HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B26 of 2020

BETWEEN: Clive Frederick Palmer
First Plaintiff

Mineralogy Pty Ltd ABN 65 010 582 680
Second Plaintiff

and

The State of Western Australia
First Defendant

Christopher John Dawson
Second Defendant

PLAINTIFFS' SUBMISSIONS

PART I: CERTIFICATION

1. The plaintiffs certify that this submission is in a form suitable for publication on the internet.

PART II: ISSUES IN THE SPECIAL CASE

2. The issues are represented by the questions of law arising in the proceeding in the form of a special case for the opinion of the Full Court, as follows:

   a) Are the *Quarantine (Closing the Border) Directions* (WA) (**Directions**) and/or the authorising *Emergency Management Act 2005* (WA) (**Act**) invalid (in whole or in part, and if in part, to what extent) because they contravene s 92 of the Constitution?

   b) Who should pay the costs of the special case?

PART III: SECTION 78B NOTICE

3. The plaintiffs have served Notices pursuant to 78B of the *Judiciary Act 1903* (Cth) on all State and Territory Attorneys-General.

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PART IV: JUDGMENT BELOW

4. This proceeding is in the original jurisdiction of the High Court. There is no judgment below.

PART V: FACTS

5. The facts available for this Court to resolve the questions reserved are set out in the Special Case and in the findings of Rangiah J on the partial remitter.[1] For the reasons set out below, the plaintiffs submit that the facts beyond the making of the Directions are largely irrelevant, as the invalidity of the Directions can and should be determined on their face consistent with well-settled authority of this Court. It is only if this Court entertains a departure from settled authority that it may become necessary to consider facts going to whether the Directions are "*reasonably necessary*" or whether "*the burden on freedom of interstate intercourse is no more than is proportionate to the legitimate aim pursued*".

6. The essential facts are these:

   a) The virus SARS-CoV-2, and the disease that it causes, COVID-19, were first identified in Wuhan, China, in late December 2019.[2] The first case of COVID-19 in Australia was detected on 25 January 2020.[3] The World Health Organisation declared COVID-19 to constitute a Public Health Emergency of International Concern on 30 January 2020.[4] The first case of COVID-19 in Western Australia was detected on 21 February 2020.[5]

   b) On 15 March 2020, the Western Australian Minister for Emergency Services, acting pursuant to s 56 of the Act, declared a state of emergency over the whole of the State of Western Australia to address COVID-19,[6]

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1 *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221 (**Palmer (No. 4)**).
2 Court Book (**CB**) p.350; Third Amended Defence (**Defence**) par. 11(a)-(b).
3 CB p.266.
4 CB p.352.
5 Defence par. 30(b).
6 Defence par. 5.

thereby enlivening the powers of the second defendant to give directions under the Act having the force of law.

c) On 30 April 2020, the Premier of Western Australia announced an intention to close the Western Australian border to the rest of Australia with effect from the weekend of 4 and 5 April 2020. On 5 April 2020, the second defendant, acting pursuant to the Act, issued the Directions[7]. Paragraph 4 of the Directions provides a direct prohibition on interstate travel:

> *A person must not* ***enter*** *Western Australia unless the person is an* ***exempt traveller****.*

d) The terms in bold text are defined terms in the Directions. In essence, the Directions effected a closure of the Western Australian border to all but essential travellers from other parts of Australia, and placed all non-essential entry into Western Australia at the absolute discretion of the second defendant. The number of travellers permitted to enter Western Australia pursuant to the Directions has been substantially reduced from levels before the Directions were made.[8]

e) The state of emergency declaration, and the Directions, have been continued in force by extensions to the state of emergency pursuant to s. 58 of Act and remain in force.[9]

7. The standing of the plaintiffs (which is not contested) is established by the following facts:

a) On 18 May 2020, the first plaintiff sought permission to enter Western Australia, which was refused.[10]

b) The second plaintiff is a privately held company under the direct and personal executive management of the first plaintiff.[11] The second plaintiff has offices and staff in Brisbane and Perth, derives the majority

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7 Palmer (No. 4), [2].
8 Palmer (No. 4), [119]-[121].
9 Special Case, par. 25.
10 Special Case, par. 82.
11 Special Case, par. 76.

of its income from Western Australia, and is involved in high-value litigation and arbitration there.[12]

c) By reason of the Directions, the first plaintiff, and staff of the second plaintiff, are unable to travel to Western Australia.

