HIGH COURT OF AUSTRALIA

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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

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and

The State of Western Australia
First Defendant

Christopher John Dawson
Second Defendant

20 **SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY (INTERVENING)**

Part I:

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

Part II:

2. The Attorney-General of the Australian Capital Territory (**Territory**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the position of the defendants.

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Part IV: Argument

Summary

3. The *Quarantine (Closing the Border) Directions* (WA) (**Directions**) do not infringe the freedom of interstate trade, commerce, and intercourse guaranteed by s 92 of the Commonwealth Constitution.

4. Properly characterised, the Directions are aimed at preventing the spread of a serious disease during a declared pandemic and protecting the health of those living in and outside of Western Australia.

5. Though they impose a burden on interstate trade, commerce, and intercourse, they do so in the reasonably appropriate and adapted pursuit of a plainly legitimate purpose. The Directions are suitable, necessary, and adequate in their balance.

Entry restrictions in the Territory

6. At different points this year, the Territory has imposed a number of restrictions on the entry of people into the ACT.[1]

7. Section 92 of the Commonwealth Constitution relates to "trade, commerce, and intercourse among the States", and makes no express reference to any Territory of Australia.

8. Section 69 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), however, provides that trade, commerce and intercourse between the Self-Governing Territories and the States, and between the Self-Governing Territories themselves, shall be absolutely free. This mirrors, with reference to the Territory, the terms of s 92 of the Constitution.

9. This Court has held, in relation to the equivalent provision in the *Northern Territory (Self-Government) Act 1978* (Cth), that it is to be interpreted in accordance with the jurisprudence on s 92.[2] The same has been held by lower courts in relation to the Territory.[3]

Proper Characterisation of the Directions

10. As the first step in its analysis, it is necessary for this Court to characterise the Directions and the authorising provisions of the *Emergency Management Act 2005* (WA) (**Act**).

11. There is no denying that the Directions restrict entry into Western Australia, and therefore movement across the borders of Western Australia. They do so expressly.

12. The Directions are described as having been made pursuant to powers under ss 61, 67, 70 and 72A of the Act. Section 61 relates to the designation of authorised officers.

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[1] Special Case p 13 [49]; see also Court Book Vol 5 pp 1646-1656.
[2] *AMS v AIF* (1999) 199 CLR 160 at 175-176 [36] (Gleeson CJ, McHugh and Gummow JJ), 192 [96] (Gaudron J), 211-212 [152]-[153] (Kirby J), 232-233 [221] (Hayne J), 246 [268] (Callinan J).
[3] *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at 75 [25] (Branson, Hely and Selway JJ); *Curnow v Armfield* [2012] FMCAfam 544 at [8] (Brewster FM).

13. Relevantly, s 67 relates to "powers concerning movement and evacuation", and allows an authorised officer to "*direct or, by direction, prohibit, the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area*".

14. Section 70 of the Act relates to "powers of officers in relation to persons exposed to hazardous substances" and allows an authorised officer to direct "*any class of person who may have been exposed... to a hazardous substance*" to "*remain in an area specified by the officer for such period as is specified by the officer*". Section 70(2) provides that a s 70 direction may be given for the purpose of "*ensuring that a person to whom the direction is given does not pose a serious risk to the life or health of others*".

15. Section 72A relevantly provides that an authorised officer may direct "*a class of person to take... any action that the officer considers is reasonably necessary to prevent, control or abate risks associated with the emergency*".

16. Each of these provisions of the Act operates only during a state of emergency. As noted at DS[5], a state of emergency must be extended every fortnight.

17. The terms of the Directions fall within the scope of powers conferred by the Act. Subject to the issue of constitutional validity, there is no suggestion in this proceeding that the Directions are not authorised. Indeed, the making of the Act, and the Directions that follow, would appear to fall plainly within the power of the legislature to provide for the "peace, order and good Government" of the State.[4]

18. The stated purpose of the Directions is to limit the spread of COVID-19, in the context of a declared COVID-19 pandemic and a declared public health state of emergency in Western Australia. The means by which the legislature has chosen to achieve that objective is by way of restrictions on travel into the State, having identified a certain risk of transmission beyond the Western Australian border.

