HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B26 of 2020

BETWEEN:

CLIVE FREDERICK PALMER
First Plaintiff

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

and

THE STATE OF WESTERN AUSTRALIA
First Defendant

CHRISTOPHER JOHN DAWSON
Second Defendant

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA (INTERVENING)

Part 1: Certification

1. The Attorney-General for the State of Tasmania (Intervening) certifies that this submission is suitable for publication on the internet.

Part 2 & 3: Basis of Intervention

2. Tasmania intervenes in support of the defendants.

Part 4: Argument

Concise Statement of Argument

3. The issue in respect of which Tasmania intervenes concerns *Quarantine (Closing the Border) Directions* (WA) ('the Directions'). It is noted that the plaintiffs appear no longer

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Filed and served on behalf of the Attorney-General for the State of Tasmania (intervening)

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to pursue the invalidity of the provisions of the *Emergency Management Act 2005* (WA), under which the *Quarantine (Closing the Border) Directions* (WA) are made.

4. In support of the validity of the Directions, Tasmania submits:

   (a) this case is to be determined on its facts and in light of the extraordinary circumstances it presents, including the need for a State to protect its citizens from COVID-19;

   (b) section 92 is a restriction on legislative power, it does not confer an individual right;

   (c) the Directions are for a purpose that is not directed, or pointed at interstate intercourse, and that the impediment they impose is no greater than is reasonably required to achieve their object;

   (d) nor do the Directions have any protectionist element necessary to impose a burden on interstate trade and commerce.

Material Facts

5. Tasmania respectfully adopts the factual analysis provided in Part IV of the defendants' submissions.

Introduction

6. This case should be determined according to its own facts and considerations and not by reference to the facts and considerations arising in earlier decisions.

7. Dixon J commenced his judgment in *Gratwick v Johnson*[1] by pointing out that:

> 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 it presents.[2]

8. Therefore, contrary to the plaintiffs' submissions **(PS[5])** the facts should not be put aside. *Gratwick v Johnson* did not establish that a State may not for a legitimate purpose regulate

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1 (1945) 70 CLR 1.

2 (1945) 70 CLR 1, 19 (Dixon J), see also, *AMS v AIF* (1999) CLR 160, 178 [43] (Gleeson CJ, McHugh & Gummow JJ), referring to 'reasonable regulation'. *Commonwealth v Bank of NSW* (1949) 79 CLR 497, 635, 640-641 (PC).

the movement of citizens across its borders. *Gratwick v Johnson* depends upon its facts.[3] The members of the Court identified nothing in the circumstances to support the Order to allow the Director-General of Land Transport to refuse Ms Johnson her permit to travel to Western Australia by rail. A different answer may have been given if the war had reached Australia and it was necessary to use the rail system for 'the movement of troops, munitions, war supplies or any like consideration.'[4] The burden was direct and it was not justified on the facts.

9. The facts of the present case are very different. The virus SARS-CoV-2 spreads the potentially fatal disease COVID-19. It presents an unquantifiable risk to those parts of the Australian population in which it indiscriminately establishes itself. Lives are at risk and lives have been lost. Questions of how to control it are quintessentially public health questions for the legislature and the executive of each State.

10. In the absence of the extraordinary threat to the population posed by COVID-19 it is inconceivable that a State would impose restrictions of the kind involved in this case, because of the obvious social, political and economic consequences. As the reasons of Rangiah J[5] demonstrate, the premise for the imposition of border regulation in the present circumstances is firmly rooted in public health to prevent the unquantifiable threat of the spread of the disease.

11. The object of the impugned direction is not to impede interstate intercourse and to the extent that the Directions do so, their effect is no greater than is reasonably required to achieve that object.

Individual rights

12. Although it is recognised that the constitutional guarantee of freedom of interstate intercourse extends to a guarantee of personal freedom 'to pass to and fro among the States without burden, hindrance or restriction'[6], there is nothing in the current authorities to indicate that such a guarantee amounts to a personal or individual right.

