Palmer v Western Australia 2021 –
A brief synopsis- another sham case!

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

CLIVE FREDERICK PALMER & ANOR PLAINTIFFS

AND

THE STATE OF WESTERN AUSTRALIA & ANOR DEFENDANTS

Palmer v Western Australia

[2021] HCA 5

Date of Hearing: 3 & 4 November 2020
Date of Order: 6 November 2020
Date of Publication of Reasons: 24 February 2021

B26/2020

ORDER

The questions stated for the opinion of the Full Court in the special case filed on 22 September 2020 be answered as follows:

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

Pay close attention to the question of law Mr Dunning QC, representing the plaintiffs, Mr Palmer and his company ,asks the Court. He mixes the question of law where he combines a challenge to the validity of the Act, the Emergency Management Act of WA, AND/OR the directions made under the Act are invalid or not.

As we shall see in the transcript below dated 3/11/2020, he doesn't challenge the validity of the Act at all. To Chief Justice Kiefel and Justice Edelman's credit , they call him out on this and explain to him that Constitutional guarantees such as section 92 operate as a restraint on the legislative power, and not upon executive action such as directions made under the Act.

Furthermore, when you challenge the directions made under the act, you assume the Act is valid, and therefore deprive the ability of section 92 to attack and strike down the Act.

This also results in no constitutional question arising before the Court, and thus the judicial powers of the Commonwealth vested in the High court pursuant to section 71 of the Constitution are not engaged, rendering the decision of the Court without any legal force behind it. The decision is null and void and can be ignored by everyone.

Chapter III—The Judicature

71. Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Kable V DPP 1996 HCA

Toohey J stated in the paragraph 21:

"...Although the argument before the Court proceeded at times by reference to federal jurisdiction, **in truth it is the judicial power of the Commonwealth with which the Court is concerned, a power applicable by reason of s 71 of the Constitution.** The Supreme Court of New South Wales was required, at first instance and on appeal, to **determine questions arising under the Constitution.** In those circumstances s 39(2) of the Judiciary Act, read with s 77(iii) of the Constitution, conferred jurisdiction on the Supreme Court to determine those questions. **Section 71 of the Constitution ensured that the judicial power of the Commonwealth was engaged in those circumstances."**

When the validity of the Act is not challenged, the only real avenue to strike down the directions is to prove they are unreasonble, illogical or irrational of the *Wednesbury kind* and to prove this, it is very difficult. This is why the Court said the directions complied with section 92,

but had the validity of the Emergency Management Act WA been challenged, we could very well have seen a different outcome and our borders could now be open rather than closed.

Answer:

On their proper construction, ss 56 and 67 of the Emergency Management Act 2005 *(WA) in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic comply with the constitutional limitation of s 92 of the* Constitution *in each of its limbs.*

The exercise of the power given by those provisions to make paras 4 and 5 of the Quarantine (Closing the Border) **Directions *(WA) does not raise a constitutional question.***

No issue is taken as to whether the Quarantine (Closing the Border) Directions *(WA) were validly authorised by the statutory provisions so that no other question remains for determination by a court.*

Here the Court simply reaffirms in its decision that Palmer didn't challenge the validity of the Act, only the directions made under it.

Representation

P J Dunning QC with R Scheelings and P J Ward for the plaintiffs (instructed by Jonathan Shaw)

Pay attention to Mr Palmer's legal representative, Mr P J Dunning, as he pulls the same trick in another very recent case, LibertyWorks Inc v Commonwealth HCA 2021, where he leads the Court to believe he is challenging the validity of the Act, then at the lastminute changes his mind to only challenge a decision or action made under the Act.

Why is challenging the validity of an Act so important? It's important because if you invalidate the Act, you take away the authority of the person acting or making decisions under it. Their source of authority is gone and their ability to make directions ever again under the Act also disappears!

By challenging the directions made under the Act, the person making them can make as many as they like, whenever they like, and your only chance of invalidating the directions is to prove they are unreasonable, irrational and illogical- good luck with that, it very rarely happens!

KIEFEL CJ AND KEANE J.

paragraph 10 :

The first plaintiff is a resident of the State of Queensland and the Chairman and Managing Director of the second plaintiff. He travels to and from Western Australia for purposes associated with the second plaintiff and for other purposes, and whilst in Perth stays at a residence maintained by the second plaintiff. He has not, to his knowledge, suffered any symptoms of COVID-19. His application to enter Western Australia as an "exempt traveller" was refused.