19. That purpose, however, is not stated to be restricted to limiting the spread of COVID-19 within the confines of Western Australia. The effect of the Directions, by reducing the probability of COVID-19 being transmitted into Western Australia to a very substantial extent,[5] is necessarily also to reduce the probability of COVID-19 being transmitted within Western Australia, and consequently also out of Western Australia.

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[4] *Constitution Act 1889* (WA) s 2(1).
[5] *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 at 70-71 [315] (Rangiah J).

20. There is no indication that the Directions or the Act have been enacted for a protectionist purpose, although the plaintiffs assert that they have a protectionist operation or effect (see [52], below).

21. Though the Directions refer to "Closing the Border" in their title, that description is, in many respects, inapt. The Directions do not place any restrictions on departure from Western Australia. Nor do the Directions, *simpliciter*, prevent entry into Western Australia. Rather, they prevent entry "unless the person is an exempt traveller".

22. "Exempt traveller" is a multi-part defined term that encompasses a broad spectrum of people, including those exercising various national and state security, governance and judicial functions ((a)-(e), (n)); those providing health, transport, logistics or emergency services ((f)-(g), (m)); those possessing requisite specialist skills ((h)-(j)); and persons who ordinarily travel interstate for work purposes for regular periods according to established work schedules (*viz.*, FIFO employees) ((k)-(l)). It also includes those entering Western Australia for medical treatment or compassionate visits ((o)-(q)), or people approved by an authorised person "on any other ground whatsoever" ((r)).[6] The Directions set out certain circumstances in which exempt travellers are prevented from entering Western Australia or permitted to do so only under conditions.[7]

23. Relevantly, this case has proceeded on the basis that approximately 470 people are still entering Western Australia each day, compared to between 3,500 and 5,000 people per day before the restrictions were imposed.[8]

24. Finally, the Territory submits that the Directions are appropriately understood as placing a burden on both interstate trade and commerce, and on interstate intercourse (including entirely non-commercial intercourse). Persons wishing to enter Western Australia, but not falling within a category of "exempt person", are restricted from travelling whether they wish to do so for reasons related to business, or for personal reasons.

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[6] Court Book Vol 4 pp 1457-1467.
[7] See summary in *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 at 17-18 [69] (Rangiah J).
[8] *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 at 38-39 [157] (Rangiah J).

Legal test to be applied

Plaintiffs' argument should be rejected

25. The plaintiffs submit at PS[10]-[11] that any provision which is "aimed at"[9] movement across a State border offends the intercourse limb of s 92, and cannot be justified *on any terms*. For that reason, the Directions are said to be invalid regardless of their purpose or factual context (PS[5]). There are at least five reasons this Court should reject that absolutist interpretation of s 92.

26. First, the plaintiffs' argument is almost entirely dependent upon *Gratwick v Johnson*[10] and *R v Smithers; Ex parte Benson*.[11] The argument, however, both misstates the substance of those decisions and neglects the developed jurisprudence of this Court.

27. As articulated by the Defendants' at DS[35] and [60]-[67], both *Gratwick* and *Smithers* contemplated the possibility that a law using state border crossing as a criterion could nevertheless comply with s 92. The Territory submits that *Gratwick* should be understood as indicating that legislation could validly meet the exigencies of war by regulating the transport of men and materials, including across State borders, even though the Transport Order in that case did not.[12] There are indications in *Gratwick* of various circumstances that are not necessarily encompassed by the result in that case, including a "*general system of regulation of traffic or transport*";[13] restrictions based on an articulated concern with "*priorities of travel upon transport facilities under excessive demand*";[14] or express limits on the discretion to be exercised by way of an articulation of matters to be taken into account in determining whether to grant or refuse a permit.[15] This is because "*the criterion of the application of s 92 depends upon the facts of the particular case*".[16]

