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
and
State of Western Australia
First Defendant
Christopher John Dawson
Second Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: PUBLICATION OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III LEAVE TO INTERVENE

3. Not applicable.

Part IV SUBMISSIONS

4. South Australia confines its submissions to matters of legal principle raised by the issues of validity in the present case.

5. The Plaintiffs' primary submission is that the *Quarantine (Closing the Border) Directions* (WA) (**Directions**) *must* be invalid for contravening s 92 of the *Commonwealth Constitution* because they are 'aimed at' or 'directed to' the crossing of the Western Australian border by persons from outside Western Australia, in the sense that the Directions *by their terms* burden passage across the border.[1]

6. South Australia submits that the Plaintiffs' primary submission – that *any* measure that, by its terms, burdens passage across a State border, is *necessarily* invalid – is not supported by the authorities of this Court and is wrong as a matter of principle. Rather, the validity of a measure that imposes an effective burden on interstate intercourse can only be discerned after assessing whether that burden is imposed in the proportionate pursuit of a legitimate object.

7. The Plaintiffs' alternative submission is that, even if the Directions are not to be characterised as 'aimed at' crossing the border, but rather as regulations that incidentally burden interstate intercourse, they are invalid because they have not been shown to be 'reasonably required' to achieve some other legislative object.[2] That test is said by the Plaintiffs to impose a more stringent standard than the test developed to determine the validity of measures that burden the implied freedom of political communication.[3]

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1 Plaintiffs' Submissions (**PS**), [10], [13], [23].
2 PS, [14], [45], [48].
3 PS, [48].

8. South Australia submits that the test for determining whether a relevant burden imposed on interstate trade, commerce or intercourse is justified (described variously as "reasonably required",[4] "reasonably necessary",[5] "appropriate and adapted",[6] or "proportionate"[7]), does not differ materially from the test for determining whether a measure that burdens the implied freedom of political communication is reasonably appropriate and adapted to a legitimate end. For that reason, recourse to the tools of analysis developed in that jurisprudence may assist.

Reasonable necessity testing is applicable to all burdens on interstate intercourse; a threshold 'criterion of operation' test should be rejected

9. The Plaintiffs' primary submission is that the Directions are invalid because they are relevantly 'aimed at' the crossing of the Western Australian border.[8] Phrases such as 'aimed at', 'directed against', 'directed to' and 'targeted at' are used throughout the authorities concerning s 92 in a variety of importantly different ways.[9] First, they are used to describe measures which adopt movement across state borders as a criterion of their operation.[10] Second, they are used to identify the object which an impugned measure might be said to pursue.[11] Third, they may be used in a conclusory sense to identify the 'true' character of an impugned measure, whether that be a proscribed character or a permissible one.[12]

10. It is tolerably clear that in their submissions the Plaintiffs use this language in the first sense identified, and in so doing they invoke a criterion of operation test.[13]

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4 *AMS v AIF* (1999) 199 CLR 160, 179 [45] (Gleeson CJ, McHugh and Gummow JJ); *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 393 [177] (Gummow J).

5 See, for example, *Betfair Pty Ltd v Western Australia (Betfair (No 1))* (2008) 234 CLR 418, 477 [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair Pty Ltd v Racing New South Wales (Betfair (No 2))* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

6 See, for example, *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 472 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ); *Betfair (No 1)* (2008) 234 CLR 418, 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Nationwide News v Wills* (1992) 177 CLR 1, 59 (Brennan J).

7 See, for example, *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 472-3 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ); *Betfair (No 1)* (2008) 234 CLR 418, 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

8 PS at [10].

9 For this reason, Dixon J doubted their utility: *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 387.

10 See, for example, *Gratwick v Johnson* (1945) 70 CLR 1, 17 (Starke J).

11 See, for example, *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 351 [28], 353 [36], (Gleeson CJ and Heydon J).

12 See, for example, *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 396 (McHugh J); *AMS v AIF* (1999) 199 CLR 160, 250 [279] (Callinan J).

13 The test contended for by the Plaintiffs would appear to be different from that articulated by Dixon J in a series of cases culminating in *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 17. The nature of that test was discussed in *Cole v Whitfield* (1988) 165 CLR 360, 400-401 (the Court).

The Plaintiffs' primary submission amounts to a contention that *any* measure that burdens interstate intercourse and which adopts movement across a border as its criterion of operation *must* infringe s 92.

The authorities of this Court have not embraced a threshold test of criterion of operation

11. Careful consideration of the authorities of this Court reveals that a threshold criterion of operation test to assess the validity of a measure that burdens interstate intercourse has never commanded a majority of the members of this Court. Rather, the weight of authority favours, and in South Australia's submission ultimately confirms, that the relevant test of validity is one that engages proportionality-style reasoning. In s 92 jurisprudence this is referred to as a test of 'reasonable necessity'.[14]

12. In *R v Smithers; Ex parte Benson* (***Smithers***),[15] the Court unanimously held the impugned provision of the *Influx of Criminals Prevention Act 1903* (NSW) to be invalid. Justices Isaacs and Higgins held that the provision interfered with the freedom of interstate intercourse and was invalid. In a passage relied on by the Plaintiffs, Isaacs J said:[16]

> [T]he guarantee of inter-State freedom of transit and access for persons and property under s 92 is absolute – that is, it is an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians.

Whilst this passage supports the Plaintiffs' primary submission, it has never secured the support of a majority of this Court, and has, indeed, been the subject of criticism.[17] Although the reasoning of Higgins J was to similar effect,[18] Griffith CJ and Barton J did not consider that the Act infringed s 92. Rather, their Honours considered that the Act was beyond the legislative power of the States by virtue of an implication to be drawn from the federal compact. Although Griffith CJ and Barton J decided the case outside the rubric of s 92, their Honours employed

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[14] *Betfair (No 1)* (2008) 234 CLR 418, 477 [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair (No 2)* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The earlier intercourse cases tend to use the similar language of "reasonably required": *AMS v AIF* (1999) 199 CLR 160, 179 [45] (Gleeson CJ, McHugh and Gummow JJ); *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 393-394 [177] (Gummow J).