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3 (1945) 70 CLR 1, 15, (Latham J), 16 (Rich J), 17 (Starke J), 19 (Dixon J).
4 (1945) 70 CLR 1, 19 (Dixon J) and see 15 (Latham CJ) and 16 (Rich J).
5 *Palmer v State of Western Australia* (No 4) [2020] FCA 1221; **CB 122**.
6 *Gratwick v Johnson* (1945) 70 CLR 1, 17 (Starke J); *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360, 393 (the Court).

13. Rather, properly understood, the freedom of intercourse arises by virtue of a limitation on legislative power. As Brennan J observed in *Australian Capital Television Pty Ltd v Commonwealth*[7], the freedom of intercourse guaranteed by s 92 is not to be understood as a personal right but as 'an immunity consequent on a limitation of legislative power'. That observation is reflective of the earlier statements of Mason J (as he then was) in *Pilkington v Frank Hammond Pty Ltd*[8] that section 92 'does not in terms speak of the private right of the individual to engage in trade, commerce and intercourse among the States' and 'the section protects the right of the individual to engage in interstate trade, commerce and intercourse but it needs to be recognised that this protection is incidental to, and in a sense consequential upon, the protection which is given to the entire concept of inter-State trade, commerce and intercourse'.

14. Further, the individual rights theory of s 92 was left behind in *Cole v Whitfield*.[9] It is now accepted that s 92 and the freedoms it guarantees operate to impose a limitation on the legislative powers of the States and the Commonwealth.[10]

15. The protection given by s 92 is to the movement of people. It does not amount to the conferral of a personal right.[11]

Freedom of Intercourse

16. In *Cole v Whitfield*[12] the Court said:

> The purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries.[13]

17. *Cole v Whitfield*[14] recognised that in the operation of s 92 there is a distinction to be made between trade and commerce, on one hand and interstate intercourse on the other.[15]

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7 (1992) 177 CLR 106, 150 (Brennan J).
8 131 CLR 124, 185-186 (Mason J).
9 *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 266 [42] (French CJ, Gummow, Hayne, Crennan & Bell JJ); *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 59 (Brennan J).
10 *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 258 [14] (French CJ, Gummow, Hayne, Crennan & Bell JJ) 282[91] (Kiefel J).
11 *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 55 (Brennan J).
12 [1988] HCA 18; (1988) 165 CLR 360.
13 [1988] HCA 18; (1988) 165 CLR 360, 391.
14 [1988] HCA 18; (1988) 165 CLR 360.
15 [1988] HCA 18; (1988) 165 CLR 360, 388 (the Court); *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 82 (Deane and Toohey JJ).

However, the limits, or content of the distinction is not settled. In *APLA v Legal Services Commissioner (NSW)*[16], Hayne J noted that the text of s 92 does not readily yield a distinction between interstate trade and commerce and interstate intercourse, yet the accepted premise was that there are different tests.[17]

Trade and Commerce and Intercourse

18. Dawson J observed in *Australian Capital Television Pty Ltd v The Commonwealth* that 'intercourse obviously extends beyond the realm of protectionism', but that the absolute freedom guaranteed under s 92 for both 'interstate trade and commerce' and 'interstate intercourse' is 'not freedom from all restriction; it is not a prescription for anarchy.' [18]

19. The concepts of 'intercourse' and 'trade and commerce' are, however, not mutually exclusive. In *Nationwide News Pty Ltd v Wills*, Brennan J said:

> Although the conception of intercourse is distinct from the conception of `trade' or of `commerce', instances of intercourse may be, and frequently are, instances of trade and commerce.[19]

20. It is not yet settled in a case involving an overlap of interstate trade and commerce and interstate intercourse, or where the law is said to burden both aspects, whether the question will be resolved by applying the test applicable to trade and commerce.[20] Even if to suggest otherwise would conflict with 'the Court's insistence in *Cole v Whitfield* that s 92 does not operate as a source of unfair and potentially divisive preference of interstate trade over intrastate trade' the distinction may not be material.[21] If it is suggested that in the development of the law since *Cole v Whitfield*, first, that protectionism is a sufficient, but not necessary condition of the trade and commerce limb[22] and secondly, that the operation of the intercourse limb is 'confined rather more closely' than was anticipated[23] by *Cole v Whitfield*, the rationalisation of the tests may not be too remote from one