28. In any case, contrary to PS[10] and [22], the Directions are not "materially identical" or "strikingly similar" to the orders in *Gratwick*. The Directions do not impose a blanket prohibition on entry. Indeed, as above, nearly 500 people continue to enter Western Australia each day. Nor is there an unfettered discretion as to whether entry

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[9] Or "directed to", both used in contradistinction to provisions which impact border crossing only "incidentally".
[10] (1945) 70 CLR 1.
[11] (1912) 16 CLR 99.
[12] Because it was held to be a "mere prohibition": *Gratwick v Johnson* (1945) 70 CLR 1 at 14 (Latham CJ), 16 (Rich J); See also *Cole v Whitfield* (1988) 165 CLR 360 at 406-407.
[13] *Gratwick v Johnson* (1945) 70 CLR 1 at 15 (Latham CJ).
[14] *Gratwick v Johnson* (1945) 70 CLR 1 at 19 (Dixon J).
[15] *Gratwick v Johnson* (1945) 70 CLR 1 at 15 (Latham CJ).
[16] *Gratwick v Johnson* (1945) 70 CLR 1 at 16 (Rich J).

will be permitted. The Directions provide for a discretion that is exercised in accordance with the definition of an "exempt traveller", which in turn provides detailed guidance on whether and how a person can so qualify.[17]

29. Subsequent cases have confirmed that there is no absolute position in relation to laws directed at interstate intercourse. In *Cole v Whitfield,* the admonition rose no further than that "*personal movement across a border cannot, generally speaking, be impeded… It is not necessary now to consider the content of the guarantee of freedom of various forms of interstate intercourse. Much will depend on the form and circumstance of the intercourse involved*" (emphasis added).[18]

30. Similarly, in *Australian Capital Television Pty Ltd v Commonwealth,* Dawson J opined that s 92 does not mean that "*movement across State borders is immune from regulation*". Rather, if a law has another object, then a burden may be placed on movement across State borders "*provided that the means adopted to achieve the object are neither inappropriate nor disproportionate*".[19] In such cases, laws may regulate "*even the act of crossing the border*" but not deny the freedom guaranteed by s 92.[20]

31. Secondly, this Court has consistently reasoned that provisions aimed at protecting the health of a State's populace are an obvious example of laws that may be consistent with s 92, even though a burden is thereby placed on interstate trade, commerce or intercourse. Though many of these cases have been concerned with restrictions imposed on trade and commerce, there is no principled basis to conclude that the rationale should not apply to interstate intercourse. For example:

    1. In *Ex parte Nelson (No 1),* the majority upheld preventing the entry of cattle from another State on account of real or supposed disease, and noted that it would be a "strange result" if Federation "*had stripped the States of power to protect their citizens from the dangers of infectious and contagious diseases, however such dangers may arise*";[21]

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[17] Court Book Vol 4 pp 1449-1450.
[18] *Cole v Whitfield* (1988) 165 CLR 360 at 393; cited with approval in *AMS v AIF* (1999) 199 CLR 160 at 177 [40], 178 [43] (Gleeson CJ, McHugh and Gummow JJ), 248 [276] (Callinan J); see also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 192-193 (Dawson J).
[19] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 195 (Dawson J).
[20] Ibid.
[21] *Ex parte Nelson (No 1)* (1928) 42 CLR 209 at 218 (Knox CJ, Gavan Duffy and Starke JJ).

