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

and

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

and

STATE OF WESTERN AUSTRALIA
First Defendant

and

CHRISTOPHER JOHN DAWSON
Second Defendant

OUTLINE OF ORAL SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Filed on behalf of the Attorney-General for the State of Queensland, intervening

3 November 2020

PART I: Internet publication

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II: Outline

Burden

2. The Plaintiffs accept, as do the Defendants, that structured proportionality is an available tool of analysis when considering whether a burden on s 92 is justified: Reply [4]; Def [44]-[46]; Qld [31]; SA [8]; ACT [48]. Cf Tas [31]-[37]; Vic [41]-[45].

3. It is first necessary to be clear about what is a burden on s 92 which calls for justification.

   a. A law will burden the trade and commerce limb if it discriminates against interstate trade to the competitive advantage of intrastate trade.

   b. A law will burden the intercourse limb if it discriminates against interstate intercourse as compared to intrastate movement: *Nationwide News* (1992) 177 CLR 1, 58-9 (**JBA 9.52, 3140-1**); *Cunliffe* (1994) 182 CLR 272, 333, 384 (**JBA 6.32, 1763, 1814**); Kirk, 'Section 92 in its Second Century' in *Current Issues in Australian Constitutional Law* (2020) 253, 279-80 (**JBA 16.87, 5975-6**).

4. Discrimination is required for both limbs of s 92 because:

   a. textually, s 92 does not disclose a basis for requiring discrimination for one limb and not the other: *APLA* (2005) 224 CLR 322, 456-7 [402] (**JBA 3.18, 717-8**);

   b. otherwise, the intercourse limb would entirely subsume the trade and commerce limb; and,

   c. otherwise, general laws that burden interstate movement may be held invalid, privileging interstate movement over intrastate movement: cf *Cole v Whitfield* (1988) 165 CLR 360, 402 (**JBA 5.30, 1636**).

5. Taking into account the difference in constitutional values protected by each limb in s 92, Queensland submits that burden and justification should be approached in the way set out in Qld [33].

Justification

6. **Compatibility:** The Plaintiffs accept that protecting public health is a legitimate aim (Pl [20]; Reply [5]). The Directions and the *Emergency Management Act 2005* (WA) have that purpose.

7. **Suitability:** To establish a rational connection, it would have sufficed to show that it is 'reasonable to suppose' that the Directions are effective: Qld [41]; *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, [438] (**JBA 15.81, 5697**). Rangiah J went further and found that the Directions are effective: **CB 1.16, 167-8 [151]-[157]**.

8. **Necessity:** Given that information is in a 'state of flux', that polities must apply the 'precautionary principle', and that the comparisons to be drawn for necessity testing are comparisons between different combinations of measures, the 'domain of selections' is necessarily wide in the context of a global pandemic. It is more than enough that epidemiologists agree that a combination of measures which includes border restrictions is more effective than other combinations of measures: Qld [35]-[36], [46]. Again, Rangiah J went further and found that 'border measures have additional value above and beyond other measures, as they are the only measures that prevent entry of disease': **CB 1.16, 169 [163]**.

9. **Adequacy of balance:** Rangiah J understood his task to be the finding of facts necessary for this Court to determine justification, potentially including adequacy of balance: **CB 1.16, 134-5 [18]-[19]; 136 [24]**. Rangiah J made those findings: WA [76]. They are supplemented by a Special Case as well as constitutional facts of which the Court may take judicial notice. This is not a case where the polity has failed to adduce evidence necessary to provide a constitutional basis for impugned legislation: cf *Unions NSW [No 2]* (2019) 264 CLR 595, 616 [45], 613 [53] (Kiefel CJ, Bell and Keane JJ), 631-2 [93]-[96], 634 [102] (Gageler J), 640-1 [117]-[118] (Nettle J), 650 [151]-[152] (Gordon J) (**JBA 11.65, 4140, 4142, 4155-6, 4158, 4164-5, 4174-5**).

10. As the *Emergency Management Act* and Directions present as suitable and necessary, they are to be 'regarded as adequate in [their] balance unless the benefit sought to be achieved by the [Act and Directions] is manifestly outweighed by [their] adverse effect on' the value underlying s 92, namely national unity: cf *Comcare v Banerji* (2019) 93 ALJR 900, 914 [38] (**JBA 13.74, 4804**).

11. As the Defendants point out (in Def [9]), Rangiah J identified 11 features of COVID-19 which demonstrate why addressing the risks it poses weighs so heavily in the balance: **CB 1.16, 151-3 [84]-[95]**. In the worst-case scenario, failure to address that risk may have 'catastrophic consequences for the population': **CB 1.16, 149 [72]**. On the other side of the scales, it can only be accepted that the burden on s 92 is deep: Qld [31]. The Court may take judicial notice of aspects of that burden. There are also agreed facts before the Court regarding the economic impacts of border restrictions and/or COVID-19, which may bear on the impacts on national unity: **CB2.18, 252-7 [58]-[72]**.

12. Moreover, a law calculated to limit the spread of disease by restricting movement over a State border serves the purpose of national unity by assisting the States 'to swim' together: cf Pl [18]. National unity, and interstate intercourse, are aided by the control and elimination of disease, much in the same way that 'looked at in their true light', the restrictions in *Ex parte Nelson* (1928) 42 CLR 209, 219 **(JBA 6.34, 1936)** were 'aids to' the freedom of interstate commerce. '[A]reas ravaged by … pestilence' may be quarantined for 'the Nation as a whole': *Zemel v Rusk* 381 US 1, 14 (1965): Vic fn 64.

13. Given the sheer importance of addressing the risks posed by COVID-19, this Court should be slow to disturb the balance struck by the WA Parliament and the executive: Qld [55]. That is especially so when the relevant risks frequently and rapidly change. It is also especially so where the executive has foreshadowed adjustments to tailor the Directions to the nature of the risk as it changes, subject only to the precaution of waiting one incubation period from the relaxing of border restrictions elsewhere: Aff of R Paljetak, 2 Nov 2020, Ex RP3.

Dated 3 November 2020.

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