[15] (1912) 16 CLR 99.

[16] *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 117 (Isaacs J).

[17] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 54 (Brennan J).

[18] *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 119.

proportionality-style reasoning in recognising that the States might exclude persons in circumstances of necessity.[19] Justice Barton said:[20]

> I must by no means be thought to say … that the language of s 92 destroys the right of individual States to take any precautionary measure in respect of the intrusion from outside the State of persons who are or may be dangerous to its domestic order, its health or its morals.

13. In *Ex parte Nelson [No 1]*,[21] the Court was evenly divided on the question of whether the impugned provisions of the *Stock Act 1901* (NSW) violated s 92. In upholding their validity, Knox CJ, Gavan Duffy and Starke JJ employed proportionality-style reasoning. Their Honours said:[22]

> The establishment of freedom of trade between the States is perhaps the most notable achievement of the Constitution: yet it would be a strange result, if that achievement had stripped the States of power to protect their citizens from the dangers of infectious and contagious diseases, however such dangers may arise… The grounds and design of the legislation, and the primary matter dealt with, its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs; and any merely incidental effect it may have over other matters does not alter the character of the law.

14. In *Tasmania v Victoria*,[23] Gavan Duffy CJ, Rich, Dixon, Evatt and McTiernan JJ held a proclamation made under the *Vegetation and Vine Diseases Act 1928* (Vic) to be invalid. Chief Justice Gavan Duffy, Evatt and McTiernan JJ employed proportionality-style reasoning. Their Honours said:[24]

> In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed.

Justice Rich also employed proportionality-style reasoning. His Honour found that the law operated upon the act of entry into the State "*and it does nothing else*. There is … no room for an argument that its effect upon inter-State commerce is

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19 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 109 (Griffith CJ), 110 (Barton J).
20 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 110 (Barton J).
21 (1928) 42 CLR 209.
22 *Ex parte Nelson [No 1]* (1928) 42 CLR 209, 218 (Knox CJ, Gavan Duffy and Starke JJ).
23 (1935) 52 CLR 157.
24 *Tasmania v Victoria* (1935) 52 CLR 157, 168-169 (Gavan Duffy CJ, Evatt and McTiernan JJ).

consequential".[25] Justice Starke, in dissent, also employed proportionality-style reasoning. His Honour said:[26]

> [T]he exclusion from a State of diseased persons, animals or plants is for the purpose of protecting the State and its people. It is not, in any legitimate sense of the term, an interference with the freedom of inter-State trade or a violation of any right secured or protected by the Constitution.

15. In *Gratwick v Johnson* (***Gratwick***),[27] the Court unanimously held the *Restriction of Interstate Passenger Transport Order* made under the *National Security (Land Transport) Regulations* to be invalid. Justice Starke, in an apparent reversal from the approach his Honour had adopted in *Tasmania v Victoria*, said:[28]

> None of the cases referred to formulate 'a precise and inflexible interpretation' of s 92, but all, I think, recognize that 'legislation "pointed directly at the act of entry, in course of commerce, into the second State"' contravenes the provisions of s 92… And it follows that legislation pointed directly at the passing of people to and fro among the States … contravenes the provisions of s 92. It is immaterial as I understand the cases, that the object or purpose of the legislation, gathered from its provisions, is for the public safety or … any other legislative purpose if it be pointed directly at the right guaranteed and protected by the provisions of s 92 of the Constitution.

Whilst this passage supports the Plaintiffs' primary submission, it has never secured the support of a majority of this Court. Further, it is notable that Starke J expressed himself with some equivocation, qualifying his statement by reference to his "understand[ing of] the cases". For the reasons given above, the authorities that preceded *Gratwick* did not provide a foundation to support the principle articulated by Starke J. Indeed, it is noteworthy that one of the authorities referred to by Starke J would appear to stand against the proposition that his Honour articulates. In *James v Cowan*, the Privy Council observed that the exercise of a statutory power of acquisition "for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, … would not be open to attack because incidentally inter-State trade was affected".[29]

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[25] *Tasmania v Victoria* (1935) 52 CLR 157, 173 (Rich J) (emphasis added).
[26] *Tasmania v Victoria* (1935) 52 CLR 157, 176 (Starke J).
[27] (1945) 70 CLR 1.
[28] *Gratwick v Johnson* (1945) 70 CLR 1, 17. Justice McTiernan can likely be considered to have also supported this approach: 21-22.
[29] *James v Cowan* (1932) 47 CLR 386, 396-397 (Lord Atkin on behalf of the Privy Council).

16. By contrast to Starke J, in *Gratwick* each of Latham CJ, Rich and Dixon JJ employed proportionality-style reasoning. Chief Justice Latham drew a distinction between measures that regulate interstate intercourse from those that impose "a mere prohibition".[30] His Honour noted that the Order was "in terms 'directed against' [inter-State] intercourse",[31] but this did not foreclose the inquiry. His Honour went on to consider whether the Order contributed to "any general system of regulation".[32] It was only upon concluding that it did not that his Honour formed the opinion that the Order was invalid. Justice Rich acknowledged that circumstances might arise in which "the exigencies of war require the regulation of the transport of men and material."[33] However, no such justification had been demonstrated in that case. Justice Dixon did not confine himself to consideration of the legal operation of the Order. His Honour noted that the Order, "does not profess to be concerned with priorities of travel upon transport facilities under excessive demand… It does not … depend in any degree for its practical operation or administration upon the movement of troops, munitions, war supplies, or any like considerations."[34]

17. Finally, it is noteworthy that *Gratwick* was decided at a time when this Court's s 92 jurisprudence was so unsettled that Justice Dixon lamented that:[35]

> In questions concerning the application of s 92 of the Constitution, I think that it has become desirable for the Court to avoid as far as possible the statement of general propositions and in each case to decide the matter, so far as may be, on the specific considerations or features which it presents. None of the many attempts that have been made to formulate principles or to expound the meaning and operation of the text has succeeded in giving the guidance in subsequent cases which their authors had hoped. What has been clear has not found acceptance and what has been accepted has yet to be made clear.

