



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B52 of 2020

BETWEEN:

CLIVE FREDERICK PALMER

Plaintiff

and

STATE OF WESTERN AUSTRALIA

Defendant

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PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: OUTLINE OF PROPOSITIONS FOR ORAL ARGUMENT

2. I intend to advance the following propositions, in the following sequence, to demonstrate that the Amending Act should be declared invalid in its entirety:

Issue 1 – The State Agreement, Australia Act 1986 (Cth) and “manner and form”¹

3. The State Agreement contains many provisions which demonstrate that it has the status of “a law made by” the Defendant’s Parliament, within the meaning of section 6 of the *Australia Act 1986* (Cth), prescribing the “manner and form” required to be followed whenever the Defendant seeks to amend the State Agreement. These provisions fall into four main categories:

(a) provisions which amended and overrode legislation previously enacted by the Defendant’s Parliament: see clauses 4(3); 7(6); 9(2)(c); 9(2)(c)(i)-(ii); 9(5), 9(5)(a); 9(5)(c); 10(8); 20(6); 20(7); 23; 27(2); 31(3); and 41;²

(b) provisions which created and granted entirely new legal rights: see clauses 9(2)(c); 9(2)(c)(i)-(ii); 10(2)(a); 10(7); 14; and 20(6)(a);³

(c) provisions which have an obvious public purpose: see clauses 19 (particularly sub-clauses 19(2)-(7)); 21(1); 21(3); 22 (particularly sub-clauses 22(4) and (5)); and 32;⁴ and

- 20 (d) provisions which repose power in the Defendant’s Minister to make decisions in the public interest: see clauses 6 to 8.⁵

4. Alternatively, and in response to submissions of the Defendant, if section 4(3) of the Original Act were to operate to give legislative force to the State Agreement, then that section itself gives the force of law to clause 32 of the State Agreement as a law of

¹ See plaintiff’s principal submissions (PS), [60]-[64]; plaintiff’s reply submissions (PRS) [35]-[42].

² Special Case Book (SCB), pp. 86, 97, 99, 100, 105, 121, 122, 127, 129, 132 and 139. See PS [60]-[61]; PRS, [38].

³ SCB, pp. 99, 103, 105, 114 and 121. See PRS, [39].

⁴ SCB, pp. 117, 122, 124 and 132. See PRS, [39].

⁵ SCB, p.132.

Western Australia. In the further alternative, I also submit that section 3 of the *Government Agreements Act 1979* (WA) is itself a manner and form requirement.

5. A review of what the State Agreement does, and how, demonstrates that the State Agreement itself has the status of “*a law made by*” the Defendant’s Parliament, prescribing (in clause 32) the “*manner and form*” which was required to be followed, but was not followed, in the case of the Amending Act. In consequence, and in either case, the Amending Act is invalid.⁶

Issue 2 – Section 118 of the Constitution⁷

- 10 6. Section 35(1) of each of the *Commercial Arbitration Acts* contains a clear legislative statement to the effect that an arbitral award is binding. The award is binding *from the time when it is made*.⁸ Those provisions are part of an integrated national scheme of legislation which depends for its efficacy upon the Constitutional assumption of “*full faith and credit*” in section 118. That national scheme cannot function if an individual State is permitted to annihilate unfavourable arbitral awards *retrospectively*.⁹
7. The two ground mentioned above (ie. regarding manner and form and section 118 of the *Constitution*) are supported by important public policy considerations, including promoting certainty in the law, the efficacy of Australia’s integrated national scheme for commercial arbitrations,¹⁰ the ability to rely upon State Agreements to support investment in Australia¹¹ and Australia’s performance of its obligations under free trade agreements.¹²
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Issue 3 – Section 117 of the Constitution¹³

8. The Amending Act targets a single named individual - me. It does not target any resident of Western Australia. Nor is it a law of general application. It singles me out for “disability” and “discrimination” of a kind which section 117 forbids.¹⁴

⁶ See PS [63]-[64]; PRS [36], [38], [42].

⁷ See PRS, [24]-[31].

⁸ See PRS, [25].

⁹ See PRS, [29].

¹⁰ See PRS [28]-[31].

¹¹ See PS [62]; PRS [40].

¹² See PRS [40].

¹³ PS, [18]-[34]; PRS [4]-[19].

¹⁴ See PS [18], [32]-[34]; PRS, [16]-[18].

Issue 4 – Section 75(iv) of the Constitution¹⁵

- 9. As a matter of substance over form, the Amending Act purports to quell a dispute between the Defendant and a resident of the State of Queensland, contrary to the requirements of section 75(iv) of the Constitution. For this reason also, it is invalid.¹⁶

Issue 5 – Purpose in Constitutional law and the rule of law¹⁷

- 10. The purpose of the Amending Act is best inferred from its text and from other available sources (including the *Hansard* material) and also from what the Amending Act does in fact. It is thus essential to focus on the *substance* of what the Amending Act does.¹⁸
- 11. The Amending Act violates core principles and values of the rule of law, an assumption upon which the Australian Constitution is framed.¹⁹
- 12. The Amending Act falls foul of the “*cardinal principle of the rule of law*” that “*Government should be under law ... the law should apply to and be observed by Government and its agencies ... just as it applies to the ordinary citizen*”.²⁰
- 13. In conclusion, if the rule of law is allowed to be eroded by extraordinary legislation such as the Amending Act, Australia would no longer be a country where basic rights and freedoms exist. Under the Amending Act, they have come for me, but “*injustice anywhere is a threat to justice everywhere*”.

Dated: 16 June 2021

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¹⁵ See PS, [35]-[59]; PRS [20]-[23].
¹⁶ See PS, [36], [39], [59]; PRS, [22]-[23].
¹⁷ PS [20]-[24]; [32]-[34]; [37]-[39]; [48]-[50].
¹⁸ See PS [22]-[24], [34], [37]-[39]; PRS, [11], [14], [15].
¹⁹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).
²⁰ *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17, [91] (Gordon and Steward JJ). See PS [48]-[50].