2. In *James v Cowan*, the Privy Council expressed the view that a law which had as its "real object" "*taking preventive measures against famine or disease and the like*", would not offend against s 92;[22]
3. In *Tasmania v Victoria,* the plurality held that there was scope for a State to "*lawfully protect its citizens against the introduction of disease*" without infringing s 92, though their Honours found that it was not necessary to determine the precise scope of that power;[23]
4. In the *Bank Nationalisation Case,* the Privy Council found that trade might be regulated by "*excluding from passage across the frontier of a State creatures or things calculated to injure its citizens*";[24]
5. In *North Eastern Dairy v Dairy Industry Authority,* Barwick CJ stressed the need to clearly distinguish attempts by a State to preserve a "monopoly of dealing" (or similar) from "*action on the part of a State to ensure that unhealthy, impure goods or dishonest practices are not introduced into the State or indulged in there*".[25] He opined that a law for the protection of health would not infringe s 92 if it were "*reasonably necessary as compared with other available expedients to achieve that purpose*".[26] In the same case, Mason J held that s 92 would not invalidate a law that "*does no more than protect the community from hazards affecting health*";[27]
6. In *Castlemaine Tooheys,* it was said to be a "fundamental consideration" that each State has the power "*to enact legislation for the well-being of the people of that State*";[28] and
7. In *Nationwide News,* Brennan J opined that if the true character of a law is to "*protect the State or its residents from injury, a law which expressly prohibits or impedes movement of the apprehended source of injury across the border into the State may yet be valid*".[29]

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[22] *James v Cowan* (1932) 47 CLR 386 at 396.
[23] *Tasmania v Victoria* (1935) 52 CLR 157 at 168 (Gavan Duffy CJ, Evatt and McTiernan JJ).
[24] *Commonwealth v Bank of New South Wales (Bank Nationalisation Case)* (1949) 79 CLR 497 at 641.
[25] *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 579-580 (Barwick CJ).
[26] Ibid at 584. Gibbs J also contemplated that a statute could be justified if it was "necessary to protect the health of the public" at 600. See similarly from Mason J at 615 and Jacobs J at 634.
[27] Ibid at 607.
[28] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[29] *Nationwide News v Wills* (1992) 177 CLR 1 at 58 (Brennan J).

32. Thirdly, the plaintiffs rely on a different approach being taken in respect of provisions that "directly" impact interstate intercourse, as compared to those which have an "incidental" impact. The Territory submits that differential tests should not be applied depending on whether a law operates "directly" or "incidentally". While the manner in which the burden is imposed will inform its justification,[30] the plaintiffs' analysis presupposes a binary distinction between "direct" and "indirect" burdens, which is apt to mislead.

33. In *Cole v Whitfield*, the Court held that it was unsatisfactory to draw a distinction between burdens which are direct and immediate, and those that are indirect, consequential and remote.[31] To the extent that this finding can be said to have been limited to the freedom of interstate trade and commerce under s 92, this Court ought also to apply it to the freedom of interstate intercourse.

34. The proposition that the Court looks to the practical operation of the law in order to determine its validity does not waver according to the "limb" of s 92 in question. The focus in all cases is on the substance of the law in question, and on the practical and economic consequences of any burden imposed.[32] This is as opposed to a binary distinction between "direct" and "indirect" burdens imposed by a law, which takes as its premise the very outcome of the assessment of the operation of that law.

35. Fourthly, the plaintiffs' absolutist approach has broad-sweeping, and presumably unintended, consequences. This is gauged by noting that, if the Directions provided only that a person must not enter Western Australia if they have tested positive for COVID-19, and on the proposed date of entry the person is infectious, the plaintiffs' position would still render the Directions unconstitutional.

36. The plaintiffs' construction of s 92 would prevent Western Australia from refusing entry to (or imposing other travel restrictions on) not only people who pose a risk of transmitting a potentially deadly disease, but also those who have that disease and are actively contagious. Consistent with this Court's approach to the scope of s 92, and in that regard, the ability of States to lawfully protect their citizens against the

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[30] See *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 396 (McHugh J): "*a law that incidentally restricts or burdens interstate intercourse as the consequence of regulating another subject matter will be easier to justify as being consistent with the freedom guaranteed by s 92 than a law that directly restricts or burdens a characteristic of interstate intercourse. But whether the restriction or burden is direct or indirect, it is inconsistent with the freedom guaranteed by s 92 unless the restriction or burden is reasonably necessary...*" (emphasis added).

[31] *Cole v Whitfield* (1988) 165 CLR 360 at 399, 401.