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16 (2005) 224 CLR 322.
17 (2005) 224 CLR 322, 456-457 [401]–[402]. (Hayne J).
18 [1992] HCA 45; (1992) 177 CLR 106, 192 (Dawson J).
19 [1992] HCA 46; (1992) 177 CLR 1, 54-55, 59 (Brennan J).
20 Cf., the judgments in *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 390-391 [165] (Gummow J), 458 [408] (Hayne J). Gleeson CJ & Heydon J left the question open. And see *Nationwide News* (1992) 177 CLR 1, 83-84 (Deane & Toohey JJ) regarding the true character of the law.
21 *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322, 391 (Gummow J)
22 cf., Hon Justice Susan Kiefel, *Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives* 36(2) Monash Law Review 1, 9.
23 *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322, 463 [426] (Hayne J).

another.[24] However, given the lack of vigour with which the plaintiff's submissions concerning the 'trade and commerce' limb are made, this case should not present the occasion to settle the question.

Constitutional tests

21. It is well accepted that the freedom guaranteed by s 92 is not absolute.[25] The judgments in *Cunliffe v Commonwealth of Australia*[26] accept the qualified nature of the freedom, as it relates to interstate intercourse. The distinction to be made between the protectionism obnoxious to free trade and commerce and a factum that may result in the invalidity of a law that may offend interstate intercourse has depended on the incremental development of the following propositions.[27]

22. First, s. 92 does not require `that every form of intercourse must be left without any restriction or regulation'.[28]

23. Secondly, the working out of the measure of freedom from legislative, executive or curial interference in respect of interstate intercourse in each case should be decided, 'as far as may be, on the specific considerations of features which it presents.'[29]

24. Thirdly, a law which in terms applies to movement across a border *and* is enacted for the purpose of imposing a burden or restriction on interstate intercourse is invalid.[30] Cases in this category are subject to the 'general criterion of invalidity' identified by Brennan J in *Nationwide News Pty Ltd v Wills*[31], viz, that State borders are 'in themselves' used as

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24 See too, James Stellios *The Intercourse Limb of Section 92 and the High Court's Decision in APLA v Legal Services Commissioner* (2006) 17 PLR 5, 15-16.
25 [1988] HCA 18; (1988) 165 CLR 360, 393.
26 [1994] HCA 44; (1994) 182 CLR 272.
27 [1994] HCA 44; (1994) 182 CLR 272, 307-308 (Mason CJ).
28 [1994] HCA 44; (1994) 182 CLR 272, 307-308 (Mason CJ); see also *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160, 177 [40] (Gleeson CJ, McHugh and Gummow JJ).
29 *Cole v Whitfield* (1988) CLR 360, 393; *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160, 177 [40] (Gleeson CJ, McHugh and Gummow JJ) citing *Gratwick v Johnson* (1945) 70 CLR 1, 19 (Dixon J).
30 *Nationwide News* (1992) 177 CLR 1, 57 (Brennan J). See also *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160, 177 [40] (Gleeson CJ, McHugh and Gummow JJ).
31 [1992] HCA 46; (1992) 177 CLR 1, 57 (Brennan J).

barriers to interstate intercourse[32]. These include cases like *R v Smithers ex parte Benson*[33] and *Gratwick v Johnson*[34].

25. This proposition emphasises that burden is fundamental to any attack on the validity of an impugned law. That question will depend on the correct characterisation of the impugned law by reference to its object or purpose.[35]

26. Fourthly, a law which in its practical operation imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject matter other than interstate intercourse does not fail if the burden or restriction is reasonably required to achieve the objects of the law[36].

10 27. In respect of the fourth proposition, in *Nationwide News*, Brennan J proposed the following test.

