

## Palmer v The State of Western Australia [2021] HCA 5

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### Facts

- On 15 March 2020 the Minister for Emergency Services for Western Australia declared a state of emergency in Western Australia in respect of the COVID-19 pandemic.
- S56 of the *Emergency Management Act 2005* (WA) empowers the Minister to declare a state of emergency provided, *inter alia*, they were satisfied of the occurrence of an emergency and that extraordinary measures were required to prevent or minimise "*loss of life, prejudice to the safety, or harm to the health, of persons*". S67 empowers an authorised officer, "[f]or the purpose of *emergency management*" during a state of emergency, to direct or prohibit the movement of persons into an emergency area.
- Directions, issued by the State Emergency Coordinator, took effect from 5 April 2020 and prohibited entry into Western Australia unless they were the subject to exemption.
- Clive Palmer sought a declaration that the Act and/or the Directions were invalid, either wholly or in part, by reason of s92 of the Constitution. S92 provides that "*trade, commerce, and intercourse among the States ... shall be absolutely free*".
- Palmer claimed that the Directions imposed a burden on the freedom of intercourse by prohibiting cross-border movement, or alternatively that they imposed a discriminatory burden with protectionist effect and, as a consequence, contravened s92.

### Issues

- Did the directions impose an unreasonable burden on interstate trade, commerce and intercourse among states and thereby contravene s92?

### Held

- Unanimously, the High Court found that s92 was concerned with freedom from unjustified burdens of a discriminatory kind.
- The Court accepted that s67 imposed a burden on interstate intercourse. However, by reference to the purpose of the provisions and the statutory constraints on the declaration of a state of emergency and the making of directions, the Court held that the burden was justified and the provisions, at least in their application to an emergency of a plague or epidemic, did not infringe the constitutional limitations of s92.

## Quotes

*"In Cole v Whitfield<sup>15</sup> the Court said that the guarantee in s 92, that interstate trade, commerce and intercourse be "absolutely free", was not to be taken literally. The section should not be construed as precluding an exercise of legislative power which would impose any barrier or restriction on interstate trade or commerce<sup>16</sup> or interstate intercourse. This view of s 92 had consistently been applied in cases which preceded Cole v Whitfield and it was to be confirmed in subsequent cases."*

(Kiefel CJ and Keane J, paragraph [29])

## Full Text

The full text is available here: <http://eresources.hcourt.gov.au/showCase/2021/HCA/5>

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