8. Were the occasion to arise (which the plaintiffs submit it does not) to enter into consideration of the reasonable need for, or proportionality of, the Directions, the following facts, as at the date of Rangiah J's judgement, are relevant:

a) Where there have been no reported cases of community transmission of COVID-19 within a community for two incubation periods (28 days), the disease can be described as "eliminated", and that is "as low risk situation as can reasonably be hoped for".[13]

b) The contribution of the closure of the Western Australian border pursuant to the Directions from 5 April 2020 has been "fairly small" compared to Personal Isolation Measures, Containment Measures and Community Isolation Measures, because the growth rate of COVID-19 was already below 1 when the Directions were introduced.[14] The defendants specifically failed to prove, on the remitter, the allegation in paragraph 39C(c) of their defence that measures other than the Directions were not wholly effective in reducing the rate of community transmission as far as possible below a rate of 1.[15]

c) There is a negligible probability of infectious persons travelling to Western Australia from places in which there have been no cases of community transmission with an unknown source for 28 days (excluding persons merely transiting through such places from places that have had cases of community transmission from unknown sources within that time).16

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12 Special Case, par. 77-81.
13 Palmer (No. 4), [113].
14 Palmer (No. 4), [137]-[138], [152].
15 Palmer (No. 4), [365].
16 Palmer (No. 4), [247].

d) There have been no cases of community transmission of COVID-19 from an unknown source within the past 28 days in any parts of Australia outside of the city of Sydney or the State of Victoria.

e) The probability of an infected person entering Western Australia with the Directions in place is qualitatively the same (i.e. no more than low, and in the case of Tasmania very low) than if the Directions permitted travel to Western Australia from South Australia, Tasmania, the Northern Territory or the Australian Capital Territory or if the Directions were replaced with a combination of entry and exit screening, mandating of face masks, and testing of persons arriving from those places.[17]

f) A "hotspot" regime can substantially reduce the risk of importing COVID-19 into Western Australia[18] and is a reasonably practical measure.[19] The defendants specifically failed to prove, on the remitter, the allegation in paragraph 39C(i) of their defence that, from a health perspective, easing of the closure of the Western Australian border to the whole of the rest of Australia pursuant to the Directions could only occur without increased risk if there was no community transmission within other States and Territories. To the contrary, border restrictions could be eased with some States and Territories without a significantly increased risk of morbidity and mortality within the Western Australian community or population.[20]

PART VI: ARGUMENT

Summary of argument

9. In summary, the Directions are wholly invalid on the following basis.

10. The Directions are materially identical to the orders considered by this Court in *Gratwick v Johnson*[21] (***Gratwick***). In the relevant sense discussed in the cases

17 Palmer (No. 4), [274], [277], [281], [285], [305], [320]-[321].
18 Palmer (No. 4), [349].
19 Palmer (No. 4), [360].
20 Palmer (No. 4), [365].
21 (1945) 70 CLR 1; [1945] HCA 7.

below, the Directions are "aimed at" or "directed to" the crossing of the Western Australian border by persons from States outside of Western Australia.

11. This Court in *Gratwick* held, unanimously, orders that were aimed at movement across a State border offended the absolute freedom of intercourse conferred by s 92 and could not be justified on any terms. In so holding, the conclusion in *Gratwick* was consistent with an earlier, also unanimous, decision of this Court in *R v Smithers; Ex parte Benson*[22] (***Smithers***).

12. In *Cole v Whitfield*[23] ***(Cole)*** a unanimous court of Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ considered *Gratwick* authoritative on this point. Subsequently in *Australian Capital Television Pty Ltd v Commonwealth*[24] (***ACTV)*** Dawson, Gaudron and McHugh JJ referred to *Smithers* with approval. In *Cunliffe v Commonwealth*[25] (***Cunliffe)*** all of Mason CJ, Dawson, Brennan, Deane and Gaudron JJ referred with approval to this line of authority. Similarly, the reasoning in these cases was approved in *AMS v AIF*[26] (***AMS)*** by all of Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ. Finally, in *APLA Limited v Legal Services Commissioner of New South Wales*[27] (***APLA)*** all of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ again referred to these principles with approval.

13. Consequently, as the Directions are aimed at the crossing of the Western Australian border, and in the absence of any application by Western Australia to reopen *Gratwick* (and at least some of the cases that have followed it), the Directions must, consistent with this unbroken line of authority, be held to be invalid. None of the recognised criteria[28] for reopening an earlier decision of this Court (much less a line of them) is present in the current circumstances.