Paragraph 11

The second plaintiff is a company with interests in iron ore projects in Western Australia and is engaged in litigation and arbitration in that State. It has offices and personnel in Perth, where many of its records are held. Other personnel, including professional advisers who would normally work in both Brisbane and Perth, are likewise unable to enter Western Australia. It contended that its business and other interests are harmed or inhibited.

Paragraph 12:

In proceedings commenced on 25 May 2020 in the original jurisdiction of this Court the plaintiffs claim a declaration that "either the authorising Act and/or the Directions are invalid, either wholly or in part … by reason of s 92 of the Constitution". **The plaintiffs' claims to invalidity and the particulars provided of them refer to the Directions and their effects.**

Paragraph13:

The plaintiffs claim that **the Directions** impose an effective burden on the freedom of intercourse among the Australian people in the several States by prohibiting cross-border movement of persons, backed by a criminal sanction. Alternatively, they allege that the freedom of trade and commerce guaranteed by s 92 is contravened because **the Directions** impose an effective discriminatory burden with protectionist effect.

GORDON J.

Paragraph 200

As explained, **the plaintiffs did not challenge the constitutional validity of s 56 or s 67 of the Act,** or allege that the express statutory conditions for the exercise of the power to make the state of emergency declaration under s 56[312] or the Directions under s 67 had not been met. The plaintiffs submitted that the putative burden on the freedom guaranteed by s 92 arose because of the Directions.

Palmer v Western Australia 2021 **transcript 03/11/2020**

KIEFEL CJ: Another point of clarification, the plaintiffs' claim to invalidity is directed to the **directions** which are, of course, made under the *Emergency Management Act.* As I understand the plaintiffs' case, it is **not contended that the *Emergency Management Act* itself, the authorising Act, is invalid, but rather only the directions made under it. Is that correct?**

MR DUNNING: That is correct, Chief Justice.

KIEFEL CJ: It is raised against you that therefore there **might not be a constitutional question** because **section 92, of course, operates on the statute, not what is made under the statute, the latter usually raising a question of whether or not it is properly authorised within what is otherwise a valid Act.** Now, you do not contend that the *Emergency Management Act* is invalid for contravention of section 92. As I understand your answer to the issue raised by the intervener Victoria is that the directions take the character of legislation. Is that how you put it?

MR DUNNING: Yes, and in a sense in the way that the Court dealt with the directions as they were in *Gratwick*.

KIEFEL CJ: But it remains the case, does it not, that the directions are still made under and are only authorised by the statute.

MR DUNNING: That is correct, yes.

KIEFEL CJ: But you say that section 92 operates on the directions, directly?

MR DUNNING: Yes, we do, your Honour.

EDELMAN J: Mr Dunning, in *Gratwick*, if the direction that the subsidiary orders had been invalid, the legislation, the national security legislation, would have been invalid to that extent. The invalidity in *Gratwick* was an invalidity of the application of the legislation, and therefore an invalidity of the legislation to that extent.

MR DUNNING: Yes.

Libertyworks v Commonwealth HCA 2021

Representation

P J Dunning QC with R Scheelings for the plaintiff

(instructed by Speed and Stracey Lawyers)

Kiefel CJ, Keanne and Gleeson

paragraph 40.

The parties have agreed to state the following questions for the opinion of the Full Court:

1. Is the *Foreign Influence Transparency Scheme Act 2018* (Cth) invalid, to the extent it imposes registration obligations with respect to communications activities, on the ground that it infringes the implied freedom of political communication?

2. In light of the answer to question 1, what relief, if any, should issue?

3. Who should pay the costs of and incidental to this special case?

Paragraph 41 :

Question 1 reflects a substantial narrowing of the plaintiff's case concerning the implied freedom of political communication. **Prior to its amendment the question was stated as whether the FITS Act is "invalid, either in whole or in part (and if in part, to what extent)" on the ground that it infringes the freedom.**

Here again, PJ Dunning QC pulls his magic trick again, challenge the validity of the Act and make everyone believe that you have a proper matter before the Court in relation to a Constitutional guarantee, this time the implied freedom of political communication largely contained in section 7, 24 and 128 of the Commonwealth Constitution, and then at the last minute, withdraw it and only challenge directions or some other action taken under it, leaving the Act intact. Its like having Mike Tyson (section 92) on your side and leaving him outside the ring to never knock out your opponent!

In summary, we are still yet to have a proper and valid case before the High court in relation to section 92 and the Acts under which directions are made. This means border closures could all be Constitutionally invalid and there is a high chance this is so.