



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY**

**No. B52 of 2020**

B E T W E E N:

**CLIVE FREDERICK PALMER**  
Plaintiff

AND

**STATE OF WESTERN AUSTRALIA**  
Defendant

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**DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS**

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Date of Document: 16 June 2021

Filed on behalf of the Defendant by:  
State Solicitor for Western Australia  
David Malcolm Justice Centre  
28 Barrack Street  
PERTH WA 6000

Tel: (08) 9264 1874  
Fax: (08) 9264 1440  
Ref: 3402-20 (A Tan)  
Email: [a.tan@sso.wa.gov.au](mailto:a.tan@sso.wa.gov.au)

## PART I: SUITABILITY FOR PUBLICATION

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

## PART II: OUTLINE OF SUBMISSIONS

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### Section 117 (Additional Issue 1)

2. Section 117 protects an interstate resident where “the effect of a law is to subject an interstate resident to a disability or discrimination to which that person would not be subject as an intrastate resident”: *Street v Queensland Bar Association* (JBA B52 T10) at 559: DS at [13].
3. It is necessary to consider the operation and practical effect of the legislation and compare the position of an interstate resident with the position they would be in if they did not reside interstate: *Street* 488, 506, 525, 544, 559, 566, 582; *Sweedman v Transport Accident Commission* (JBA B54 T109) at [57], [59], [65]. Here the operation and effect of the Act does not differ according to place of residence: DS [14].
4. The plaintiff posits a very different test which asks whether the Amending Act would have been passed at all, in this form, if he were a resident of Western Australia. This is misconceived.
5. The character of the law depends on its legal operation and effect, not the motives of individual legislators: *Re Australian Education Union; Ex parte Victoria* (JBA B54 T99) at 239-240: DS [14]-[16], [18]. Relying on Hansard to establish such motives also infringes parliamentary privilege: *Parliamentary Privileges Act 1891* (WA), s 1(a); *Mees v Roads Corporation* (JBA B52 T13) at [81]-[86]: DS [20]-[21].
6. The plaintiff’s alternative argument based on “nationhood and national unity” would convert s 117 into an exemption from the operation of non-discriminatory State laws.
7. Any application for leave to re-open *Street* and/or *Sweedman* should be rejected: see *Wurridjal v The Commonwealth* (JBA B52 T12) at [68]-[71]: DS [23]-[24].
8. If the Act is discriminatory, it is appropriate and adapted to a proper objective: *Sweedman* at [66]; *Street* at 491-492: DS [17].
9. Even if s 117 is infringed, the law is merely inoperative in respect of the plaintiff, not invalid: *Street* at 486, 502-3, 541: DS [15].

### Section 75(iv) (Additional Issue 2)

10. The proposition that the Act is an exercise of judicial power in respect of a matter is wrong, as explained in B54: *Crouch v Commissioner for Railways (Qld)* (JBA B52 T7): DS [25].

11. There is no “dispute” between the plaintiff and the State which is “quelled” by the Act. The legislature did not purport to apply existing legal rules to particular facts; it declared relevant legal rights and obligations to be subject to a new regime: *Duncan v New South Wales* (JBA B54 T64): DS [25]. It imposed new obligations on the plaintiff and others.

### Bill of pains and penalties (Additional Issue 3)

12. For reasons outlined in B54, the Act does not interfere with or usurp judicial power: see *Haskins v Commonwealth* (JBA B52 T8) at [25]: DS [29]-[30].

10 13. “Punishment” is not simply the imposition of adverse consequences; it presupposes a determination that the person has breached some antecedent standard of conduct: *Duncan* (JBA B54 T64) at [43]; *Haskins* (JBA B52 T8) at [26]; *Polyukhovich v Commonwealth* (JBA B54 T90) at 535, 721: DS [31].

14. The Act does not visit “punishment” upon anyone. It protects the State. No party is said to have contravened any norm of conduct: DS [32]-[33].

### Extreme laws (Additional Issue 4)

15. A State may validly pass a law that takes property without compensation: *Durham Holdings Pty Ltd v New South Wales* (JBA B54 T65).

16. Kirby J’s *obiter* observations concerned a species of “extreme law” that is not a law, properly understood: *Durham* at 431-432. Kirby J did not regard a law which deprives a person of property without just compensation to be an “extreme” law of this kind: DS [35].

20 17. The fact that a law is directed to a particular person or small group does not render it unconstitutional: *Cth BLF* (JBA B54 T43); *NSW BLF* (JBA B54 T122); *Knight v Victoria* (JBA B54 T78).

18. That is especially so where the context is an existing regime of special rights and obligations for a small group of identified persons: DS [29].

### Inconsistency with Commonwealth laws (Additional Issue 4, Common Issue 5)

19. The Court should not deal with constitutional issues in the abstract in the absence of a justiciable controversy arising on the basis of established facts: *Zhang v Commissioner of the AFP* (JBA B54 T157) at [21]-[25]; *Duncan* (JBA B54 T64) at [52]; *Knight* (JBA B54 T78) at [33]; *Clubb v Edwards* (JBA B54 T57) at [33]-[36], [143]-[148], [230], [329]-[340], [443].

30 20. It is necessary to construe the relevant laws and understand the circumstances in which the supposed inconsistency exists, in order to determine whether there is a “real conflict”: *Work Health Authority v Outback Ballooning Pty Ltd* (JBA B54 T118) at [73] at [70], [105]; *Bell*

**Group NB (in liq) v Western Australia** (JBA B54 T50) at [52]. The plaintiff has not engaged with the detail of the provisions, and there is an insufficient factual basis to determine any question of inconsistency.

21. None of the alleged inconsistencies could justify a declaration of invalidity, or a general statement as to inoperability:

a. Section 109 of the Constitution, when engaged, only has the effect that the State law is inoperative to the extent of the inconsistency.

b. Many of the alleged inconsistencies would only arise in the context of a proceeding in federal jurisdiction, where the decisive question would be whether the relevant provision is picked up by s 79 of the *Judiciary Act 1903* (Cth): **Masson v Parsons** (JBA B54 T82) at [42]. No question of invalidity or inoperability would arise: DS [38]-[40], [53], [61], [67].

c. Otherwise, any putative inconsistency for s 109 purposes would be resolved as a matter of interpretation by s 8(4) of the Act. The relevant concepts in the Act (eg “proceedings”, “liability”) are readily capable of distributive operation: **Bell Group** at [71]; **Knight** at [33]-[35]: DS [44], [54], [61], [67]. Whether and how they should be construed should be determined in the context of a concrete factual scenario that properly throws up that question: **Zhang** at [21]. No such factual scenario is disclosed in the special cases.

22. In any event, there is no inconsistency with the various Commonwealth laws relied upon, for the reasons given at DS [41]-[91].

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J A Thomson SC, S Free SC, J Shaw, Z Heger

16 June 2021