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22 (1912) 16 CLR 99; [1912] HCA 96.
23 (1988) 165 CLR 360; [1988] HCA 18.
24 (1992) 177 CLR 106; [1992] HCA 45.
25 (1994) 182 CLR 272; [1994] HCA 44.
26 (1999) 199 CLR 160; [199] HCA 26.
27 (2005) 54 CLR 322; [2005] HCA 44.
28 E.g. *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630 per Aickin J; *Wurridjal v The Commonwealth* (2009) 237 CLR 309; [2009] HCA 2 at [71] per French CJ.

Indeed, such considerations would be against reopening. An application to reopen *Gratwick* in the past was unsuccessful.[29]

14. Even if the Directions were not to be characterised as aimed at border crossing, but rather regulations that incidentally impacted upon border crossings, the Directions will still fail because Western Australia has failed to demonstrate, according to the relevant test, that they are "reasonably required" and instead sought to rely upon less stringent proof.

The purpose and history of the intercourse limb

15. As was authoritatively resolved in *Cole*, "… "intercourse" appeared in the words of [s92] as a distinct and independent concept the freedom of which was guaranteed from the very beginning. … [which] precludes the approach that the content of the guarantee of freedom of interstate intercourse must be governed by the pre-existing content of a guarantee of freedom of interstate trade and commerce into which it was introduced. The notions of absolutely free trade and commerce and absolutely free intercourse are quite distinct and neither the history of the clause nor the ordinary meaning of its words require that the content of the guarantee of freedom of trade and commerce be seen as governing or governed by the content of the guarantee of freedom of intercourse".[30]

16. Whilst *Cole* was a trade and commerce case, the correctness of this history and distinction has been adopted in subsequent intercourse cases.[31]

17. The issues that have been raised in this litigation, and the community debate regarding the 'hard border closure' unilaterally imposed by some, but not all, States, serves to remind of the need for the vitality of the absolute freedom of intercourse provided for by s 92.

18. In that regard it repays repeating the analysis of Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel (as her Honour then was) JJ in *Betfair Pty Ltd v*

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29 *Bank of New South Wales v Commonwealth* (1949) 79 CLR 497 at 531.

30 At 387-388 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

31 *ACTV* at 192 per Dawson J; *Cunliffe* at 346 per Deane J and 395 per McHugh J; *AMS* at]98] per Gaudron J; *APLA* at [37] per Gleeson CJ and Heydon J and [398]-[400] per Hayne J.

Western Australia[32] (***Betfair No. 1***) concerning the assistance in framing s 92 from the contemporary law of the United States, and in particular of its Supreme Court by way of the negative Commerce Clause in the late 1800's. This Court in *Betfair No. 1* recorded the negative Commerce Clause had been developed in response to the "inconvenient … truth … that legislatures in one political subdivision, such as the States, may be susceptible to pressures which encourage decisions adverse to the commercial or other interests of those who are not their constituents and not their tax payers." In particular, their Honours referred to Cardozo J in *Baldwin v GAF Seling Inc*[33] of the US Constitution being "framed under the dominion of a political philosophy less parochial in range… upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

19. These themes were the progenitor of s 92 and thereby found express recognition in the Constitution. Similarly, it repays recalling Deane and Toohey JJ's description in *Nationwide News Pty Ltd v Wills*[34] (***Nationwide News***) of section 92 as "a provision which had been adopted as a guarantee of national unity". When introducing the clause that became s92 in the constitutional convention, Sir Henry Parkes said, "… there can be no federation – no complete union of these governments, of these communities, of these separate colony unless … the boundaries now existing had no existence whatsoever. … Australia, as Australia, shall be free … in its trade and intercourse between its own people; that there shall be no impediment of any kind - that there shall be no barrier of any kind between one section of the Australian people and another."[35]

20. Applying the test mandated in *Smithers* and *Gratwick*, and confirmed on repeated occasion since, is astute to achieve such end. A polity such as Western Australia is free to legislate, and pursuant to that by executive action, take steps to protect the safety and well-being of its community, being a subset

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32 (2008) 234 CLR 418; [2008] HCA 11 at [33] – [35].
33 (1935) 294 US 511 at 523.
34 (1992) 177 CLR 1 at 82.
35 National Australasian Convention, Sydney, Wednesday, March 4, 1891, at p. 23.

of the Australian citizenry. This includes by steps which may incidentally burden (rather than directly target) the freedom of interstate intercourse, provided necessitous circumstances exist. Such a constitutionally imposed rigour on governance ensures that the response of any polity in those circumstances is calibrated and astute to maximise the protection of the members of that state community, but without inflicting needless harm on other Australians. This is to be compared with the uncalibrated, inefficient and antithetical approach to the national interest that the absence of such an absolute protection, and its enforcement, can be seen to produce.