> If the law is enacted for some other purpose, then, provided the law is appropriate and adapted to the fulfilment of the other purpose, an incidental burdening of interstate intercourse may not be held to invalidate the law. A law may be found to be enacted for the prohibited purpose by reference to its meaning or by reference to its effect.[37]

28. Brennan J adhered to that test in *Cunliffe v The Commonwealth*.[38] However, other members of the Court thought that the question of proportionality should be evaluated against an external standard. In the development of this proposition there was suggestion
20 that the working out of this measure involved an external standard, expressed in various ways, including 'the preservation of an ordered society',[39] 'under a system of representative government and democracy and the burden or restriction was not disproportionate to that end'[40], 'reasonably necessary for the government of a free society

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32 See also James Stellios *The Intercourse Limb of Section 92 and the High Court's Decision in APLA v Legal Services Commissioner* (2006) 17 PLR 5, 11-12.
33 (1912) 16 CLR 99.
34 (1945) 70 CLR 1.
35 *APLA Ltd v Legal Services Commissioner (NSW)* (2005)224 CLR 322, 394 [178] (GummowJ).
36 *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160, 177 [45], [46] (Gleeson CJ, McHugh and Gummow JJ).
37 [1992] HCA 46; (1992) 177 CLR 1, 57 (Brennan J).
38 [1994] HCA 44; (1994) 182 CLR 272, 333, n.90 (Brennan J); see also Dawson J, 366, where his Honour adhered to the view he expressed in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 196-197.
39 [1994] HCA 44; (1994) 182 CLR 272, 308 (Mason CJ), 346 (Deane J), 392 (Gaudron J).
40 [1994] HCA 44; (1994) 182 CLR 272, 308 (Mason CJ).

regulated by the rule of law'[41] 'or the protection or vindication of the legitimate claims of individuals'[42] and including weighing competing public interests[43].

29. However, reference to an external standard has been rejected in favour of a test looking to the objects of the law[44]. In *AMS v AIF*[45] Gleeson CJ, McHugh and Gummow JJ noting the differences in the judgments in *Cunliffe*, considered that five of them reflected reasoning similar to that of the Privy Council in the *Bank Nationalisation Case*[46] concerning 'reasonable regulation'. The test articulated by their Honours and Kirby J[47] did not turn on an external standard. In *APLA v Legal Services Commissioner*, Gleeson CJ and Heydon J, said that given the object of the regulations prohibiting advertising legal services was not to impede interstate intercourse:

> The test to be applied therefore is whether the impediment to such intercourse imposed by the regulations is greater than that reasonably required to achieve the object of the regulations.[48]

Gummow J proposed a test in similar terms and held that it should be the accepted doctrine of the Court.[49] Hayne J agreed with Gummow J.[50]

30. It is submitted, then, that the questions to be asked in relation to a law that is said to be invalid under s 92, are:

(a) whether the impugned law burdens the freedom; and, if so,

(b) is the impediment imposed by the impugned law greater than is reasonably required to achieve the object of the law.

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41 [1994] HCA 44; (1994) 182 CLR 272, 396 (McHugh J).
42 [1994] HCA 44; (1994) 182 CLR 272, 346 (Deane J), 392 (Gaudron J).
43 [1994] HCA 44; (1994) 182 CLR 272, 308 (Mason CJ).
44 *APLA Ltd v Legal Services Commissioner (NSW)* (2005)224 CLR 322 at 461 [419]-[420] (Hayne J).
45 (1999) 199 CLR 160.
46 *The Commonwealth v Bank of NSW* (1949) 79 CLR 497, 639-641.
47 *AMS v AIF* (1999) 199 CLR 160, 236 215-216 [162].
48 (2005) 224 CLR 322, 353, citing *AMS v AIF* (1999) 199 CLR 160, 178-180 [41] – [48] (Gleeson CJ, McHugh & Gummow JJ); 232-233 [221] (Hayne J).
49 (2005) 224 CLR 322, 393-394, citing AMS v AIF *AMS v AIF* (1999) 199 CLR 160, 178-180 [43] – [45], (Gleeson CJ, McHugh & Gummow JJ; 233 [221] (Hayne J).
50 (2005) 224 CLR 322, 461 [420] (Hayne J).