[32] *Cole v Whitfield* (1988) 165 CLR 360 at 393; *AMS v AIF* (1999) 199 CLR 160 at 178 [43] (Gleeson CJ, McHugh and Gummow JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 195 (Dawson J).

introduction of disease, the Territory submits that this cannot be the intended or appropriate application of s 92.

37. If it is accepted that such a provision, which uses the crossing of State borders as a criterion of operation, could be valid,[33] that must be on the basis that the freedom of interstate intercourse in s 92 is not absolute, but is conditioned by some form of necessity or proportionality analysis.

38. Fifthly, acceptance of the plaintiffs' submission would create a disjuncture between the operation of the aspects of "trade and commerce" and "intercourse" in s 92. The former would be limited to laws which impose a disproportionate burden of a discriminatory and protectionist nature, while the latter would present, in cases of "direct" burden, an absolute guarantee of unfettered passage across borders. There is no jurisprudential or principled basis for such a divide.

39. The Territory acknowledges the conclusion of this Court in *Cole v Whitfield* that there is "*no reason in logic or commonsense for insisting on a strict correspondence between the freedom guaranteed to interstate trade and commerce and that guaranteed to interstate intercourse*".[34] The Territory does not contend for strict correspondence; only that the Court should not embrace an internecine distinction between aspects of s 92, especially given the potential overlap of "trade and commerce" and "intercourse". Indeed, it has been observed that, properly applied, there should be little difference in the operation of s 92 between those two aspects.[35]

Court should adopt a structured proportionality analysis

40. In contradistinction to the absolutist and bifurcated approach advocated by the plaintiffs, a "structured proportionality" analysis is appropriate for both the trade and commerce, and the intercourse, aspects of s 92.

41. Though the applicable tests have been variously expressed by reference to both "reasonable necessity" and proportionality, and not infrequently both,[36] those

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[33] Take, for example, the hypothetical of an outbreak of a far deadlier disease, such as of Ebola.
[34] *Cole v Whitfield* (1988) 165 CLR 360 at 394.
[35] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 56-57 (Brennan J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 458 [408], 462-463 [425]-[426] (Hayne J), at 481-482 [462]-[464] (Callinan J); Stellios, *Zines's The High Court and the Constitution* (6th edition, The Federation Press, 2015) at 193.
[36] For example (with emphasis added): "*necessary or appropriate and adapted either to the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare*" *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); "*reasonably necessary ... to achieve a legitimate non-protectionist purpose*" (in the context of the trade and commerce limb in particular) *Betfair Pty Limited v Racing New South Wales* (2012) 249 CLR 217 at 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ); "*necessary or appropriate and adapted*

statements of principle are best synthesised by this now well-established framework of analysis.

42. Contrary to the distinction drawn in PS[47], structured proportionality, as it is conceived in this country, is apt for resolving a question of whether a provision is "reasonably required" or "reasonably necessary" to achieve a legislative object.[37]

43. The Territory does not accept that there are necessarily two standards of proportionality analysis (see DS[42]-[45]). However, in circumstances where a more rigorous standard would apply to an assessment for the purposes of s 92, nothing turns upon such a distinction in this case.

10 44. The proportionality analysis ought to proceed along similar lines for both aspects of s 92, save for a distinction in the first step. When assessing whether a provision imposes a burden on the freedoms guaranteed by s 92, a provision will only burden the trade and commerce "limb" if it is found that there is, in fact (i.e. practical operation), some degree of discrimination in a protectionist sense. That is compatible with this Court's consistent line of authority that the freedom guaranteed by s 92 in relation to trade and commerce is a freedom from provisions with a discriminatory and protectionist effect.[38]

45. In relation to intercourse, the Territory accepts that s 92 protects movement between the States generally, such that any burden requires the analysis to proceed to the next

20 stage.