The Directions

21. The constitutional validity of delegated legislation is to be tested as though it had been passed by parliament – if it can be said that the parliament is constrained by the Constitution in exercising its legislative power from passing the impugned instrument, then no delegate of legislative power can so enact.[36]

22. The relevant orders that offended s 92 in *Gratwick*, set out in Latham CJ's reasons at 9-10, are strikingly similar to the Directions; see para 6(c) above. In that case the orders were sought to be supported by the exigencies of World War II.

23. By their *terms* the Directions are aimed at,[37] or pointed directly at,[38] persons entering Western Australia by crossing the border. The Directions prohibit entry into Western Australia by a person unless the person is an 'exempt traveller' (clause 4). 'Enter' is defined in clause 26 to mean crossing the border via various means, including via disembarking from an airplane. An 'exempt traveller' is defined in clause 27, and is limited to persons in discrete categories or those who are authorised in the absolute, unfettered and unreviewable discretion of the second defendant.

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[36] *APLA* at [102]-[105] per Gummow J; *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 594 per Fullagar J "The question therefore resolves itself into whether the regulations are within the constitutional power of the [State]. If Parliament had enacted them directly, would they be valid?"

[37] *Nationwide News* per Brennan J ("s 92 does not immunise interstate intercourse from the operation of laws of general application which are not aimed at that activity.").

[38] *Gratwick* at 17 (per Starke J).

24. In determining whether the Directions are "aimed at" or "directed to" border crossing, or some other matter and the topic of border crossing is only incidental, any such legislative purpose or intention must always remain an objective concept, identified in the orthodox way, by cleaving to the text employed, where appropriate understood in its context and with the assistance of any appropriate extrinsic sources.[39]

Settled High Court jurisprudence

Gratwick

25. In a unanimous decision of this Court it was held in *Gratwick* that a law directed at interstate intercourse would always be invalid against the absolute freedom provided for by s92, compared with laws that incidentally affected intercourse, which may be permissible in certain circumstances.

26. Latham CJ put it as "… drawing a distinction between laws of such a character that they did not interfere with the freedom which was guaranteed by s. 92 and other laws which did interfere with such a freedom. Thus a distinction was drawn between a law directed against inter-State transport, or merely prohibiting inter-State transport on the one hand, and, on the other hand, a law which, though it indirectly affected inter-State transport, was not directed against it, but introduced a system of regulation which included inter-State transport and which did not amount to a mere prohibition thereof."[40]

27. Rich J held it unnecessary to consider the asserted justification of the direction as having "the real purpose … to effectuate defence, canalize and regulate transport." … [as the direction was] … a direct and immediate invasion of the freedom guaranteed by s. 92 to which the defence power is subject…". His Honour then recognised the contra-distinction of incidental effects on the freedom which may be permissible "… where the exigencies of war require the regulation of men and material." (emphasis added) His Honour held the facts did not in any event show an emergency requiring regulation.[41]

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39 *APLA* at [423] per Hayne J.

40 At 13-14.

41 At 16.

28. Starke J's reasoning, which is the most frequently cited, captured the essence of the constitutional guarantee as "[t]he people of Australia are thus free to pass to and fro among States without burden, hinderance or restriction…". His Honour, in response to arguments addressed to the requirements of defence and national security, and to the authorities to that point, reasoned "… that legislation pointed directly at the passing of people to and fro among the States … contravenes the provisions of s. 92. It [was] immaterial … that the object or purpose of the legislation … is for public safety or defence of the Commonwealth or any other legislative purpose if it is to be pointed directly at the right guaranteed and protected by the provisions of s. 92 of the Constitution." Likewise, his Honour admitted the possibility of validity of a law "not so pointed", "… but it [was] enough in this case to say that the Order attacked is so pointed, and consequently is, to that extent, bad."[42]