Proportionality

31. The test of proportionality for cases under s 92 is not doctrinally the same as 'the *McCloy* test' as formulated *McCloy v New South Wales*,[51] modified in *Brown v Tasmania*[52] and authoritatively stated in *Clubb v Edwards*.[53] The area of operation and scope of an implication such as the implied freedom of political communication has been said to be significantly different from those freedoms guaranteed by s 92[54]. Moreover, the 'structured proportionality' criteria used by the Court to assist[55] in the answer to the third of the questions in the *McCloy* test are not constitutional principles. They are tools for analysis[56] and are not necessarily applicable in all cases involving questions of proportionality.[57]

32. The *McCloy* test is inextricably tied to an external standard, viz, the constitutionally prescribed system of representative and responsible government.[58] The test for the determination in a s 92 case, requires the law to be considered by reference to its own objects.[59]

33. 'Reasonable necessity' for the constitutional test for s 92 cases was noted in *Unions NSW v New South Wales*.[60] Although expressed in slightly different terms in *APLA*, what is 'reasonably required' to achieve the object of a law impugned in a s 92 case invites comparison with the criterion of 'necessity' used in the proportionality analysis referred to in *McCloy*. Whether there is a less restrictive method of achieving the object may be a consideration relevant to answer the question of what is reasonably required. However, the tests have different consequences.

34. In the case of the implied freedom of political communication, if the question of whether there are less restrictive means available is answered in the affirmative, the law will fail

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51 (2015) 257 CLR 178, 194-195 [2] (French CJ Kiefel, Bell & Keane JJ), 375-376 [156] (Gageler J), 416 [277] (Nettle J).
52 (2017) 261 CLR 328, 363-364 [104].
53 (2019) 93 ALJR 448, 462 [5] (Kiefel CJ, Bell & Keane JJ).
54 *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1 at 81 (Deane & Toohey JJ).
55 *Clubb v Edwards* (2019) 93 ALJR 448, 462 [5] (Kiefel CJ, Bell & Keane JJ).
56 *McCloy v NSW* (2015) 257 CLR 178, 195-196 [4], 213 [68] (French CJ Kiefel, Bell & Keane JJ).
57 *Murphy v Electoral Commissioner* [2016] HCA 36 (2016) 261 CLR 28, [37] (French CJ & Bell J) [101] (Gageler J) [297] to [303] (Gordon J).
58 *McCloy v NSW* (2015) 257 CLR 178, 195-196.
59 Cf. *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 392 (Gaudron J) and *AMS v AIS* (1999) 199 CLR 160, 193 [101] (Gaudron J). The tests are not the same.
60 (2019) 264 CLR 595, 615 [42] (Kiefel CJ, Bell and Keane JJ), referring the *Betfair* (2008) 234 CLR 418.

because it does not meet the criteria required to protect the constitutionally prescribed system of representative and responsible government.[61]

35. However, in a section 92 case, the question of whether there is another law that achieves the same purpose assists in the characterisation of the impugned law and whether it overreaches its purpose.[62] For example, in *Betfair Pty Ltd v Western Australia*[63] the Court considered that the prohibitions imposed by the Western Australian legislation with the object of ensuring the integrity of the racing industry was not the least restrictive method of doing so.

36. It is submitted that the constitutional questions to be answered are those identified by the majority of the Court in *APLA* and that there may be different means of analysis employed by the Court to answer them, much in the way that the Court has accepted the different means available to examine the third question in *McCloy*.

37. Leaving aside laws with no object other than interference with freedom of movement, whichever method of analysis is employed, the answer to the constitutional questions for s 92 cases depends on the measure of the burden (if any) of the impugned law (properly characterised) against its own object.

The Protection of Citizens

38. It is submitted that while what is reasonably required is not resolved by the law as it was prior to *Cole v Whitfield*, questions relating the reasonable limits of law may be informed by those authorities.[64] As Brennan J wrote in *Nationwide News v Wills*:

> Cases prior to *Cole v Whitfield* admitted the validity of laws for the protection of a State against the introduction into the State of animal[65] and plant[66] diseases, noxious drugs[67], gambling materials and pornography[68]. The Privy Council said that permissible regulation of trade might take the form 'of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens'.[69]