46. Where a law impedes both commercial and non-commercial intercourse, as in this case, that must be accounted for in the analysis. In respect of the burden on commercial intercourse (i.e. trade and commerce), s 92 will only be engaged if there

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for the preservation of an ordered society or the protection or vindication of the legitimate claims of individuals in such a society" *Cunliffe v Commonwealth (Migration Agents Case)* (1994) 182 CLR 272 at 346 (Deane J, Gaudron J agreeing at 392); whether "*the impediment so imposed is greater than that reasonably required to achieve the objects of the legislation*" *AMS v AIF* (1999) 199 CLR 160 at 179 [45] (Gleeson CJ, McHugh and Gummow JJ, Hayne J agreeing); whether "*the impediment to such intercourse imposed by the regulations is greater than is reasonably required to achieve the object of the regulations*" *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [38] (Gleeson CJ and Heydon J); "*if it is reasonably appropriate and adapted or, which is the same thing, proportionate to some legitimate purpose*" *AMS v AIS* (1999) 199 CLR 160 at 193 [100] (Gaudron J).

[37] See *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 366 (Dawson J); *Levy v Victoria* (1997) 189 CLR 579 at 614-615 (Toohey and Gummow JJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 485 [470] (Callinan J); *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418 at 476 – 477 [101]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Unions NSW v NSW* (2019) 264 CLR 595 at [35] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 93 ALJR 448 at 469-470 [64] (Kiefel CJ, Bell and Keane JJ), 488 [184] (Gageler J), 493 [210] (Nettle J), 546 [470] (Edelman J).

[38] *Cole v Whitfield* (1988) 165 CLR 360 at 408.

is the requisite element of protectionist discrimination.[39] Analysis of the same law's operation in relation to the intercourse limb, however, should proceed to the next stage of the proportionality framework if there is any burden. This approach also ensures that the risk identified at DS[77] does not eventuate – that is, the s 92 trade and commerce freedom continues to have a distinct and substantial operation.

47. If the purpose or "real object" of a law is to restrict interstate intercourse, then the law will be invalid. Such a purpose is not legitimate in light of the freedoms guaranteed by s 92. If the impugned provision has some other purpose, a Court should consider whether the law is reasonably appropriate and adapted to the achievement of that purpose.

48. In assessing whether a law is reasonably appropriate and adapted, the Court should ask whether the law is suitable, necessary and adequate in its balance, in accordance with the well-established framework outlined in *McCloy*.[40]

49. As a result, an analysis of whether the Directions infringe s 92 will depend on their precise terms and practical effect.

Application of structured proportionality analysis to the Directions

Burden

50. The Territory accepts that the Directions burden interstate trade, commerce and intercourse.

51. In relation to trade and commerce, the burden lacks the discriminatory and protectionist effect that could offend s 92.

52. At PS[53], the plaintiffs assert that, because the Directions "are discriminatory on their face against persons wishing to enter Western Australia", they have a protectionist legal operation and effect. That assertion lacks a sufficient factual basis and should not be accepted (see DS[78]). As indicated above, the "exemptions" provided for in the Directions demonstrate that this is not so: that is, some persons wishing to enter Western Australia are permitted, and continue, to do so.

53. Moreover, the assertion that remote management of the plaintiffs' business is not an "adequate substitute for direct personal attendances and direct management" is unsupported.[41]

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[39] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 353 [37] (Gleeson CJ and Heydon J); 458 [408] (Hayne J).
[40] *McCloy v NSW* (2015) 257 CLR 178 at 193-195 [2] (French CJ, Kiefel, Bell and Keane JJ).
[41] Court Book Vol 1 pp 34, 35 and 95.

54. While the plaintiffs acknowledge the correct statement of principle (PS[54]), the plaintiffs advance no argument that the Directions are not reasonably necessary to achieve their object, asserting rather that there "is no agreed fact nor finding of Rangiah J against a test of 'reasonably required' or 'necessary'" (PS[47]). That assertion is wrong (DS[75]-[76]).

Purpose

55. The "real object" of the Directions is not to prevent entry to Western Australia. The Directions merely regulate the entry of persons into Western Australia. As set out at [18] above, that is done for the purpose of limiting the spread of COVID-19, in the context of a declared COVID-19 pandemic and a declared public health state emergency in Western Australia. That purpose is a legitimate end for the Western Australian legislature and government to pursue.

