HIGH COURT OF AUSTRALIA

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Details of Filing

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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

10 and

State of Western Australia
First Defendant
Christopher John Dawson
Second Defendant

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

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Part I: PUBLICATION

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

Part II: OUTLINE OF ORAL SUBMISSIONS

Distinguishing and assimilating the two 'limbs' of s 92

1. The submissions of the parties and interveners give rise to an issue concerning the degree to which the intercourse 'limb' of s 92 is to be *distinguished from*, or *assimilated with*, the provision's trade and commerce 'limb'. The issue emerges from a constructional tension inhering in s 92 between the textual grounds for assimilation derived from the undifferentiated terms of that section, and the purposive grounds for distinction derived from the history of s 92 (*Cole v Whitfield* (1988) 165 CLR 360, 388, 394; *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 456-457 [401]-[402] (Hayne J); SA [31], [38]).

2. The two steps taken by the Court in *Cole v Whitfield* in modernising the test for measures that burden interstate trade and commerce, provide a conceptual basis to reconcile the tension. Those steps speak to 'burden' and 'justification' respectively in a manner that guides where distinguishing between the freedoms is appropriate, and where assimilation is warranted (SA [30], [38]).

3. As to the first step, as the purpose of the trade and commerce 'limb' was confined to eliminating protectionism in a way that the intercourse limb was not, the Court found a constructional necessity to distinguish between the two 'limbs' of s 92. The narrower purpose of the trade and commerce 'limb' required a confining of the burdens that would trigger its application. By contrast, any effective burden on interstate intercourse may trigger the engagement of s 92 (SA [30]-[31]).

4. As to the second step, *Cole v Whitfield* rejected the criterion of operation test that had been developed by Dixon J. The emphasis of the second step on substance over form provides no rationale to draw a further distinction between the two 'limbs' of s 92. It is on this dimension that the textual prescript for consonance and assimilation between the two 'limbs' of s 92 is accommodated (*Cole v Whitfield* (1988) 165 CLR 360, 400-403, 406-408, SA [29], [32], [38]).

Assessment of justification indispensable

5. Phrases such as 'aimed at' or 'directed against' interstate intercourse can be understood in at least three different ways (SA [9]).

6. First, they can be used to describe measures which adopt movement across state borders as a criterion of their operation. This is the sense in which the plaintiffs appeared to invoke the phrase at PS [5], [23], [45], and upon which meaning the plaintiffs have now disclaimed reliance: PR [3], *Palmer v Western Australia* [2020] HCATrans 178, lines 1974-1981. All parties and interveners now agree that this is not a criterion for validity under s 92.

10 7. Second, they can be used to identify measures which, on their proper construction, pursue no legislative object other than to burden interstate intercourse. Such measures do not purport to pursue a legitimate end at all, such that the burden they impose on interstate intercourse is incapable of being relevantly justified. The requisite justification enquiry is complete if a proper construction reveals the measure to have a purpose only to burden interstate intercourse. This is the sense in which it appears the plaintiffs were invoking the phrase at PS [24], PR [3]. All parties and interveners agree that the purpose of responding to a public health emergency is legitimate: PR [5].

8. Third, they can be used in a conclusory sense to identify that the 'true' character or
20 'true' purpose of an impugned measure is impermissibly to burden interstate intercourse, because the burden it imposes on interstate intercourse is not reasonably necessary for, or proportionate to, the pursuit of its legitimate object.

9. The second and third usages represent two stages of the one overarching enquiry indispensable to assessing the compatibility with s 92 of a measure that imposes an effective burden on interstate intercourse. That enquiry is as to whether the burden imposed is justified by the measure's pursuit of a legitimate object. This is the sole criterion of validity under the intercourse limb of s 92. South Australia submits that the plaintiffs fall into error in the application of each of these stages.

(1) Identifying the measure's legitimate object

30 10. The plaintiffs appear to contend that, as a matter of construction, the Directions are not directed to protecting public health. That conclusion represents a flawed approach

to the construction exercise. It places too much weight on certain textual considerations (specifically, that the Directions by their terms prohibit entry into Western Australia from all other States and Territories) whilst discounting others (such as the express stated purpose and the broader protective terms of the Directions). It also ignores broader contextual and purposive indicators that leave no room for a conclusion that the Directions are oriented to the purpose of burdening interstate intercourse (such as the fact that the Directions are made pursuant to the EMA in the course of a declared emergency). Rather, the plaintiffs' construction appears to conflate the critical distinction between legislative purpose and practical effects (SA [35]; *Brown v Tasmania* (2017) 261 CLR 328, 362-363 [99]-[100] (Kiefel CJ, Bell and Keane JJ), [208]-[209] (Gageler J), [322] (Gordon J); *Unions NSW v New South Wales (Unions No 2)* (2019) 264 CLR 595, [169]-[172] (Edelman J).

(2) 'Reasonable necessity' not a 'more stringent' test

11. There is no basis in authority or principle for applying some 'more stringent' test than that applicable in the context of the implied freedom of political communication, in order to discern whether an impugned measure has a 'true' purpose or character proscribed by s 92 (SA [41]-[42]).

12. Insofar as Gaudron J's passage in *AMS v AIF* addressed proportionality testing, her Honour was not advocating a difference in the intensity of the scrutiny with which that testing is to be performed. As Gaudron J explained in the very paragraph relied on by the plaintiffs, her Honour considered that the test for measures burdening interstate intercourse was "more stringent" in the sense that only measures furthering "the preservation of an ordered society" would be valid (provided they could be shown to be justified) (*AMS v AIF* (1999) 199 CLR 160, 193 [101]; SA [42]; cf PS [46]-[47]). The adoption of a limitation of legitimate legislative object to those furthering "the preservation of an ordered society" was rejected by a majority of this Court in *APLA* (*APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 393-394 [177] (Gummow J), 461 [420] (Hayne J); SA [42]).

Dated: 4 November 2020

MJ Wait SC