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61 *McCloy v NSW* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ).
62 Shipra Chordia, *Border closures, COVID-19 and s 92 of the Constitution – what role for proportionality (if any)?* https://auspublaw.org/2020/06/border-closures-covid-19-and-s-92-of -the-constitution/.
63 (2008) 234 CLR 418.
64 *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 57-58 (Brennan J).
65 *Ex parte Nelson (No 1)* (1928) 42 CLR 209, 218-219.
66 *Tasmania v Victoria* (1935) 52 CLR 157, 168-169.
67 *The Commonwealth v Bank of NSW* (1949) 79 CLR 497, 641, [1950] AC 235, 311-312.
68 *R v Connare; Ex parte Wawn* (1939) 61 CLR 596, 620, 628; see also *Mansell v Beck* (1956) 95 CLR 550.
69 *The Commonwealth v. Bank of N.S.W.*(1949) 79 CLR , 641; (1950) AC, 312. See also *Fergusson v. Stevenson* [1951] HCA 49; (1951) 84 CLR 421, 434-435, and the views of Inglis Clark in *Studies in*

> 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"[70], 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[71]. However, the severity of and need for the prohibitory measure are relevant considerations.[72] After *Cole v. Whitfield*, these cases need not be seen as exceptions to a general invalidation of laws impairing the guaranteed freedom of interstate trade and commerce, but the reasoning in these cases is material to the scope of the guaranteed freedom of interstate intercourse.[73]

10 39. The public health of citizens is clearly a non-economic value that may form a legitimate object for the law of a State.[74]

40. This brings into focus the Directions in the present case. Before *Cole v Whitfield* the categories of case identified by Brennan J, were said to be 'exceptional categories'.[75] However, it could not be suggested that laws in the nature of these exceptional categories would be found to be unreasonable regulation of interstate intercourse on the tests developed since *Cole v Whitfield.*

The Object of the Direction

41. The Directions in the present case prohibit a person from entering Western Australia unless the person is an exempt traveller.[76]

20 42. The expressed purpose of the Directions is 'to limit the spread of COVID-19. For the reasons referred to at **[9]** above, there is no reason to further examine that purpose.

Nature and extent of the Burden

43. It is accepted that, as a result of the pursuit of that object, the direction burdens the freedom of intercourse guaranteed by s 92, but it only does so incidentally, in pursuit of limiting the spread COVID-19.

Australian Constitutional Law, (1901), p 146 and of Harrison Moore in *The Constitution of the Commonwealth of Australia*, 2nd ed. (1910), p 571, and cf. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901), pp 850-853.

70 *Ex parte Nelson (No.1)* (1928) 42 CLR 209, 218.

71 *Chapman v. Suttie* [1963] HCA 9; (1963) 110 CLR 321, 341.

72 *Tasmania v. Victoria* (1935) 52 CLR 157, 168-169.

73 *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 57-58 (Brennan J).

74 Cf., Hon Justice Susan Kiefel, *Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives* 36(2) Monash Law Review 1, 10; and see too *North Eastern Dairy Co Ltd v Dairy Industry Authority* (NSW) (1975) 134 CLR 559, 608 (Mason J).

75 *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 57-58 (Brennan J).

76 *Quarantine (Closing the Borders) Consolidated Direction*: **CB (vol 4) 1449.**

44. Should it be necessary to characterise the burden, it may be accepted that is significant. However, the question is whether the direction is reasonably required to limit the spread of COVID-19.

Is the Direction reasonably required?

45. It is submitted that the findings of fact made by Rangiah J on remittal,[77] foreclose this issue. Without limiting the Court's analysis of those findings, the following matters are significant.

(a) No isolation measures, apart from those contained in the Directions, would be equally effective to reduce the risk of reintroduction of COVID-19 into the Western Australian community and the risk of community transmission amongst the community.[78]

(b) Relaxing the measures will increase the risk of morbidity, mortality and community transmission.[79]

(c) The risk of pre-symptomatic, or asymptomatic cases entering Western Australia is substantially greater without the community isolation measures and the Directions.[80]

(d) The community isolation measures and the Directions have substantially reduced the risk of community transmission of the virus from an unknown case entering Western Australia in circumstances where containment measures, personal isolation measures and community isolation measures (apart from the Directions) are unlikely to be adequate. And the Directions have been effective to prevent further community transmission in WA and are likely to be successful in the future. The use of one set of measures is unlikely to do so.[81]

46. In the circumstances of COVID-19, there is no present measure that will be sufficient to ensure that the population of Western Australia is entirely safe from COVID-19. That is because a person may present to the border in a pre-symptomatic, or asymptomatic state.