Proportionality - suitability

56. The Territory submits that the Directions do not impose a burden going beyond that which is appropriate and adapted for the purpose of limiting the spread of COVID-19.

57. As regards suitability, the Directions plainly have a rational connection to the purpose of limiting the spread of COVID-19. Indeed, Rangiah J concluded that the Directions "have very substantially reduced the chance of importation of the virus by dramatically reducing the number of travellers".[42]

Proportionality - Necessity

58. The Territory submits that the facts before the Court establish that there is no obvious and compelling alternative, reasonably practicable means of achieving the purpose of the Directions.

59. Justice Rangiah found that alternative measures such as screening, PCR testing and mask-wearing, even in combination, would not have the same effectiveness in preventing importation of the virus.[43] In the same way, unless it covered the entirety of a State or Territory, a targeted hotspot regime would be less effective in preventing infected persons from travelling into Western Australia than the Directions.[44]

60. Though it may be effective, limitations on the safe operating capacity of Western Australia's hotel quarantine system has the result that mandatory hotel quarantine for

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[42] *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 at 40 [166] (Rangiah J).
[43] Ibid at 70-71 [315] (Rangiah J).
[44] Ibid at 70-71 [315] (Rangiah J).

interstate arrivals is not a reasonably practicable alternative to measures provided for in the Directions.[45]

61. Overall, the Directions were found to "*offer a tangible and substantial layer of protection to the Western Australian community over the protection offered by the Common Measures*".[46]

62. The Plaintiffs have proposed no other alternative means in substitution for the Directions.

Proportionality - Adequacy of balance

63. In the context of an implied freedom, this Court has said that the issue at this stage of the analysis is whether the law imposes a burden which is "*manifestly excessive by comparison to the demands of legitimate purpose*".[47] It is submitted that this standard is appropriate to be applied in the context of s 92, where it has long been observed that the "*question whether a particular legislative enactment is a necessary or even a desirable solution to a particular problem is in large measure a political question best left for resolution to the political process*".[48]

64. In application of that standard, the Territory posits the following factors as relevant to assessing the adequacy of the Directions' balance, and which it submits demonstrate that adequacy.

65. First, the Directions "have been effective to a very substantial extent" to reduce the probability of COVID-19 being imported into Western Australia from interstate.[49] Absent the Directions, the overall risk of importation from other parts of Australia was found to be high.[50]

66. In addition, the potential consequences of COVID-19 importation into Western Australia are serious and potentially catastrophic. As at 16 September 2020, Australia's COVID-19 fatality rate exceeded 3%.[51]

67. Secondly, this Court should consider the social and economic impact of the Directions. Justice Rangiah found that an effect of the Directions was to allow the

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[45] See *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 at 72 [326]-[328] (Rangiah J).
[46] Ibid at 41 [171] (Rangiah J).
[47] *Clubb v Edwards* (2019) 93 ALJR 448 at 470 [69] (Kiefel CJ, Bell and Keane JJ).
[48] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[49] *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 at 70-71 [315] (Rangiah J).
[50] Ibid at 60-62 [256]-[262] (Rangiah J).
[51] Special Case p 5 [3].

population of Western Australia to live in a near-normal manner.[52] That has had positive social and economic impacts.

68. For example, the ability to ease Containment Measures earlier than anticipated has resulted in the economic impact of COVID-19 being likely less adverse than estimated by the Western Australian Treasurer in March.[53] In the June quarter, Western Australia's State Final Demand contracted less than NSW, Victoria or Australia as a whole.[54] There were objective signs of recovery in Western Australian employment data from June and July 2020,[55] and there have been recent improvements in business and consumer confidence in Western Australia.[56]

69. Thirdly, the "precautionary principle" was found to be an accepted principle in management of a pandemic which involves the potential for grave public health risks, requiring the implementation of all available and effective mitigation measures.[57] The Territory submits that this Court should take account of this principle in assessing the adequacy of the balance struck by the Directions.