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30 *Gratwick v Johnson* (1945) 70 CLR 1, 14.
31 *Gratwick v Johnson* (1945) 70 CLR 1, 14.
32 *Gratwick v Johnson* (1945) 70 CLR 1, 15.
33 *Gratwick v Johnson* (1945) 70 CLR 1, 16.
34 Although other passages in Dixon J's judgment may appear to lend support to a criterion of operation approach (which his Honour was to adopt in later cases), in *Miller v TCN Channel Nine Pty Ltd* Brennan J supports the above understanding of the effect of Dixon J's judgment in *Gratwick*: *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 603. Justice Brennan's analysis was subsequently endorsed by the Court in *Cole v Whitfield* (1988) 165 CLR 360, 406.
35 *Gratwick v Johnson* (1945) 70 CLR 1, 19.

18. In the *Commonwealth v Bank of NSW* (***Bank Nationalisation Case***),[36] the Privy Council held the *Banking Act 1947* (Cth) to be invalid. In doing so, the Privy Council adopted proportionality-style reasoning. Their Lordships said:[37]

> It is generally recognised that the expression 'free' in s 92, though emphasised by the accompanying 'absolutely,' yet must receive some qualification… [T]he problem has been to define the qualification of that which in the Constitution is left unqualified… [I]n determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. …
>
> [R]egulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here again a question of fact and degree is involved[.]

It is apparent that the Privy Council considered that even prohibition of trade, commerce or intercourse "across the frontier" could in limited circumstances constitute reasonable regulation. This latter passage is of particular significance because it is specifically referred to in this Court's most recent and authoritative expositions of the tests applicable to measures that burden both interstate trade and commerce, and interstate intercourse.[38]

19. In *Miller v TCN Channel Nine Pty Ltd*,[39] a majority of the Court comprising Gibbs CJ, Mason, Wilson and Dawson JJ held that s 92 protected the use of a station for the purpose of receiving and transmitting television messages from prohibition without a licence issued under the *Wireless Telegraphy Act 1905* (Cth). Chief Justice Gibbs, Wilson and Dawson JJ adopted proportionality-style reasoning by asking whether the regulation of the use of the station constituted reasonable regulation, concluding that it did not.[40] Justice Mason, although critical of the criterion of operation test, applied that test in holding that the prohibition of the use of the station to transmit was invalid. A differently constituted majority, comprising Gibbs CJ, Mason, Brennan, Deane and Dawson JJ, held that s 92 did not protect

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[36] (1949) 79 CLR 497.

[37] *Commonwealth v Bank of NSW* (1949) 79 CLR 497, 639, 641 (Lord Porter on behalf of the Privy Council).

[38] *Betfair (No 1)* (2008) 234 CLR 418, 477 [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *AMS v AIF* (1999) 199 CLR 160, 175 [34], 178 [43]; *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).

[39] (1986) 161 CLR 556.

[40] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 567 (Gibbs CJ), 590-592 (Wilson J), 628 (Dawson J).

against the prohibition of the establishment and erection of a station for the same purpose on the basis that the establishment and erection was antecedent to trade, commerce or intercourse.[41] Justices Mason and Deane each commented on the lamentable state of the Court's s 92 jurisprudence in terms that were precipitous of the decision in *Cole v Whitfield*.[42]

20. The decision in *Cole v Whitfield*[43] itself does not support the adoption of a threshold criterion of operation test for measures that burden interstate intercourse. The Court was careful to acknowledge that the guarantee of freedom of intercourse did not preclude all restrictions and regulations. The Court said it was not necessary to consider the content of the freedom of various forms of interstate intercourse, but that "[m]uch will depend on the form and circumstances of the intercourse involved."[44] The relevance of the "circumstances" of interstate intercourse may be understood as an implicit acceptance of proportionality-style reasoning. Later the Court noted that the decision in *Gratwick*:[45]

> did not deny power to meet the exigencies of war by regulating the transport of men and materials… If it were not so, the section would create a substantial lacuna in the legislative powers available to the national Parliament in times of war or national crisis arising from actual or threatened international aggression.

The Court then expressly noted that criterion of operation testing was inapt to deal with the extreme circumstances presented by national crisis.[46]

21. In *Nationwide News Pty Ltd v Wills*,[47] Brennan J was the only member of the Court to consider whether the impugned provision of the *Industrial Relations Act 1988* (Cth) was invalid for offending s 92. In doing so, his Honour stated that, "[t]he general criterion of invalidity of a law which places a burden on interstate intercourse is that the law is enacted for the purpose of burdening interstate intercourse."[48] South Australia agrees with this statement of principle. As to discernment of purpose in this context, there are passages in the judgment of Brennan J that suggest a formalistic method is apt with respect to measures that

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41 *Miller v TCN Channel Nine* (1986) 161 CLR 556, 566 (Gibbs CJ), 575 (Mason J), 595-596 (Brennan J), 622-3 (Deane J), 634 (Dawson J). Justice Murphy came to the same conclusion for different reasons.
42 *Miller v TCN Channel Nine* (1986) 161 CLR 556, 571 (Mason J), 615-618 (Deane J).
43 (1988) 165 CLR 360.
44 *Cole v Whitfield* (1988) 165 CLR 360, 393.
45 *Cole v Whitfield* (1988) 165 CLR 360, 406-407.
46 *Cole v Whitfield* (1988) 165 CLR 360, 407.
47 (1992) 177 CLR 1.
48 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 57 (Brennan J).

impose burdens upon the crossing of a border. These statements are arguably supportive of the Plaintiffs' primary submission. However, His Honour recognised the existence of exceptions in the following terms:[49]

> Cases prior to *Cole v Whitfield* admitted the validity of laws for the protection of a State against the introduction into the State of animals and plant diseases, noxious drugs, gambling materials and pornography. … Where the true character of a law, ascertained by reference to the 'grounds and design of the legislation, and the primary matter dealt with, [and] its object and scope', 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.