29. Dixon J, as his Honour then was, considered the orders to be "… arguing an indifference to, if not a disdain of, s. 92 … [by] choos[ing] to make the fact that a journey by rail or commercial passenger vehicle is to be made from any State in the Commonwealth to any other State the very reason for prohibiting it, unless a permit for it is granted by the Director-General of Land Transport." His Honour distinguished them from a law which promogulated such orders that might have "… depend[ed] in any degree for its practical operation or administration upon the movement of troops, munitions, war supplies, or any like considerations." His Honour summarised its invalidity as because it was "… simply based on the "inter-Stateness" of the journeys it assumes to control…".[43] This led his Honour to record that "[t]he application of what Lord Wright describes as "the true criterion" of the operation of the section, viz. :"freedom as at the frontier", "passing into or out of the State" (*James v The Commonwealth*[44] (***James***)), seems quite fatal to the validity of the Order."[45]

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42 At 17. Starke J at 18 also adopted the "… conception of the freedom guaranteed by s. 92, namely, "freedom as at the frontier…" formulated by the Judicial Committee of the Privy Council in *James*.

43 At 19.

44 (1936) 55 CLR 1 at 58.

45 At 20.

30. McTiernan J, having recorded the "present Order was made in circumstances of grave national peril" held them invalid as the "provisions restrain travel … merely because the journey to be undertaken is across a State border … [and thereby] a direct interference on freedom of intercourse between the States."[46] Similarly, his Honour recognised the possibility of validity for a law that only incidentally affected interstate intercourse.[47]

31. This unanimous holding was consistent with authority to that point, as early as this Court's decision in *Smithers*. In *Smithers*, Issacs J, as his Honour then was, held "intercourse" in s 92 "… includes a personal right in an Australian as such, and independent of any commercial attributes he may possess to pass over this continent irrespective of any State border as a reason in itself for such interference…".[48] (emphasis added) That led his Honour to conclude that "… the guarantee of inter-State freedom of transit and access for persons and property under sec 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."[49] (emphasis added)

32. Higgins J reasoned to a like effect that "[n]o due effect can be given to the word "intercourse" unless it be treated as including all migration or movement of persons from one State to another…" Consequently, Higgins J "… base[d his] decision on the fact that the … Statute … is pointed directly at the act of *coming* into New South Wales…".[50] (emphasis in the original) His Honour noted that the injunction of Taney CJ in *Crandall v Nevada*[51] that "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it as freely as in our own States.", which was implied into its constitution, "… is expressed in sec. 92 of our Constitution, so far as it regards State boundaries;"[52]

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46 At 21.
47 At 22.
48 At 113.
49 At 117.
50 At 118.
51 6 Wall., 35 at 49.
52 At 119.

33. Griffith CJ[53] and Barton J[54] arrived at the same result, effectively on the basis that such a conclusion was compelled by the "elementary notion of a Commonwealth", and fortified by the presence of s 92.

Cole and the intercourse cases that have followed that decision

34. In *Cole* it was necessary for this Court to consider the correctness and ambit of *Gratwick* for the purpose of the comprehensive restatement of the law regarding the trade and commerce component of s 92 wrought by that decision. Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ recorded *Gratwick* as authority that a "constitutional guarantee of freedom of interstate intercourse, if it is to have substantial content, extends to a guarantee of personal freedom "to pass to and fro among the States without burden, hinderance or restriction"",[55] citing the passage of Starke J set out above.

35. Of direct application to the present case, their Honours went on to hold that by *Gratwick* this Court "has held that s. 92 secured the citizen's freedom of movement across State borders even in wartime" but that *Gratwick* "did not deny the power to meet the exigencies of war by regulating the transport of men and materials".[56] (emphasis added) In doing so their Honours referred with approval to the reasons of Brennan J, as his Honour then was, in *Miller v TCN Nine Pty Ltd*[57] (***Miller***) where Brennan J amplified the distinction between direct and incidental laws affecting intercourse in times of national emergency.

36. In *ACTV* Dawson J adopted the reasoning of Issacs J in *Smithers* that s 92 was "an absolute prohibition on the Commonwealth and the States alike to regard State borders as in themselves possible barriers to intercourse between

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53 At 108-109.
54 At 109-110.
55 At 393.
56 At 406.
57 (1986) 161 CLR 516 at 603. Both Gibbs CJ, at 564, and Dawson J, at 637, also referred to *Gratwick* with approval in *Miller*.

Australians" as correct.[58] Gaudron[59] and McHugh[60] JJ also referred to *Smithers* with approval.

