealth* [1945] HCA 41; (1945) 71 CLR 29 at 61. This passage was subsequently unanimously approved by the Judicial Committee in *Hughes and Vale Pty Ltd v New South Wales [No 1]* (1954) 93 CLR 1 at 17-19. Similarly, in *Harris v Wagner* [1959] HCA 60; (1959) 103 CLR 452, 463, Fullagar J said, "*No State can, consistently with s. 92, prohibit or restrict or burden the actual entry of persons or goods from one State into another.*" (emphasis added). See also the *Airlines Nationalisation case* per Rich J at 73; Starke J at 78; Dixon J (as his Honour then was) at 90; Williams J at 109-110.

14 Defendants at par [48]; NT at par [11]; ACT at par [31.1]; Queensland at par [10].

15 [1935] HCA 4; (1935) 52 CLR 157, 169. Note that Sir Frank Gavan Duffy was in the statutory majority in *Ex parte Nelson (No. 1)* and was Chief Justice in the plurality in *Tasmania v Victoria*.

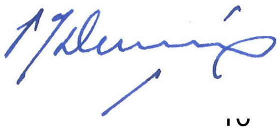
16 As to the distinction between regulation and prohibition, see also *Cam & Sons Pty Ltd v Chief Secretary (NSW)* [1951] HCA 59; 84 CLR 442 (***Cam***), 455 per Dixon, Williams, Webb, Fullagar & Kitto JJ. Note also that the regulations considered in *Ex parte Nelson (No. 1)* were confined to cattle coming cattle from a limited part of Queensland and which presented a disease risk unless certain conditions were complied with. This limitation was critical to the legislation not infringing s.92 (see *Tasmania v Victoria* [1935] HCA 4; (1935) 52 CLR 157, 169 (Gavan Duffy CJ, Evatt & McTiernan JJ), 179 (Dixon J)). To the extent that the defendants rely on the plurality's reasons in *Ex parte Nelson (No. 1)* to support a broader closure of State borders for health reasons against travellers from all parts of Australia, regardless of risk, that goes beyond what was held in that case. In any event, this Court is not bound by the decision (s.23 *Judiciary Act 1903* (Cth) and *Tasmania v Victoria* (1935) 52 CLR 157, 184-185 (Dixon J, as his Honour then was)), and the decision should not be followed for the reasons powerfully stated in dissent by Isaacs and Higgins JJ (with whom Power J agreed on the s.92 issue), and with whom Dixon J later agreed in *Tasmania v Victoria* (1935) 52 CLR 157, 183.

17 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* [1920] HCA 54; (1920) 28 CLR 129, 141-155 per Knox CJ, Isaacs, Rich and Starke JJ.

18 *Miller v TCN Channel Nine Pty Ltd* [1986] HCA 60; (1986) 161 CLR 556, 636 per Dawson J. See also per Dixon CJ at 569, "*Section 92 leaves no room for an implication of the kind suggested.*" See also *James v Commonwealth* (1936) 55 CLR 1 (PC), 53, "*It is certainly difficult to read into the express words of sec. 92 an implied limitation based on public policy.*"

19 [2012] HCA 2; 246 CLR 1.

decisions can produce legislative as well as executive outcomes.[20] The *Emergency Management Act 2005* (WA) itself contemplates the *legislative* nature of the Directions: s 77, read with Part VI of the *Interpretation Act 1984* (WA). Given their breadth of scope and their imposition of obligations on a large class of Australians, the Directions are plainly characterizable as legislative.[21]



10

....

Peter Dunning
T: 07 3218 0630
E: dunning@callinanchambers.com.au

Richard Scheelings
T: 02 8915 2640
E: rscheelings@sixthfloor.com.au

Peter Ward
T : 08 9220 0570
E : pward@francisburt.com.au

Counsel for the Plaintiffs

ANNEXURE TO PLAINTIFFS' REPLY SUBMISSIONS

20

Pursuant to paragraph 3 of Practice Direction No.1 of 2019, the Plaintiffs set out below a list of provisions not previously referred to.

Number	Description	Date in Force	Provision
1	*Interpretation Act 1984* (WA)	Current	Part VI
2	*Emergency Management Act (2005)*	Current	Section 77

[20] See generally Pearce and Argument, *Delegated Legislation in Australia* (4th ed), (2012) LexisNexis Australia, at Chapter 1 and at Section 2.4; Gleeson and Mitchelmore, Chapter 8 ('Chapter II of the Constitution') in Williams (ed), *Key Issues in Public Law* (2017) The Federation Press, at pages 130-131, 136-137.

[21] *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 (Latham CJ).