Although within the narrower ambit of an exception to a more general rule, the above passage adopts proportionality-style reasoning. Accordingly, even if his Honour's approach, which has not garnered the support of a majority of this Court,[50] were to be adopted, then the validity of the Directions would fall to be determined by reference to proportionality-style reasoning in any event.

22. In *Australian Capital Television Pty Ltd v Commonwealth*,[51] Dawson J, in dissent, was the only member of the Court who considered whether the *Broadcasting Act 1942* (Cth) infringed s 92. His Honour quoted the statement of Isaacs J from *Smithers,* but went on to say, "[t]hat does not, of course, mean that movement across State borders is immune from regulation."[52] His Honour then expressly endorsed proportionality-style reasoning as the means by which the "real object" of an impugned measure may be tested.[53] The Plaintiffs also note that Gaudron and McHugh JJ each refer to the decision of *Smithers*.[54] However, those references are to passages from the judgments of Griffith CJ and Barton J, which, as noted above, embrace proportionality-style reasoning (albeit not, at that time, within the rubric of s 92). No support can be drawn from the judgments of Gaudron and McHugh JJ for the correctness of the passage of Isaacs J in *Smithers*.

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[49] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 57-58 (Brennan J).
[50] See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 194 (Dawson J).
[51] (1992) 177 CLR 106.
[52] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 194 (Dawson J). The passage from *Smithers* is set out above at [12].
[53] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 195 (Dawson J).
[54] PS, [36].

23. In *Cunliffe v Commonwealth* (***Cunliffe***),[55] Brennan, Dawson, Toohey and McHugh JJ held that the *Migration Act 1958* (Cth) did not infringe s 92. Chief Justice Mason, in dissent, said, in a passage relied on by the Plaintiffs, that:[56]

> [A] law which in terms applies to movement across a border and imposes a restriction is invalid. But, a law which imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject matter other than interstate intercourse would not fail if the burden or restriction was reasonably necessary for the purpose of preserving an ordered society under a system of representative government and democracy and the burden or restriction was not disproportionate to that end.

Whilst this passage supports the Plaintiffs' primary submission, it has never secured the support of a majority of this Court. All members of the majority endorsed forms of proportionality-style reasoning with respect to determining whether burdens imposed on interstate intercourse infringe s 92.

24. In *AMS v AIF* (***AMS***),[57] the Court considered whether a parental order made under the *Family Court Act 1975* (WA) which had the effect of restricting the freedom of movement of one of the parents the subject of the order infringed s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth). Chief Justice Gleeson, McHugh and Gummow JJ (with whom Hayne J agreed on this issue) held that the practical operation test expressed in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (***North Eastern Dairy***),[58] and adopted in *Cole v Whitfield*[59] with respect to trade and commerce, operated with respect to each of the freedoms protected by s 92.[60] In assessing the validity of the order, their Honours adopted proportionality-style reasoning, asking whether it was "reasonably required" to achieve the objects of the Act.[61] In doing so, their Honours (with whom Hayne J agreed on this issue)[62] authoritatively endorsed the "reasonable regulation" test articulated by the Privy Council in the *Bank Nationalisation Case*.[63] Justices Gaudron, Kirby and Callinan also adopted proportionality-style reasoning.[64]

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55 (1994) 182 CLR 272.
56 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 308 (Mason CJ), relied on in PS, [37].
57 (1999) 199 CLR 160.
58 (1975) 134 CLR 559.
59 (1988) 165 CLR 360.
60 *AMS v AIF* (1999) 199 CLR 160, 175 [34] (Gleeson CJ, McHugh and Gummow JJ).
61 *AMS v AIF* (1999) 199 CLR 160, 179 [45] (Gleeson CJ, McHugh and Gummow JJ).
62 *AMS v AIF* (1999) 199 CLR 160, 232-233 [221].
63 *AMS v AIF* (1999) 199 CLR 160, 178 [43] (Gleeson CJ, McHugh and Gummow JJ). The passage from the *Bank Nationalisation Case* is set out above at [18].
64 *AMS v AIF* (1999) 199 CLR 160, 193 [101] (Gaudron J), 215-216 [162] (Kirby J), 250 [279] (Callinan J).

25. In *APLA Limited v Legal Services Commissioner of New South Wales* (***APLA***),[65] Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ held that the *Legal Profession Regulation 2002* (NSW) did not contravene s 92. Chief Justice Gleeson, Gummow and Heydon JJ all confirmed the "reasonably required" test.[66] Justice Gummow said, "[t]his approach should be accepted as the doctrine of the Court."[67]

26. This survey of the relevant case law demonstrates that there are certain statements in the authorities that support the criterion of operation test contended for by the Plaintiffs (most notably those of Isaacs J in *Smithers*, Starke J in *Gratwick* and Mason J in *Cunliffe*), but that none of these statements of principle have ever commanded majority support in this Court. The weight of authority favours the adoption of proportionality-style reasoning to test whether a law that burdens interstate intercourse is valid.