37. In *Cunliffe* Mason CJ, citing *Smithers* and *Gratwick*, held "a law which in terms applies to movement across a border and imposes a burden or 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 was reasonably necessary …".[61] Dawson J reasoned to a like effect.[62]

38. Brennan J adhered to his Honour's reasoning in *Nationwide News* and the reasons of Dawson J in *ACTV* to repeat that the "object of s. 92 is to preclude the crossing of the border from attracting a burden which the transaction would otherwise not have to bear;".[63]

39. Deane J, with whom Gaudron J agreed on this point,[64] held on the basis of the decision in *Cole* that the absolute freedom in s 92 was subject to "… a law which incidentally and non-discriminately affects interstate intercourse in the course of regulating some general activity…", provided it did not go beyond what was necessary or appropriate.[65]

40. In *AMS* Gleeson CJ, McHugh and Gummow JJ essayed the cases from *Gratwick* and following, consistent with the above analysis,[66] and held the legislation there "did not in terms apply to impose a burden or restriction upon movement across the borders of Western Australia" and was therefore not

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58 At 192.
59 At 214.
60 At 232.
61 At 307-308.
62 At 366.
63 At 333. See also Toohey J at 384.
64 At 392.
65 At 346.
66 At [40]-[43].

invalid on that basis.[67] Hayne J was in agreement with the plurality on this point.[68] Kirby J reasoned to a like effect.[69]

41. Gaudron J adhered to the view her Honour had expressed in *Cunliffe*,[70] set out above.

42. Callinan J, relying on the authorities mentioned above, held the "principle which the authorities state is that movement by people between states should be able to take place without regard to state borders…".[71] The law was not invalid in that case, according to his Honour, because it was not "aimed at interstate intercourse".[72]

10 43. Most recently in *APLA*, Hayne J essayed the cases from *Cunliffe*[73] and then concluded, by reference to *Cole*, that "the freedom of interstate intercourse is a freedom from laws aimed at that activity."[74] Gleeson CJ and Heydon J,[75] Gummow J[76] and Callinan J proceeded on a like footing.[77]

44. In *South Australia v Totani*[78] ***(Totani)*** French CJ cited the above authorities in a manner demonstrating his Honour considered them settled law.[79]

Justification of an incidental burden on freedom of intercourse – a 'reasonably required' test?

45. While not applicable in this case, where a statute is facially neutral, such that the burden it imposes on the s 92 freedom of intercourse is via its practical
20 effect rather than intended legal operation, the settled jurisprudence of this Court is that the impugned statute is to be justified according to "whether the

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67 At [45].
68 At [221].
69 At [162], see also 153].
70 At [101], see also [97].
71 At [276], see also [269].
72 At [279], see also [277].
73 At [410]-[420].
74 At [422].
75 At [38].
76 At [162] and [173]-[177].
77 At [462].
78 (2010) 242 CLR 1; [2010] HCA 39.
79 At [31], fn 118.

impediment so imposed is greater than that *reasonably required* to achieve the objects of the legislation" (emphasis added): *AMS* at [45] per Gleeson CJ, McHugh and Gummow JJ, at [100]-[101] per Gaudron J, [221] per Hayne J and [277]-[278] per Callinan J.[80]

46. Gaudron J explained that was so because the "test for infringement of the Constitution's explicit guarantee of freedom is, however, more stringent than for an implied freedom. That is because an implied freedom must be read in the context of those specific provisions of the Constitution which contemplate legislation impacting on it. No such consideration arises in relation to the freedom guaranteed by s 92."[81]

47. There is no agreed fact nor finding of Rangiah J against a test of "reasonably required" or "necessary". Rather, Western Australia ultimately chose to seek findings of fact consistent with those the subject of the proportionality analysis in the implied freedom context. Consistent with the authority of this Court in *AMS*, described above, and for the reasons explained by Gaudron J in that case, that is not the appropriate test for an incidental burden on the express, absolute, freedom of intercourse provided for s 92.

48. Western Australia, in seeking to sustain the Directions on the basis of that less "stringent"[82] test, will be unable to demonstrate the Directions are reasonably required.[83] Thus, even if the Directions were not invalid for being aimed at interstate passage, they would nonetheless fail as an incidental burden not justified by the polity seeking to uphold it.