70. In this case, the relevant burden is temporary, regulated, and non-absolute. In addition, the Directions have been the subject of detailed health advice, such as that referred to in [57] of the Special Case. As against that, this Court should, consistently with a precautionary approach, have regard to the "worst-case scenario" of failing to limit the spread of COVID-19, which is potentially catastrophic.[58] That remains the case despite the fact that the worst-case scenario is not the most likely to eventuate, and even if it is actually quite unlikely. This is appropriate in view of the many scientific uncertainties and the serious potential consequences of outbreaks.

71. Fourthly, in assessing the adequacy of balance, it is relevant for this Court to consider the extent of the burden imposed by the Directions. In this case, the burden is temporary and necessarily subject to fortnightly review. Indeed, the Directions form part of a suite of directions which are under active revision and reconsideration.[59]

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[52] *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 at 40 [167] (Rangiah J).
[53] Special Case p 16 [59].
[54] Special Case p 17 [63].
[55] Special Case pp 17-18 [64].
[56] Special Case pp 18-19 [65].
[57] *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 at 20 [76] (Rangiah J).
[58] Involving the risk of death and hospitalisation, particularly for vulnerable groups, such as elderly and Indigenous people: *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 at 18-19 [72], 21-22 [86], 27 [109], 84-86 [366] (Rangiah J).
[59] Special Case pp 13-14 [52], for example, lists 17 directions that have been revoked since the Federal Court remitter. Another six directions listed at Special Case pp 14-15 [53] have also been revoked.

Further, the burden is moderated by the various categories of "exempt traveller" who are permitted to enter Western Australia.

72. Additionally, technology means that the practical nature and character of that burden is much less that it would have been if the Directions had been enacted even 20 years ago. The concept of a "meeting", for example, has plainly evolved to include participation by means other than physical presence.[60] Indeed, some variations to the usual practice of this Court have been made to cater for the limitations imposed by COVID-19 (including the use of video conference technologies to conduct hearings).[61]

10

Conclusion

73. The Territory submits that the questions in the Special Case should be answered as follows:

1. No
2. The Plaintiffs.

Part V: Estimate of time for oral argument

74. It is estimated that 30 minutes will be required for the presentation of oral argument.

20 Dated 19 October 2020

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[60] See, for example, discussion in *Pell v The Queen* [2019] VSCA 186 at [1167] (Weinberg JA). See also s 33B of the *Acts Interpretation Act 1901* (Cth).
[61] Noting that the words "sitting together" in s 19 of the *Judiciary Act 1903* (Cth) do not appear to require a High Court Justice to be physically present to conduct the business of the Court.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

Clive Frederick Palmer
First Plaintiff

Mineralogy Pty Ltd
ABN 65 010 582 680
10 Second Plaintiff

and

The State of Western Australia
First Defendant

Christopher John Dawson
Second Defendant

ANNEXURE

ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY (INTERVENING) LIST OF LEGISLATIVE PROVISIONS

Statute	**Provisions**	**Version**
Commonwealth Constitution	s 92	
Commonwealth		
Australian Capital Territory (Self-Government) Act 1988 (Cth)	s 69	Compilation No. 24 (effective 1 July 2016)
Judiciary Act 1903 (Cth)	ss 19 and 78A	Compilation No. 47 (effective 25 August 2018)
Northern Territory (Self-Government) Act 1978 (Cth)	s 49	Act No. 58 of 1978 as amended (effective 1 July 2014)

Western Australia: Statutes		
Constitution Act 1889 (WA)	s 2	Version 06-f0-01 effective 26 October 2017
Emergency Management Act 2005 (WA)	ss 61, 67, 70, 72A	Act No. 15 of 2005 (version 01-c0-02 effective 4 April 2020)
Western Australia: Statutory Instruments		
Quarantine (Closing the Border) Directions (WA)		Effective 5 April 2020