27. The decisions of *AMS* and *APLA* concerned the validity of measures that did not select as a criterion of their operation passage across a state border. Nonetheless, in the absence of binding authority to support a threshold criterion of operation test, the general statements of principle in *AMS* and *APLA* should be understood as endorsing 'reasonable necessity' testing with respect to all burdens on interstate intercourse. If, however, contrary to this submission, the statements of principle in *AMS* and *APLA* are understood as being confined to addressing measures that do not select as a criterion of their operation passage across a state border, and as being silent about the test to be employed where such a criterion is used, it is now open to the Court to endorse 'reasonable necessity' testing as applicable to determining the validity of any burden on interstate intercourse. For the reasons that follow, South Australia submits that the Court should do so.

Criterion of operation should be rejected on grounds of principle

28. Rejection of a threshold criterion of operation test of invalidity applicable to measures that burden interstate intercourse is favoured by several considerations of principle.

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[65] (2005) 224 CLR 322.

[66] *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 393-394 [177] (Gummow J).

[67] *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 393-394 [177] (Gummow J). Justice Hayne agreed, 461 [420].

29. In *Cole v Whitfield* this Court overcame what had become "a quite unacceptable state of affairs"[68] by expounding a new test to determine whether a measure that burdens interstate trade or commerce infringes s 92. There were two critical steps in the modernisation of the test. First, the Court clarified, by reference to the Convention Debates, the kinds of burden on trade or commerce that would infringe s 92. In so far as s 92 protected interstate trade and commerce, its purpose was to guarantee freedom from "discriminatory burdens of a protectionist kind".[69] Second, the Court rejected the criterion of operation test that had been developed in a series of cases by Dixon J.[70] That test was criticised as promoting form over substance and, thereby, being over-inclusive in some applications and under-inclusive in others. The form of an impugned measure would no longer be determinative of validity. Rather, it would be necessary to determine the real character of the measure in question by considering whether it could be justified by reference to a legitimate object.[71]

30. The two steps taken in *Cole v Whitfield* are consistent with, and directed to, two different stages of what has now become the accepted method for testing the validity of measures that burden constitutionally protected activity. The first step taken in *Cole v Whitfield* speaks to the identification of the relevant burden. The second step speaks to the issue of justification.

31. The Court in *Cole v Whitfield* held that the "notions of absolutely free trade and commerce and absolutely free intercourse are quite distinct"[72] and 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".[73] The distinctions drawn in *Cole v Whitfield* pertain to the first step in the Court's reasoning referred to above. In other words, the Court was clear that the narrowing effect on the protection of interstate trade and commerce effected by adopting the qualifiers of "discriminatory burdens of a protectionist kind", did not necessarily impose any corresponding limitation on the freedom of

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68 *Cole v Whitfield* (1988) 165 CLR 360, 385 (the Court).
69 *Cole v Whitfield* (1988) 165 CLR 360, 394 (the Court).
70 *Cole v Whitfield* (1988) 165 CLR 360, 400-403 (the Court).
71 *Cole v Whitfield* (1988) 165 CLR 360, 408 (the Court). See also *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 471-474 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
72 *Cole v Whitfield* (1988) 165 CLR 360, 388.
73 *Cole v Whitfield* (1988) 165 CLR 360, 394.

interstate intercourse.[74] That no such corresponding limitation existed was authoritatively confirmed by a majority of this Court in *Cunliffe*.[75] By contrast to trade and commerce, s 92 is concerned to protect against any effective burden upon interstate intercourse, not a subset thereof.[76]

32. Importantly, however, the Court's insistence on distinguishing interstate trade and commerce from interstate intercourse did not relate to the second step taken in *Cole v Whitfield*. Accordingly, the Plaintiffs' reliance[77] on *Cole v Whitfield* in support of the adoption of a criterion of operation test with respect to laws that burden interstate intercourse is, with respect, misplaced.

10 33. In recent times this Court has repeatedly emphasised substance over mere form in the context of discerning the validity of measures concerning constitutional guarantees and limitations.[78] In *APLA*, McHugh J, quoting *North Eastern Dairy*, spoke of this development in general terms:[79]

> The legal criteria of liability expressed in impugned legislation do not determine its constitutional validity. Validity is determined after examining 'the nature and quality of the restriction in the light of the known and proved economic social and other circumstances of its imposition and of the community in which it is imposed'.

34. The shortcomings associated with criterion of operation testing of the kind
20 advanced by the Plaintiffs, are notorious:

a. First, it is under-inclusive. By applying a categorical threshold test, but only to measures that facially offend s 92, it tests less stringently measures that, in practice, impose equivalent or greater burdens on the constitutionally protected activity than those that burden by their form. This feature of criterion of operation testing may prompt legislators to seek to avoid facial

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74 *Cole v Whitfield* (1988) 165 CLR 360, 387-388, 393.
75 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307 (Mason CJ), 346 (Deane J), 392 (Gaudron J), 395 (McHugh J).
76 *Cole v Whitfield* (1988) 165 CLR 360, 393 (the Court).
77 PS, [15]-[16].
78 *AMS v AIF* (1999) 199 CLR 160, 175 [34] (Gleeson, McHugh and Gummow JJ); *Bachrach (HA) P/L v Queensland* (1998) 195 CLR 547, 561 [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ), 320 (Toohey J), 328 (McHugh J); *Austin v Commonwealth* (2003) 215 CLR 185, 249 [124], 257-258 [143], 265 [168] (Gaudron, Gummow and Hayne JJ).
79 *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 368 [85] (McHugh), quoting *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559, 624 (Jacobs J).

invalidity by the adoption of "circuitous devices". The challenges associated with identifying such devices is well documented.[80]

b. Second, it is over-inclusive. By applying its categorical threshold test to all measures, indiscriminately, it creates a lacuna in legislative power to meet the exigencies of even the most extreme national crisis.[81] The lacuna may be satisfied by the creation of discrete exceptions to the general rule. However, identifying and monitoring the boundaries of such exceptions generates yet further difficulties.