Trade and commerce

49. Both plaintiffs wish to enter Western Australia for business purposes. The commercial nature of the cross-border movement also attracts the trade and

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80 See also *Smithers* at 109 per Griffith CJ, 109 – 110 per Barton J; *Gratwick* at 16 per Rich J and 19 per Dixon J; *ACTV* at 232 per McHugh J; *Cunliffe* at 396 per McHugh J; *Betfair* at [102] – [103] and [110] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

81 At [101]

82 *AMS* at [101] per Gaudron J.

83 *Unions NSW v New South Wales* (2019) 264 CLR 595; [2019] HCA 1 at [93] – [96] per Gageler J and [151] per Gordon J.

commerce limb: *APLA* at [37] (Gleeson CJ and Heydon J); [164] (Gummow J), [408] (Hayne J)

50. In order to engage the trade and commerce limb, the Directions must be shown to impose a discriminatory burden on interstate trade and commerce with protectionist effect: *Betfair Pty Limited v Racing New South Wales*[84] (***Betfair No 2***) at [37] (majority); *Cole* at 394, 398 (the Court), 407-409.

51. That does not require utilisation of concepts and proofs from competition law:[85] *Betfair No 2* at [63] (Heydon J), [119]-[120] (Kiefel J, as her Honour then was). All that is required is that some likely effect upon the plaintiffs' ability to compete is demonstrated: *Betfair No 2* at [119]-[120] (Kiefel J)

52. Harm in the sense that the State has erected a 'barrier to entry' preventing the plaintiffs (and others interstate) from competing in markets within the State was sufficient in *Betfair No 2* at [6] (majority) (and see also *State of Victoria v Sportsbet Pty Ltd*[86] at [240])

53. The Directions are discriminatory on their face against persons wishing to enter Western Australia. By that discrimination, the Directions have a protectionist legal operation (and hence practical effect). That operative effect of the Directions is protectionist because a State border closed to human movement is plainly, as the Court is entitled to know, a harmful government-created 'barrier to entry' for all markets geographically located in WA and which are dependent on direct human presence as an important element of their business.[87]

54. A State law which discriminates in its operation with protectionist effect against interstate trade and commerce remains valid if it is reasonably necessary to the achievement of the law's object: *Betfair No. 1* at [102]; *Castlemaine Tooheys Ltd v South Australia*[88] at 472-3.

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84 [2012] HCA 12; 249 CLR 217.

85 The second plaintiff's operations are in the Pilbara or Western Australian 'tenements' market: *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1094]-[1131].

86 [2012] FCAFC 143.

87 *Barley Marketing Board for the State of New South Wales v Norman* (1990) 171 CLR 182 at 199.

88 (1990) 169 CLR 436.

PART VII: ORDERS SOUGHT

55. The Plaintiffs seek the following orders:

a) A declaration that the Directions are wholly invalid by reason of s 92 of the Constitution

b) Costs

c) Such further or other orders as the Court deems appropriate

PART VIII: TIME FOR ORAL ARGUMENT

56. Up to 3.5 hours will be required by the Plaintiffs in oral submissions, not including reply.

Date: 21 September 2020

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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

ANNEXURE TO PLAINTIFFS' SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No.1 of 2019, the Plaintiffs set out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

Number	Description	Date in Force	Provision
Legislation			
1.	*Judiciary Act 1903* (Cth)	25 August 2018	S 78B
2.	Commonwealth Constitution		S 92
3.	*Emergency Management Act 2005* (WA)	14 July 2017	S 56
4.	*Emergency Management Act 2005* (WA)	16 March 2020	S 58
5.	*Emergency Management Act 2005* (WA)	4 April 2020	S 58
Statutory Instruments			
6.	Declaration of State of Emergency	Various dates since 19 March 2020 with current operative instrument issued 15 September 2020	
7.	*Quarantine (Closing the Border) Directions* (WA)	4 April 2020	Cl 4, 26, 27
8.	*Quarantine (Closing the Border) Amendment Directions* (WA)	7 July 2020	
9.	*Quarantine (Closing the Border) Amendment Directions* (WA) (No 2)	9 July 2020	
10.	*Quarantine (Closing the Border) Amendment Directions* (WA) (No 3)	19 July 2020	

Number	Description	Date in Force	Provision
11.	*Quarantine (Closing the Border) Amendment Directions* (WA) (No 4)	27 August 2020	
12.	*Quarantine (Closing the Border) Amendment Directions* (WA) (No 5)	28 August 2020	
13.	*Quarantine (Closing the Border) Amendment Directions* (WA) (No 6)	18 September 2020	