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77 *Palmer v State of Western Australia (No 4)* [2020] FCA1221: **CB (vol 1) 122.**
78 **CB (vol 1) 211**, [363] k; **213** [365] (h).
79 **CB (vol 1) 212** [363] l and m.
80 **CB (vol 1) 213** [365](d).
81 **CB (vol 1) 213** [365] (g).

There are many other complex factors that allow the risk to minimised to the best extent possible, but not eliminated. The risk remains unquantifiable.

47. In those circumstances the question whether the Directions are reasonably required to limit the spread of COVID-19 must be yes.

Trade and commerce

48. The Plaintiffs argue (although faintly) that the Directions are also invalid by reason of contravening the trade and commerce limb of s 92.

49. The Directions are said to be invalid because they are discriminatory against persons seeking to enter Western Australia and by that discrimination the Directions have a protectionist legal operation and practical effect. The protectionism is said to arise because the operative effect is that markets in Western Australia are dependent on direct human presence.

50. To the extent to which the Directions and the law pursuant to which they are made might be said to be directed to trade and commerce (which we submit they are not), it is submitted that they do not discriminate against interstate trade and commerce in a protectionist sense.

51. As the court said in *Betfair Pty Ltd v Racing NSW* [82]:

> It is the concept of protectionism which supplies the criterion by which discriminatory laws may be classified as rendering less than absolutely free trade and commerce among the States.[83]

52. Contrary to the Plaintiffs' suggestion that 'all that is required is that some likely effect upon the plaintiffs' ability to compete is demonstrated' **(PS [51])**, it is not the effect of the Directions upon particular traders which is in issue but, rather, the effect upon interstate trade.[84] Whilst 'one trader may be a surrogate or representative of a particular class of activity… that does not mandate an outcome driven by the particular business methods adopted by any particular trader'.[85] The Plaintiffs' suggestion relies upon but

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82 (2012) 249 CLR 217.

83 *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 265 [36] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

84 *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 268 [46] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

85 *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 267 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

omits the critical final words from the passage of Kiefel J's judgment in *Betfair*[86] that the effect upon its ability to compete is 'as an interstate trader'. The Plaintiffs also fail to recognise that in an assessment of the effect of the impugned measure on the Plaintiffs, the Plaintiffs are merely representative of interstate trade[87].

53. There is no serious suggestion that the Directions discriminate against interstate trade and in doing so also protect the interests of intrastate trade. There is no suggestion of protectionism at all.

54. The suggestion that the Directions are discriminatory against persons wishing to enter Western Australia is not the correct test. The correct test is directed to trade, not persons. Similarly, the suggestion that the Directions have a protectionist legal operation and practical effect 'by that discrimination' is incorrect as it seeks to improperly merge the concepts of discrimination and protectionism.

Part 5: Estimated Time for Oral Submissions

55. Tasmania estimates that it will need 10 minutes to present oral submissions to the Court.

DATED 19 October 2020

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86 *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 290 [119]-[120] (Kiefel J).
87 *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 267 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 289 [113] (Kiefel J).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B26 of 2020

BETWEEN:

CLIVE FREDERICK PALMER
First Plaintiff

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

and

THE STATE OF WESTERN AUSTRALIA
First Defendant

CHRISTOPHER JOHN DAWSON
Second Defendant

ANNEXURE TO SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, Tasmania sets out below a list of the constitutional, statutes and statutory instruments referred to in these submissions.

No	Description	Date in Force	Provisions
Legislation			
1.	*Commonwealth Constitution*		s 92
2.	*Emergency Management Act 2005* (WA)	4 April 2020	
Statutory Instruments			
4.	*Quarantine (Closing the Border) Directions 2020*	Consolidated version as at 16 September 2020	