35. Not only does the Plaintiffs' test suffer these shortcomings, it is internally incongruous, in that it posits two different methods by which legislative intention is to be discerned. On such an approach, where a measure burdens interstate intercourse using the border as its criterion of operation, its purpose is to be discerned exclusively by reference to that formal legal operation. Where, on the other hand, a measure burdens interstate intercourse other than by using the border as its criterion of operation, the measure's purpose is to be discerned by undertaking a form of proportionality testing. The first method conflates the measure's objects, means and practical effects; the second method recognises that a measure's 'true purpose', or its character, can only be objectively discerned, with the distinctions between legislative objects, means and practical effects faithfully maintained.[82]

36. Acceptance of the criterion of operation test propounded by the Plaintiffs would be tantamount to embracing a threshold test of 'legitimacy' or 'compatibility' of means. Such a pre-emptive, binary assessment of the constitutional compatibility of a measure's means has been expressly rejected by this Court in the context of the implied freedom of political communication.[83]

37. By contrast to the criterion of operation test proposed by the Plaintiffs, a single test of proportionality provides a means by which the substance of a measure, and its constitutional compatibility, may be discerned, notwithstanding its form. No doubt

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[80] *Cole v Whitfield* (1988) 165 CLR 360, 401 (the Court); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 575-576 (Mason J).

[81] See *Cole v Whitfield* (1988) 165 CLR 360, 406-407 (the Court).

[82] See *McCloy v New South Wales* (2015) 257 CLR 178, 205 [40] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 362-363 [100] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 93 ALJR 448, 504 [257] (Nettle J).

[83] *Brown v Tasmania* (2017) 261 CLR 328, 363-364 [104] (Kiefel CJ, Bell and Keane JJ), 373-376 [156] (Gageler J), 478 [480]-[481] (Gordon J).

difficult questions arise concerning the validity of measures that prevent movement of persons between States during times of crisis. However, those questions should be answered through the comprehensive "graduated inquiry"[84] demanded by a proportionality test, rather than by the crude instrument of criterion of operation testing.

38. Finally, rejection of a threshold criterion of operation test of invalidity applicable to measures that burden interstate intercourse accords consonance to the elements of the composite expression "trade, commerce and intercourse". That language does not "readily yield a distinction".[85] As discussed above, the distinction between the protection afforded trade and commerce, on the one hand, and intercourse, on the other, resides in the *nature of the burden* from which those activities are protected. Save for this distinction, the freedoms guaranteed by s 92 invite comparable enquiries. Interstate intercourse is afforded greater protection by the unconstrained burdens that trigger the engagement of s 92; not by the imposition of a wholly different test for validity, which sits uncomfortably with the undifferentiated language of s 92.

39. The consolidation of the proportionality testing applicable to each 'limb' of s 92 also finds support in the strikingly similar terms in which the relevant tests have been articulated in the leading decisions of this Court.[86]

Conclusion

40. The Plaintiffs' primary submission should be rejected. The authority of this Court speaks against it and in favour of a proportionality test. Further, there are powerful reasons of principle to reject a threshold test of invalidity for measures that burden interstate intercourse that would invalidate *any* measure that imposes such a burden by reference to border crossing. Such a test would favour form over substance, be internally incongruous and cause unjustified divergence between the two limbs of s 92.

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[84] *Brown v Tasmania* (2017) 261 CLR 328, 478 [480] (Gordon J).

[85] *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 456 [401], see also 456-457 [402] (Hayne J).

[86] *Betfair (No 1)* (2008) 234 CLR 418, 477 [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *AMS v AIF* (1999) 199 CLR 160, 175 [34], 178-179 [43]-[45] (Gleeson CJ, McHugh and Gummow JJ), 232-234 [221] (Hayne J); *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 393-394 [177] (Gummow J).

The 'reasonable necessity' test is not materially different from the 'reasonably appropriate and adapted' test developed in implied freedom jurisprudence

41. The Plaintiffs submit that any justification of an effective burden on interstate intercourse is to be assessed by a test "more stringent" than that applied to burdens on the implied freedom of political communication.[87] The only authority cited by the Plaintiffs' in support of this submission is a passage from the reasons of Gaudron J in *AMS*.

42. Whilst Gaudron J did urge a "more stringent" test with respect to the express guarantee contained in s 92 than that applicable in the jurisprudence concerning the implied freedom of political communication, in the passage immediately following that relied upon by the Plaintiffs, her Honour went on to explain the sense in which she proposed that "more stringent" approach. Her Honour said:[88]

> Thus I adhere to the view I expressed in *Cunliffe v The Commonwealth* that the test of infringement of the freedom of intercourse guaranteed by s 92 is as stated by Deane J in that case, namely, that 'a law which incidentally and non-discriminately affects interstate intercourse in the course of regulating some general activity, such as the carrying on of a profession, business or commercial activity, will not contravene s 92 if its incidental effect on interstate intercourse does not go beyond what is necessary or appropriate and adapted for the preservation of an ordered society or the protection or vindication of the legitimate claims of individuals in such a society.'

Insofar as her Honour is addressing proportionality testing, it is plain that her Honour did not advocate a difference in the intensity of the scrutiny with which that task is to be performed; indeed, on the contrary, her Honour refers to necessity and appropriate and adapted testing interchangeably. Rather, 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 (if they could be demonstrated to be justified). Of course, the adoption of a limitation of legitimate legislative object by reference to "the preservation of an ordered society" was rejected by a majority of this Court in *APLA*.[89]

43. Not only does the Plaintiffs' alternative submission find no support in authority, it is also unsound as a matter of principle. The s 92 jurisprudence of this Court has

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87 PS, [46]-[48].
88 *AMS v AIF* (1999) 199 CLR 160, 193 [101] (Gaudron J).
89 *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).

adopted a range of labels to describe the proportionality-style test that is engaged; "reasonably required",[90] "reasonably necessary",[91] "not disproportionate"[92] and "appropriate and adapted".[93] There is an obvious correspondence between the labels used by this Court to describe the test applicable to determine whether a burden may be justified in the context of s 92 and the implied freedom of political communication jurisprudence. The commonality of language is unsurprising because in both contexts the test is being applied for the same purpose: to assess whether a measure that burdens a constitutionally protected activity is justified by reference to a legitimate legislative end. However, the adoption of the same method of testing does not deny that the application of the test will be attuned to the nature and extent of the burden on the relevant constitutionally protected activity.

