



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: B52/2020
File Title: Palmer v. The State of Western Australia
Registry: Brisbane
Document filed: Form 27C - Intervener's submissions
Filing party: Defendant
Date filed: 28 May 2021

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

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF
VICTORIA (INTERVENING)**

PART I, II & III: CERTIFICATION AND INTERVENTION

1. These submissions are in a form suitable for publication on the internet.
2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART IV: ARGUMENT

3. Victoria adopts and repeats its submissions in proceeding B54/2020 (**Victoria B54 submissions**), with cross-references below as appropriate. Victoria adopts the same abbreviations used in the Victoria B54 submissions.

No breach of s 117 of the Constitution

- 10 4. First, there is no breach of s 117 of the Constitution. It is necessary to examine the operation of the impugned law, action or policy, to determine whether the discrimen it chooses concerns the State residence of the person who invokes s 117. The question is whether there is any differential treatment that is attributable to residence.¹
5. Here, there is no legal connection between the rights and liabilities created by the 2020 Act and the Plaintiff's residence in Queensland. The same rights and liabilities would apply if the Plaintiff were resident in WA. The Plaintiff's reference to statements by Parliamentarians that the Plaintiff is in or from Queensland is an impermissible reliance on the subjective intentions or motives of legislators, which are irrelevant:² cf Plaintiff's submissions (**PS**) [22].

20 No interference with s 75(iv) jurisdiction, no inconsistency with Commonwealth legislation

6. Second, the 2020 Act does not purport to exercise judicial power, and does not interfere with the exercise of judicial power by a court: Victoria B54 submissions, sections A.1

¹ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 409 [64]-[65] (Gleeson CJ, Gummow, Kirby and Hayne JJ, with Heydon J agreeing on this point). That question can be analysed by comparing the actual position of the person invoking s 117 with the position they would be in if they were resident in the other State: *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 at 474 (Brennan J), 478 (Deane and Gaudron JJ, with Mason CJ agreeing), 488 (Dawson and Toohey JJ), 494-495 (McHugh J).

² See eg *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 239-240 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 at 320 [23]-[24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 229 [198] (Gummow J); *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 20 (Mason J); *Magennis v The Commonwealth* (1949) 80 CLR 382 at 398 (Latham CJ); *Deputy Commissioner of Taxation v W R Moran Pty Ltd* (1939) 61 CLR 735 at 774 (Starke J).

and B. Also, there is no interference with the exercise of federal jurisdiction: Victoria B54 submissions, section C; contra PS [35] ff. Accordingly, there is no constitutional inconsistency with Commonwealth legislation regulating the exercise of federal jurisdiction: contra PS [85]-[94] ff.

7. The Plaintiff's contention that various provisions added by the 2020 Act are inconsistent with Commonwealth laws relating to external administration, bankruptcy, insolvency and security interests in personal property does not arise on the facts in the Special Case: cf PS [95]-[102]. Section 109 renders a State law inoperative only to the extent of any inconsistency and only for so long as the inconsistency remains.³ The Plaintiff accepts that the identified Commonwealth laws "have no present application": PS [102]. But until those laws are engaged, no inconsistency arises.⁴ It is not appropriate for the Court to entertain the Plaintiff's contention on the basis of an abstract apprehension that inconsistency might arise in a "hypothetical factual situation".⁵
8. The same analysis applies to the Plaintiff's contention with respect to Commonwealth criminal legislation: cf PS [103]-[105]. No allegation of criminal conduct has been made, and the 2020 Act would in any event only be inoperative to the extent of any inconsistency (which would not invalidate the 2020 Act, or indeed any provision, entirely).⁶ In the absence of any allegation of conduct contrary to Commonwealth criminal law, the Court should not rule on this issue.

³ *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁴ *Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392 at 417 [62] (Gleeson CJ and Gaudron J), 441 [145] (Gummow J), 478 [258]-[259] (Hayne J). To the extent that any reliance is placed on notions of "indirect" inconsistency, it would be necessary to take account of ss 5E-5G of the *Corporations Act 2001* (Cth) and s 9 of the *Bankruptcy Act 1966* (Cth), which preserve in different ways the concurrent operation of State laws: contra PS [100]. On the operation of this type of provision, see generally *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 451 [48] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 461-462 [78] (Gageler J).

⁵ *Commonwealth v Queensland* (1987) 62 ALJR 1 at 1-2 (the Court). See also *Victoria v The Commonwealth (The Kakariki)* (1937) 58 CLR 618 at 631-632 (Dixon J); *Outback Ballooning* (2019) 266 CLR 428 at 468 [90] (Gageler J).

⁶ At the very highest, this inconsistency might qualify the statement that State conduct does not constitute an "offence": new s 20(8). Any s 109 inconsistency would not render new s 20(8) invalid, but would merely mean that it did not apply in respect of Commonwealth criminal liability.

Agreement, cl 32 is not a “manner and form” provision

9. Third, the Agreement is not made into a “law of a State”. Therefore, the variation provision in cl 32 of the Agreement does not come within s 6 of the Australia Act: Victoria B54 submissions, section D; contra PS [60] ff.

Invalid delegation issue does not arise

10. Fourth, there has been no attempt to make subsidiary laws under new ss 30-31 of the Agreement Act, and those provisions would be clearly severable from the remainder of the Act (see new s 8(4)-(5)). Accordingly, the validity of these provisions does not properly arise:⁷ Victoria B54 submissions, section E; cf PS [65] ff.

10 2020 Act is not a bill of pains or penalties

11. Fifth, the 2020 Act is not a bill of pains or penalties: contra PS [69] ff. A bill of pains and penalties (1) contains a legislative determination of some breach of antecedent conduct; and (2) imposes a legislative punishment consequent upon that breach.⁸ The amendments inserted by the 2020 Act contain neither of those features.
12. In any event, there is no constitutional separation of power at the State level: Victoria B54 submissions, section A.1.

No constitutional requirement for a State to provide fair compensation

13. Finally, there is no constitutional requirement for a State to provide fair compensation for any property acquired, as this Court held in *Durham Holdings Pty Ltd v New South Wales*:⁹ contra PS [75] ff.

⁷ *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 457 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁸ *Duncan v New South Wales* (2015) 255 CLR 388 at 408 [43] (the Court).

⁹ (2001) 205 CLR 399 at 409-410 [10]-[14] (Gaudron, McHugh, Gummow and Hayne JJ).

PART V: ESTIMATE OF TIME

14. See Victoria’s B54 submissions, Pt V.

Dated: 28 May 2021



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

No B52 of 2020

BETWEEN:

CLIVE FREDERICK PALMER

Plaintiff

and

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STATE OF WESTERN AUSTRALIA

Defendant

**ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF VICTORIA (INTERVENING)**

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

No.	Description	Date in Force	Provisions
<i>Constitutional provisions</i>			
1.	<i>Commonwealth Constitution</i>	Current	ss 75(iv), 109, 117
<i>Statutes</i>			
2.	<i>Australia Act 1986 (Cth)</i>	Current	s 6
3.	<i>Bankruptcy Act 1966 (Cth)</i>	Current	s 9
4.	<i>Corporations Act 2001 (Cth)</i>	Current	ss 5E, 5F, 5G
5.	<i>Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA)</i>	Current	ss 8, 20, 30, 31

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