Assessing the proportionality or 'reasonable necessity' of the burden

44. It is unnecessary to recite all of the features of proportionality testing that have been developed in the cases concerning the implied freedom of political communication. Nonetheless, several observations may be made about their application in the context of determining whether a measure breaches s 92.

45. The level of abstraction at which the object of a measure is to be identified is at the level of identifying the "mischief" to which it is directed.[94] The object of a measure is the "public interest sought to be protected and enhanced".[95]

46. It is not open to doubt that the object of promoting public health and safety is legitimate in the relevant sense (even on stricter formulations that might require the

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90 *AMS v AIF* (1999) 199 CLR 160, 179 [45]-[46], 179-180 [48] (Gleeson CJ, McHugh and Gummow JJ), 233 [221] (Hayne J); *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); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 366 (Dawson J).

91 *Betfair (No 1)* (2008) 234 CLR 418, 477 [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair (No 2)* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ)); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307-308 (Mason CJ).

92 *AMS v AIF* (1999) 199 CLR 160, 249 [277], 250 [279] (Callinan J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 366 (Dawson J).

93 *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 474 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ); *AMS v AIF* (1999) 199 CLR 160, 193 [101] (Gummow J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 346 (Deane J), 392 (Gaudron J).

94 See *Brown v Tasmania* (2017) 261 CLR 328, 363 [101] (Kiefel CJ, Bell and Keane JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 232 [132] (Gageler J); *APLA Limited v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 394 [178] (Gummow J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 301 (Mason CJ); *Clubb v Edwards* (2019) 93 ALJR 448, 470 [70] (Kiefel CJ, Bell and Keane JJ).

95 *Brown v Tasmania* (2017) 261 CLR 328, 392 [209] (Gageler J) citing *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 300 (Mason CJ).

object to be necessary for the "preservation of an ordered society",[96] or "compelling",[97] this object qualifies).[98] An end may be legitimate even though it adopts a precautionary approach "to felt necessities"[99] and "deals prophylactically with matters of public concern".[100]

47. The common feature of the tools of suitability, necessity and adequacy of balance is that they each employ an assessment of *rationality* to gauge the proportionality or reasonable necessity of the impugned measure.[101] The rationality demanded of the measure is one explicitly informed and shaped by the constitutional landscape.[102] This means that a measure that interferes with constitutionally protected activity in a way or to an extent that is not rationally explicable in the face of its constitutional protection, is not relevantly rational.[103] This touchstone of rationality represents the need to identify the character of the measure *objectively*.

    a. The tool of "suitability" tests whether the impugned measure is rationally capable of advancing the putative legitimate end.[104] It requires a logical connection between the measure and the object(s) it purports to serve.[105] A measure that does not possess such a rational connection, cannot be characterised objectively as a measure that pursues those objects. In this way, the tool of suitability serves to cross-check that the purposes identified

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[96] *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307-308 (Mason CJ), 346 (Deane J); *AMS v AIF* (1999) 199 CLR 160, 193 [101] (Gaudron J).

[97] To the extent that some members of the Court favour this approach, a purpose of preserving the health and lives of persons to whom the freedoms in s 92 are accorded, will more readily justify a burden on those freedoms: see *McCloy v New South Wales* (2015) 257 CLR 178, 222 [99] (Kiefel CJ, Bell and Keane JJ).

[98] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 58 (Brennan J); *Chapman v Suttie* (1963) 110 CLR 321, 341 (Menzies J); *Ex parte Nelson [No 1]* (1928) 42 CLR 209, 218-219 (Knox CJ, Gavan Duffy and Starke JJ); *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 472-473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), see also *Tasmania v Victoria* (1935) 52 CLR 157, 168-169 (Gavan Duffy, Evatt and McTiernan JJ), 175-177 (Starke J); *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 110 (Barton J); *Gratwick v Johnson* (1945) 70 CLR 1, 12 (Latham CJ); *Commonwealth v Bank of NSW* (1949) 79 CLR 497, 641 (Lord Porter, delivering the judgment of the Privy Council).

[99] *McCloy v New South Wales* (2015) 257 CLR 178, 251 [197] (Gageler J).

[100] *McCloy v New South Wales* (2015) 257 CLR 178, 261-262 [233] (Nettle J); *Brown v Tasmania* (2017) 261 CLR 328, 421-422 [288] (Nettle J).

[101] *Clubb v Edwards* (2019) 93 ALJR 448, 470 [70] (Kiefel CJ, Bell and Keane JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 213 [68], 220 [91] (French CJ, Kiefel, Bell and Keane JJ).

[102] See *McCloy v New South Wales* (2015) 257 CLR 178, 220 [91] (French CJ, Kiefel, Bell and Keane JJ).

[103] *Clubb v Edwards* (2019) 93 ALJR 448, 470 [70] (Kiefel CJ, Bell and Keane JJ).

[104] *McCloy v New South Wales* (2015) 257 CLR 178, 210 [55], 217 [80] (French CJ, Kiefel, Bell and Keane JJ).

[105] See *McCloy v New South Wales* (2015) 257 CLR 178, 217 [80] (French CJ, Kiefel, Bell and Keane JJ); see also *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 48-49 [30] (French CJ and Bell J).

by statutory construction as being the purposes to which the measure is directed, are indeed objectively discernible as such.[106]

b. "Necessity" is a tool for assessing whether the means implemented by the measure includes aspects that impose a burden on a constitutionally protected activity, with no countervailing benefit. It is concerned with identifying obvious and compelling reasonably practicable alternative means that would advance the measure's purposes to the same extent but by imposing a lesser burden on a constitutionally protected freedom. The need for alternative means to be "obvious and compelling" is "consistent with the proper role of the courts in assessing legislation for validity".[107] Where such alternative means are identified, the impugned measure imposes some burden not rationally explicable by the promotion of its putative purposes.[108] Absent such explanation, the residual burden can only be rationally understood as the product of a purpose (of an impermissible kind) *to effect that very burden.*[109] Put simply, it is not rational to burden gratuitously a constitutionally protected activity.

c. The touchstone of the third tool – "adequacy of balance" – is again rationality.[110] The court's task is not "to determine 'where, in effect, the balance should lie'",[111] but to assess whether the balance struck by the measure is so "grossly disproportionate"[112] or "manifestly excessive"[113] by reference to the demands of the legislative purpose that it "*manifest[s] irrationality*".[114] That conclusion is reached only where the disregard for the constitutionally protected freedoms and values does not represent a rational attempt to balance those constitutional imperatives with the relevant

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[106] See *McCloy v New South Wales* (2015) 257 CLR 178, 232 [132] (Gageler J), 284 [320] (Gordon J).
[107] *Monis v The Queen* (2013) 249 CLR 92, 214 [347] (Crennan, Kiefel and Bell JJ), referring to *Betfair (No 1)* (2008) 234 CLR 418, 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *North Eastern Dairy Co Limited v Dairy Industry Authority (NSW)* (1975) 134 CLR 559, 608 (Mason J).
[108] See *Brown v Tasmania* (2017) 261 CLR 328, 370 [130] (Kiefel CJ, Bell and Keane JJ); see also *Clubb v Edwards* (2019) 93 ALJR 448, 511-512 [286]-[287] (Nettle J).
[109] See *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 474-475 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Unions NSW v New South Wales (Unions No 2)* (2019) 264 CLR 595, 674 [222] (Edelman J).
[110] *Clubb v Edwards* (2019) 93 ALJR 448, 470 [70] (Kiefel CJ, Bell and Keane JJ).
[111] *Clubb v Edwards* (2019) 93 ALJR 448, 470 [69] (Kiefel CJ, Bell and Keane JJ).
[112] *Brown v Tasmania* (2017) 261 CLR 328, 423 [290], 425 [295] (Nettle J); *Clubb v Edwards* (2019) 93 ALJR 448, 506-507 [266], 508-509 [272], 513 [292] (Nettle J).
[113] *Clubb v Edwards* (2019) 93 ALJR 448, 470 [69] (Kiefel CJ, Bell and Keane JJ), 508 [270], 508-509 [272] (Nettle J); see also 552 [497] (Edelman J).
[114] *Clubb v Edwards* (2019) 93 ALJR 448, 470 [66] (Kiefel CJ, Bell and Keane JJ).

legislative purposes. The confinement of the judicial task to assessing whether the balance struck is so grossly disproportionate as to manifest irrationality accords with the court's *supervisory* function.[115]

48. Where, assisted by these analytical tools, a measure cannot be demonstrated to pursue its legitimate object rationally, it will not be justified. In those circumstances, it will be taken to bear the character of its burdening effect, and not its putative legitimate object, and will be invalid.

Amicus submissions

49. The Court should refuse Mr Ludlow's application to be heard as an *amicus curiae*. Mr Ludlow challenges the Directions on grounds that are neither in issue between the parties, nor the subject of the questions stated for the opinion of the Court in this case. If Mr Ludlow wishes to pursue his challenge, it ought to be the subject of separate proceedings.

Part V: TIME ESTIMATE

50. It is estimated that 15 minutes will be required for the presentation of South Australia's oral argument.

Dated 19 October 2020

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[115] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 50 (Brennan J); *Brown v Tasmania* (2017) 261 CLR 328, 466 [434], 467 [436] (Gordon J); *Unions NSW v New South Wales (Unions No 2)* (2019) 264 CLR 595, 651 [153] (Edelman J).

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN:

Clive Frederick Palmer

First Plaintiff

Mineralogy Pty Ltd (ABN 65 010 582 680)

Second Plaintiff

and

State of Western Australia

First Defendant

Christopher John Dawson

Second Defendant

ANNEXURE:

PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Number	Description	Date in Force	Provision
Constitutional Provisions			
1	Commonwealth Constitution		S 92
Statutes			
2	*Banking Act 1947* (Cth)	27 November 1947	
3	*Broadcasting Act 1942* (Cth)	12 June 1942	
4	*Family Court Act 1975* (WA)	1 December 1975	
5	*Industrial Relations Act 1988* (Cth)	8 November 1988	

6	*Influx of Criminals Prevention Act 1903* (NSW)	3 October 1903	
7	*Judiciary Act 1903* (Cth)	25 August 1903	S 78A
8	*Migration Act 1958* (Cth)	8 October 1958	
9	*Northern Territory (Self-Government) Act 1978* (Cth)	22 June 1978	
10	*Stock Act 1901* (NSW)	30 October 1901	
11	*Vegetation and Vine Diseases Act 1928* (Vic)	30 September 1958	
12	*Wireless Telegraphy Act 1905* (Cth)	18 October 1905	
Statutory Instruments			
13	*Legal Profession Regulation 2002* (NSW)	1 September 2002	
14	*National Security (Land Transport) Regulations S.R 1944 N49* (Cth)	14 March 1944	
15	*Restriction of Interstate Passenger Transport Order* under the *National Security (Land Transport) Regulations S.R 1944 N49* (Cth)	23 June 1942	
16	*Quarantine (Closing the Border) Directions* (WA)	5 April 2020	